

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 41

January, 1947

NO. 1

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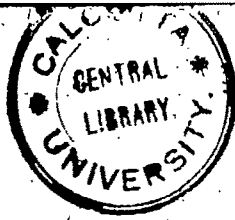
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THE TWENTY-FIFTH YEAR OF THE WORLD COURT *

By MANLEY O. HUDSON

Of the Board of Editors

The chief preoccupation with regard to the World Court during the year 1946 was the reorganization required by the modifications introduced into its Statute in 1945.¹ This involved chiefly the dissolution of the Permanent Court as it was constituted under the Statute of 1920, the election of Judges to constitute the International Court of Justice, the organization of the newly-elected bench and the reestablishment of the Registry, and the adaptation of the Rules of Court to take account of the changes in the text of the Statute. Various administrative measures were adopted by the United Nations, in consequence of its replacing the League of Nations as the body responsible for the maintenance of the Court, and some progress was made during the year in extending the Court's jurisdiction. No contentious proceeding was instituted during 1946,² no advisory opinion was requested, and hence no entry was made in the list of cases before the Court.

DISSOLUTION OF THE PERMANENT COURT

The entry into force of the revised Statute on October 24, 1945, made it clear that the Permanent Court would not be reactivated. With the assent of the parties, the two pending cases—a case between Belgium and Bulgaria relating to the *Electricity Company of Sofia and Bulgaria* and the *Gerliczy Case* between Liechtenstein and Hungary—were dropped from the Court's list. In order to clear the way for a new election of Judges, the collective resignation of the eleven Judges of the Permanent Court³ was communicated to the Secretary General of the League of Nations on January 30, 1946.⁴

* This is the twenty-fifth in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL, Vol. 17 (1923), p. 15.

¹ The modifications were traced in detail in this JOURNAL, Vol. 40 (1946), pp. 14-45.

² A number of applications were addressed to the Court by private individuals, in reply to which reference was made to the provision in paragraph 1 of Article 34 of the Statute that "only States may be parties in cases before the Court."

³ Under the provisions of Article 13 of the Statute the fifteen Judges who were in office in 1939 when the Assembly of the League of Nations decided to postpone the third general election continued in the discharge of their duties. Judge Eostworowski died in 1940, Judges Nagaoka and Urrutia resigned in 1942, and Judge Fromageot resigned in 1945.

⁴ This step had been preceded by a settlement of the Judges' claims for their unpaid salaries. Payment of the Judges' salaries had been discontinued in 1941, though token payments were made thereafter. In December, 1945, the Supervisory Commission decided that the arrears should be paid up to two-thirds of the established scale of salaries.

A further step was required to meet the situation resulting from the annexing of the Court's Statute to the Charter of the United Nations. Not all of the states parties to the 1920 Statute became parties to the Charter, and some of the latter had not been parties to the 1920 Statute. Hence, technically, the two Statutes were for a time in force, between two somewhat varying groups of states; in reality, the existing Permanent Court had been taken-over by the United Nations and it was generally appreciated that formal action was required to register the displacement of the earlier instrument. In December, 1945, the United Nations Preparatory Commission took note of the assent to the dissolution of the Permanent Court on the part of those members of the United Nations which were parties to the 1920 Statute, and declared that it "would welcome the taking by the League of Nations of appropriate steps" to that end.⁵

When the Assembly of the League of Nations met for its final session in Geneva, on April 8-18, 1946,⁶ its first committee reported that "just as the dissolution of the League of Nations follows upon the establishment of the United Nations, so the dissolution of the Permanent Court of International Justice follows upon the establishment" of the International Court of Justice; but the committee pointed out that "dissolution" did not mean that the Permanent Court is dead, for "in substance, the contrary is the truth."⁷ The following resolution was adopted by the Assembly:

THE ASSEMBLY OF THE LEAGUE OF NATIONS,

Considering that, by Article 92 of the Charter of the United Nations, provision is made for an International Court of Justice which is to be the principal judicial organ of the United Nations and which is to be open to States not members of the United Nations on terms to be determined by the United Nations;

Considering that the establishment of this Court and the impending dissolution of the League of Nations render it desirable that measures for the formal dissolution of the Permanent Court of International Justice shall be taken;

Considering that the Preparatory Commission of the United Nations, in a resolution of December 18th, 1945, declared that it would welcome the taking of appropriate steps by the League of Nations for the purpose of dissolving the Permanent Court, and that this resolution records the assent to the dissolution of the Permanent Court of all the Members of the United Nations which are parties to the Protocol of Signature of the Statute of the Permanent Court, whether Members of the League of Nations or not;

Considering that all the Judges of the Permanent Court have resigned and that on the dissolution of the League no machinery will exist for the appointment of new Judges:

⁵ *Report of the Preparatory Commission*, p. 57.

⁶ Thirty-five States were represented in this Assembly.

⁷ League of Nations, *Document A.35.1946*.

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RESOLVES:

That the Permanent Court of International Justice is for all purposes to be regarded as dissolved with effect from the day following the close of the present session of the Assembly, but without prejudice to such subsequent measures of liquidation as may be necessary.

Though some of the parties to the 1920 Protocol of Signature were not represented in the Assembly when this resolution was adopted, the authority of the resolution has passed without challenge.

ELECTION OF THE NEW BENCH

In preparation for the first election of Judges under the revised Statute of 1945, invitations were issued to national groups to nominate candidates in September, 1945. The invitations fixed December 15 as the date by which nominations should be made, but this date was later extended to January 10, 1946. In response, nominations were made by fifty national groups, that is, by the national groups of all Members of the United Nations except Liberia.⁸ The names of seventy-six candidates appeared in the list placed before the General Assembly.⁹ Only eleven of the candidates were nominated by five or more national groups.¹⁰ and forty-eight candidates had but a single nomination.

The election was begun by the General Assembly and the Security Council on the morning of February 6. Votes were cast in the Assembly for as many as fifty-six candidates, and in the Security Council for thirty-two candidates. The first comparison of the list of candidates receiving a majority (26) of the votes in the Assembly with the list receiving a majority (6) of the votes in the Security Council revealed the election of thirteen Judges. The Judges thus elected, with the votes required in the two bodies, were announced by the President of the Assembly as follows: Hsu Mo (China), De Visscher (Belgium), Basdevant (France), Guerrero (El Salvador), Krylov (USSR), McNair (UK), Fabela (Mexico), Hackworth (USA), Alvarez (Chile), Azevedo (Brazil), Badawi (Egypt), Read (Canada), and Zoricic (Yugoslavia).¹¹ In the afternoon of February 6 no candidate received a majority on the second ballot in the General Assembly, but a third ballot gave a majority to Klaestad (Norway), and as he had a majority on a third ballot in the Security Council, he was declared elected;

⁸ Seventeen of the States to which the groups belonged are not listed as having national groups in the Permanent Court of Arbitration in the *Rapport du Conseil Administratif de la Cour permanente d'Arbitrage*, published in 1946.

⁹ Document A/8/Rev.1, 24 January 1946. Three of the nominees later declined the candidacy.

¹⁰ Fabela (Mexico), 13; Lozano y Lozano (Colombia), 9; Hudson (U. S. A.) and De Visscher (Belgium), 7; Alvarez (Chile), Azevedo (Brazil), Basdevant (France), McNair (United Kingdom), 6; and Badawi (Egypt), Guerrero (El Salvador), Klaestad (Norway), 5.

¹¹ *Journal of the General Assembly*, 1st Session, No. 25, p. 440.

it is notable that this comparison of lists was made before the General Assembly had completed the number of places remaining to be filled. A fourth ballot in the General Assembly gave a majority to Winiarski (Poland) and later in the evening a fourth ballot in the Security Council had the same result, but the final comparison of the lists was not made until later and Winiarski's election was announced only on February 9.

On February 9 lots were drawn,¹² as required by Article 13 (2) of the Statute, to determine "the judges whose terms are to expire at the end of the . . . initial periods of three and six years." The names of the fifteen successful candidates were placed in a ballot box, and the Secretary General drew out five names, indicating those who were to serve for three years—Zoricic, Read, Winiarski, Badawi, and Hsu Mo; then five more names were drawn of those who were to serve for six years—Fabela, Klaestad, De Visser, Hackworth, and Krylov. The remaining five names were of those whose terms run for the full period of nine years. All of the successful candidates accepted the election, their terms commencing as of February 6, 1946.

In another place¹³ the writer has appraised the results of the election. Maintaining the high standards set in the previous general elections of 1921 and 1930, they provide a distinguished bench which includes men of many talents and varied experience, and "the body as a whole" represents quite satisfactorily "the main forms of civilization" and "the principal legal systems of the world" as prescribed by Article 9 of the Statute.

The ease with which the 1946 election was conducted and the necessary majorities were attained in a single day was remarkable; but the fact produced less satisfaction at the time because of a protracted discussion, in both the General Assembly and the Security Council, of the interpretation to be given to the phrase "third meeting" [French, *troisième séance*] as employed in Articles 11 and 12 (1) of the Statute.

If the terms employed in Articles 11 and 12 of the Statute are not as clear as they might be, they would seem to suffice for practical purposes, and it is significant that they gave rise to no difficulty in the course of previous general elections conducted by the League of Nations, neither in 1921¹⁴ nor in 1930.¹⁵ In 1921 the President of the Assembly of the League of Nations construed the term "meeting" to require the completion of a list of successful candidates for all of the places to be filled, and it was made clear that this might require a number of ballots. Only when the list was completed was a comparison to be made between the Assembly's and the Council's lists, and if the election was not then completed by the

¹² Same, No. 28, p. 469.

¹³ Manley O. Hudson, "The New Bench of the World Court," 32 *American Bar Association Journal* (1946), p. 140.

¹⁴ *Records of Second Assembly*, Plenary, pp. 235 ff.

¹⁵ *Records of Eleventh Assembly*, Plenary, pp. 134 ff.

concurrence of the two bodies, a further "meeting" would be held for filling the remaining places. Thus in 1921, when the Assembly proceeded to the election of eleven Judges, nine candidates had a majority on the first ballot, one on the second ballot, none on the third and fourth ballots, and one on the fifth ballot. Only after the fifth ballot was a comparison made with the Council's list, and it revealed agreement by the two bodies on nine candidates. Thereupon, the "meeting" of the Assembly was adjourned, and ten minutes later on the same day a new meeting was held. A sixth ballot, then taken for electing two Judges, gave a majority to two candidates, and comparison with the Council's list revealed agreement on these candidates. The election of four deputy-judges then ensued. A first ballot in the Assembly yielded a majority for two candidates; no candidate had a majority on the second ballot but two were successful on the third. Comparison then revealed the final election of three candidates. To fill the fourth place, a third ballot was taken at the "meeting" of the Assembly and a candidate received a majority; but on comparison with the Council's list this successful candidate was not elected. A fifth ballot produced a majority for a candidate, but a comparison revealed a different result in the Council. The Assembly then decided that a joint conference should be held. On the following day, the joint conference was constituted; on the next following day, the candidate proposed by the joint conference was elected.

In 1930, when fifteen Judges were to be elected, a first ballot in the Assembly gave a majority to fourteen candidates; four more ballots were then taken at the same "meeting" before a fifteenth candidate was successful. Then a comparison was made with the Council's list, and it revealed agreement on fourteen candidates. At a "meeting" in the afternoon of the same day, five ballots were taken in the Assembly before a candidate for the fifteenth place was successful. Comparison then revealed disagreement between the electoral bodies, whereupon the Assembly adjourned for ten minutes. Upon a sixth ballot, a candidate was successful, and comparison then revealed his success also in the Council. In electing four deputy Judges, the Assembly took four ballots before completing its list and before a comparison was made; two more ballots, and two more comparisons were required before the election of the four deputy judges was completed. A joint conference was at no time proposed.

The paper prepared by the Secretariat in 1946 was not too clear on this point.¹⁶ In the General Assembly Mr. Guerrero expressed the view that "it is a question of days of meetings and not of a separate meeting"; but the President of the General Assembly declared that in interpreting Article 11 "a meeting is a meeting in which one ballot has taken place, and there is nothing to prevent us from adjourning in that way either for an hour or for a day, if we so decide to have a second meeting for a second ballot,

¹⁶ Document A/25, 31 January 1946.

and so on." When this latter interpretation was adopted,¹⁷ a suggestion was forthcoming that an advisory opinion by the Court was needed. The discussion in the Security Council was protracted, due in part to incomplete familiarity with the League precedents; the conclusion seems to have been that a ballot was a meeting. Finally the President of the Security Council gave assurance that no precedent was being set, and that there would be "some appeal to the Court of International Justice, with a view to clarifying the position."¹⁸ The delegations of El Salvador, France, and the United Kingdom later made a definite proposal that the Court be requested to give an advisory opinion on the question.¹⁹

This proposal was placed on the agenda of the second part of the General Assembly. The American delegation in that body, when it met, suggested an interpretation to be given by the Assembly itself, however.²⁰ The Sixth Committee reported its opinion "that, in each of the successive 'meetings' referred to in Article 11, balloting should continue until the electoral body concerned has completed a full list for all the seats to be filled," and that "the concurrent 'meetings' of the General Assembly and the Security Council will then be followed by comparison of the lists."²¹ It therefore drafted a rule of procedure to be adopted provisionally and subject to the concurrence of the Security Council, as follows:

"Rule 99A. Any meeting of the General Assembly held in pursuance of the Statute of the International Court of Justice for the purpose of the election of members of the Court shall continue until as many candidates as are required for all the seats to be filled have obtained in one or more ballots an absolute majority of votes."

This report and the proposed rule were adopted by the General Assembly on November 19, 1946;²² apparently the rule has not yet been adopted by the Security Council. The solution of the problem envisaged in this rule, which is eminently satisfactory, accords with the League of Nations practice.

NEW PARTIES TO THE STATUTE

By reason of their becoming Members of the United Nations Afghanistan, Iceland, Siam, and Sweden became parties to the Statute during 1946. Switzerland was the first State to seek to become a party to the Statute without becoming a Member of the United Nations.

On October 26, 1946, the Swiss Government made enquiry as to the conditions on which Switzerland might become a party to the Court's Statute,

¹⁷ *Journal of the General Assembly*, 1st Session, No. 25 (Supp. A), p. 442.

¹⁸ *Journal of the Security Council*, 1st Year, No. 9, p. 167.

¹⁹ *Document A/59*, 13 February 1946.

²⁰ *Document A/C6/44*, 2 November 1946.

²¹ *Document A/191*, 15 November 1946.

²² *Journal of the General Assembly*, 1st Session, No. 38 (Supp. A), p. 327.

under paragraph 2 of Article 93 of the Charter.²³ On November 15 the Security Council recommended that the accession be permitted on condition of (a) acceptance of the provisions of the Statute, (b) acceptance of the obligations of a Member of the United Nations under Article 94 of the Charter, and (c) an undertaking to contribute to the Court's expenses such equitable amount as the General Assembly should assess from time to time after consultation with the Swiss Government.²⁴ A committee of experts had reported to the Security Council that no special conditions were required as to Switzerland's participation in the election of Judges and amendment of the Statute, but that general conditions on these matters should be fixed later on. On December 11, 1946, the General Assembly adopted the recommendations of the Security Council;²⁵ the accession by Switzerland had not been consummated.

ACCESS TO THE COURT BY STATES NOT PARTIES TO THE STATUTE

Article 35 of the Statute provides (in paragraph 2) that "the conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court." This text follows closely that embodied in the 1920 Statute; but there is an important difference in the meaning of "other states." The first paragraph of the original Article 35 opened the Court both to members of the League and to states mentioned in the annex to the Covenant; by the 1945 text of the paragraph the Court is open only to parties to the Statute.

On May 17, 1922, the Council of the League of Nations adopted a resolution which was conceived in mystifying confusion.²⁶ It laid down a condition requiring a declaration accepting "the jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of the Court," and undertaking "to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith." Either particular or general declarations were to be permitted, and in making a general declaration a state could accept the Court's compulsory jurisdiction though its acceptance could not be relied upon *vis-à-vis* states making declarations under paragraph 2 of Article 36 of the Statute. The Covenant of the League gave the Court no contentious jurisdiction—it is even doubtful whether, apart from Article 1 of the Statute, it empowered

²³ Document S/185, 26 October 1946.

²⁴ Document A/Bur./64, 18 November 1946. For the report of the committee of experts, see Document S/191, 11 November 1946.

²⁵ *Journal of the General Assembly*, 1st Session, No. 58, (Supp. A), p. 498; Document A/239, 10 December 1946.

²⁶ *Minutes of the Council*, 1922, p. 545.

the Court to give advisory opinions; clearly it was unnecessary for the Council's resolution to refer to the Covenant. Nor did the Statute itself confer on the Court anything which could be called jurisdiction over contentious cases. The resolution would seem to have confused the problem of opening the Court to litigants, with the problem of jurisdiction over disputes. It should have provided for access without dealing with jurisdiction.

This conclusion is confirmed by subsequent events. Under the Council's resolution two particular declarations were filed by Turkey, in the *Lotus Case* and the *Castellorizo Case*; and only two general declarations were made—by Monaco and Liechtenstein.²⁷ In other words, except for particular declarations, the effect of the resolution in extending the use of the Court was slight; it might have been greater if access and jurisdiction had been more carefully distinguished.

In a letter of May 1, 1946, the President of the Court drew this matter to the attention of the Security Council,²⁸ by which it was referred to a committee of experts. In view of the similarity of the text in the revised Statute to that in the original Statute the committee of experts sought a solution "analogous to that adopted by the Council of the League of Nations."²⁹ Little attention seems to have been paid to the distinction between access and jurisdiction, owing perhaps to the data prepared by the Secretariat. In consequence the mistake of 1922 was repeated in the resolution adopted by the Security Council on October 15, which was phrased in the following terms:³⁰

The Security Council of the United Nations in virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the International Court of Justice, and subject to the provisions of that Article, resolves:

(1) The International Court of Justice shall be open to a state which is not a party to the Statute of the International Court of Justice,³¹ upon the following condition, namely: that such state shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.

(2) Such declaration may be either particular or general.

²⁷ See Hudson, *Permanent Court of International Justice, 1920-1942*, pp. 389-390.

²⁸ Document S/99, 5 July 1946.

²⁹ Document S/169, 24 September 1946.

³⁰ 1 *Weekly Bulletin of the United Nations*, No. 13, p. 3.

³¹ The category of states not parties to the Statute now includes: Albania, Austria, Bulgaria, Finland, Germany, Hungary, Ireland, Italy, Japan, Liechtenstein, Monaco, Nepal, Outer Mongolia, Portugal, Rumania, San Marino, Spain, Transjordan and Yemen.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A state in making such a general declaration may, in accordance with Article 36, paragraph 2, of the Statute, recognize as compulsory, *ipso facto*, and without special agreement, the jurisdiction of the Court, provided, however, that such acceptance may not, without explicit agreement, be relied upon *vis-à-vis* states parties to the Statute, which have made the declaration in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice.

(3) The original declarations made under the terms of this Resolution shall be kept in the custody of the Registrar of the Court, in accordance with the practice of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all states parties to the Statute of the International Court of Justice, and to such other states as shall have deposited a declaration under the terms of this Resolution, and to the Secretary-General of the United Nations.

(4) The Security Council of the United Nations reserves the right to rescind or amend this Resolution by a Resolution which shall be communicated to the Court, and on the receipt of such communication and to the extent determined by the new Resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

(5) All questions as to the validity or the effect of a declaration made under the terms of this Resolution shall be decided by the Court.

After the text of this resolution had been adopted by the committee of experts, the Polish representative, desiring to exclude Spain from access to the Court, proposed that it should "not apply to states whose regimes have been installed with the help of armed forces of countries which have fought against the United Nations, so long as these regimes are in power."⁸² This proposal, which was supported by the French, Mexican, and Soviet Union representatives, was not adopted. The new text of paragraph 3 of the Security Council's resolution gives greater clarity to the references in the Statute to "states entitled to appear before the Court."⁸³

DECLARATIONS RECOGNIZING COMPULSORY JURISDICTION

In view of the urgent insistence by many delegations at San Francisco that the Statute of the Court should provide for general compulsory jurisdiction over legal disputes, it might have been anticipated that a number of states which had not previously done so would promptly proceed to

⁸² 1 *Weekly Bulletin of the United Nations*, No. 13, p. 3.

⁸³ See Hudson, *Permanent Court of International Justice, 1920-1942*, pp. 392-394.

exercise the option provided for in Article 36 of the Statute, and to make declarations accepting the compulsory jurisdiction as there outlined. Indeed, that course was recommended in a resolution adopted unanimously by the San Francisco Conference.³⁴ Events have not vindicated the anticipation, however, and the record through 1946 falls far short of what one would have hoped for. No general movement favoring such declarations developed during the meetings of the Assembly, and perhaps it must be thought that the Secretariat of the United Nations was remiss in this connection.³⁵

Under paragraph 5 of Article 36 previous declarations under Article 36 are to be deemed to be still in force, to the extent that they have not expired according to their terms, "as between the parties to the present Statute." In consequence the previous declarations made by Australia, Brazil, Canada, Colombia, Dominican Republic, Great Britain, Haiti, India, Iran, Luxembourg, New Zealand, Nicaragua, Panama, El Salvador, Siam, South Africa and Uruguay were in force down to the end of 1946. Declarations which had been made by the Netherlands and Norway expired during the year, but were renewed. Denmark made a new declaration some months after the expiration of its previous declaration. Previous declarations by Bolivia and Sweden expired during the year (on July 7 and August 16, respectively), and were not renewed. Wholly new declarations were deposited during the year only by the United Kingdom, the United States of America, and China.

A British declaration, communicated to the Secretary General on February 13, 1946, was conceived in the following terms: ³⁶

I, ERNEST BEVIN, His Majesty's Principal Secretary of State for Foreign Affairs, declare on behalf of His Majesty's Government in the United Kingdom in accordance with paragraph 2 of Article 36 of the Statute of the International Court of Justice that for a period of five years from the date of this declaration they accept as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning the interpretation, application or validity of any treaty relating to the boundaries of British Honduras, and over any questions arising out of any conclusion which the Court may reach with regard to such treaty.

The general declaration made by the United Kingdom on February 28, 1940, which is still in force, would seem to have covered such disputes with states making similar declarations. The special declaration, which may

³⁴ 1 *Documents of the Conference*, p. 627.

³⁵ For instance, the declarations actually made were not reproduced in official documents for general distribution until after the session of the General Assembly had been completed. See *Journal of the United Nations*, No. 66 (24 December 1946). Inadequate information was given even at that late date.

³⁶ *British Parliament Papers*, Cmd. 6934.

become applicable to other states, is notable for its limitation to a specific subject-matter. It is based upon Article 36 (2) of the Statute of the Court; that text, as amended in 1945, seems to envisage a declaration of this limited scope, for it applies to disputes concerning "the interpretation of a treaty."

The making of this declaration had been foreshadowed in a communication on behalf of the Government of the United Kingdom addressed to the Guatemalan Minister for Foreign Affairs on January 14, 1946, in response to the latter's letter of September 24, 1945.⁸⁷ The Guatemalan Minister had referred to "the recovery of the territory of Belize" but the British reply referred to a transitory article in the Guatemalan Constitution adopted on March 11, 1945, declaring the whole of the territory of British Honduras to be Guatemalan. No position has yet been taken by Guatemala in response to the British action.

The Netherlands declaration of August 5, 1946, signed by Mr. van Kleffens, was as follows (translation):

I declare that the Netherlands Government recognizes as compulsory *ipso facto* and without special agreement in relation to any other Member of the United Nations and any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2 of the Statute of the Court, for a period of ten years as from 6 August 1946 and thereafter until notification of abrogation is made, on any future disputes, except those in regard to which the parties would have agreed, after the coming into force of the Statute of the Permanent Court of International Justice, to have recourse to another method of pacific settlement.

Previous declarations by the Netherlands had been made on August 6, 1921, September 2, 1926, and August 5, 1936, the latest of them expiring on August 6, 1946.

The American declaration of August 14, 1946, communicated to the Secretary-General on August 26, 1946, was cast in the following terms:⁸⁸

I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Inter-

⁸⁷ United Nations Document, A/13, 23, January, 1946. The correspondence has also been published in *British Honduras*, a pamphlet issued by British Information Services in New York, I. D. 679, October, 1946.

⁸⁸ 15 Department of State Bulletin (1946), p. 452.

national Court of Justice in all legal disputes hereafter arising concerning

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

c. disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

The jurisdiction conferred by this declaration is narrowly limited. Under sub-paragraph b of the first proviso, the respondent in any case to which the United States is a party may determine that the dispute concerns matters essentially within its domestic jurisdiction, with the effect that the Court will lack jurisdiction to adjudicate on the merits. Under sub-paragraph c of the first proviso, the Court may be able to take jurisdiction over a dispute arising under a multilateral treaty, in a case to which the United States is a party, only if all parties to the treaty are parties before the Court.⁸⁹ Neither of these limitations had been included in any previous declaration under Article 36; if they should be repeated in future declarations by other states a distinctly backward step would have been taken. In the letter communicating the United States declaration to the Secretary-General, the Government of the United States was said to "look forward to a great development of the rule of law in international relations through a broad acceptance of the function of the Court in the spirit of the Charter"; obviously the declaration falls short of being such a "broad acceptance." Yet the second proviso in the declaration is a useful innovation in that it sets a period for advance notice of the termination of the acceptance of jurisdiction.

The Chinese declaration deposited on October 26, 1946, was made in the following terms:

⁸⁹ The writer has analyzed these limitations, in greater detail in 32 *American Bar Association Journal* (1946), p. 832. For other comments see the articles by Wayne L. Morse and Lawrence Preuss in same, pp. 776, 660, and the articles by Francis O. Wilcox, Lawrence Preuss and C. C. Hyde in this JOURNAL, Vol. 40 (1946), pp. 699, 720, and 778.

The Chinese Government recognizes as compulsory *ipso facto* and without special agreement, in relation to any State which accepts the same obligation and on the sole condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraphs 2 and 3, of the Statute of the International Court of Justice for a period of five years and thereafter until the expiration of a six months' notice of termination.

China had previously accepted the Court's jurisdiction by a declaration of May 13, 1922, which expired on May 13, 1927.

The Norwegian declaration, signed by the Minister for Foreign Affairs under date of November 16, 1946, was as follows:

I declare on behalf of the Norwegian Government that Norway recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2 of the Statute of the Court, for a period of ten years as from 3 October 1946.

Previous declarations had been made by Norway on September 6, 1921, September 22, 1926, and May 19, 1936, the latest of which expired on October 3, 1946.

The Minister for Foreign Affairs of Denmark communicated the following declaration to the Secretary General on December 10, 1946 (translation):

Denmark recognizes as compulsory, in conformity with Article 36, paragraph 2 of the Statute of the International Court of Justice, the jurisdiction of the court towards any other state accepting the same obligation, for a period of ten years from the handing over of this declaration to the Secretary-General of the United Nations.

Previous declarations had been made by Denmark on December 18, 1920, December 11, 1925, and June 4, 1936, the latest expiring according to its terms on June 13, 1946.

The texts of these various declarations bring out in relief the devotion of certain States to the strengthening of international law. They are able, therefore, to accept compulsory jurisdiction with a freedom from the fears which prompted the exceptions in the American declaration.

(Provisions for the Court's jurisdiction have also been included in the trusteeship agreements approved by the General Assembly on December 13, 1946.) The agreement concerning Togoland under British Mandate thus provides (in Article 19):⁴⁰

If any dispute whatever, should arise between the Administering Authority and another Member of the United Nations relating to the

⁴⁰ Document A/150/Rev. 2, 12 December 1946. See also Article 75 of the Constitution of the World Health Organization of July 22, 1946, Document E/155; and Article 17 of the Constitution of the International Refugee Organization of December 15, 1946, Document A/284, 14 January, 1947.

interpretation or application of the provisions of this agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice provided for in Chapter XIV of the United Nations Charter.

REQUESTING OF ADVISORY OPINIONS

On September 21, 1946, the Economic and Social Council recommended to the General Assembly that it should be authorized to request advisory opinions from the Court. On November 20 the Sixth Committee of the General Assembly proposed a resolution authorizing such requests by the Economic and Social Council "on legal questions arising within the scope" of its activities, the term "scope" being interpreted to include "legal questions concerning mutual relationship of the United Nations and the specialized agencies."⁴¹ The resolution was adopted by the General Assembly on December 11, 1946.⁴²

The draft agreements negotiated with specialized agencies were approved by the Economic and Social Council on June 21, 1946,⁴³ and October 3, 1946,⁴⁴ and by the General Assembly on December 14, 1946.⁴⁵ The specialized agencies thus to be related to the United Nations are the International Labor Organization,⁴⁶ the United Nations Educational, Scientific and Cultural Organization, the Food and Agricultural Organization of the United Nations, and the Provisional International Civil Aviation Organization. Each of the draft agreements contains a standard clause concerning relations with the Court,⁴⁷ of which the following served as model:

Article IX. Relations with the International Court of Justice

1. The International Labour Organization agrees to furnish any information which may be requested by the International Court of Justice in pursuance of Article 34 of the Statute of the Court.

2. The General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.

3. Such request may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorization by the Conference.

4. When requesting the International Court of Justice to give an

⁴¹ Document A/201, 29 November 1946.

⁴² *Journal of the General Assembly*, 1st Session, No. 58 (Supp. A), p. 465.

⁴³ *Journal of the Economic and Social Council*, No. 29, p. 486.

⁴⁴ Document E/245, 25 October 1946, p. 41.

⁴⁵ *Journal of the General Assembly*, 1st Session, No. 64 (Supp. A), p. 732.

⁴⁶ The agreement with the International Labor Organization was signed on December 21, 1946.

⁴⁷ Document A/242, 11 December 1946.

advisory opinion the International Labour Organization shall inform the Economic and Social Council of the request.⁴⁸

During the course of the year suggestions have been made on several occasions that requests be made for advisory opinions but no such request was voted:

(1) Reference has already been made to the suggestion at London that the Court's opinion be requested on the interpretation to be given to the word "meeting" in Articles 11 and 12 of the Statute of the Court.

(2) In the Second Part of the First Session of the General Assembly, various delegations proposed that an advisory opinion be requested in connection with an Indian application regarding the treatment of Indians in the Union of South Africa; the question proposed was "whether the matters referred to in the Indian application are, under Article 2, paragraph 7, of the Charter, essentially within the domestic jurisdiction of the Union."⁴⁹

THE SESSION OF THE COURT OF 1946

A meeting of the Court was held at The Hague from April 3 to May 6, 1946. As the eldest member Judge Guerrero served as acting President at the beginning. Proceeding to the election of officers on April 6 Judge Guerrero, who had served so efficiently as President since 1937, was again elected to fill that office, and Judge Basdevant was elected Vice-President. On April 6, also, the Court elected as Registrar, Mr. Edvard Hambro, who had served as Acting Secretary during the preliminary stages; on April 18 Mr. Jean Garnier-Coignet, who had been Secretary to the Presidency from 1922 to 1940, was elected Deputy-Registrar. On May 3 the Court constituted the Chamber for Summary Procedure, to consist of President Guerrero, Vice-President Basdevant, and Judges McNair, Krylov, and Hsu Mo, with Judges Fabela and De Visscher as substitute members.

A public inaugural meeting was held at the Peace Palace on April 18, in the presence of the President of the General Assembly (Mr. Spaak), a representative of the United Nations (Mr. Kern), and Netherlands personalities.⁵⁰ With the exception of Judge Alvarez all of the Judges were present and made the solemn declarations required by Article 20 of the Statute on this occasion.

The principal achievement of the Court at this session was the adaptation of the Rules of Court to take account of the changes effected in the Statute in 1945. The original Rules adopted on March 24, 1922, and revised in

⁴⁸ The International Labor Office had long insisted on its being placed in a position to request advisory opinions directly. See, especially, League of Nations, *Document C.20.M.20.1944.X*.

⁴⁹ *Document A/C.1* and 6/20, 29 November 1946.

⁵⁰ The addresses by President Guerrero, Mr. Spaak, Dr. Kern, Mr. van Roijen and Mr. de Monchy were published by the Court.

1926 and 1931, had been thoroughly overhauled in 1936.⁵¹ The new Rules effect relatively few changes in the 1936 Rules.⁵² The chief subjects of these changes are (a) the organization and working of the special chambers, (b) assessors, (c) notification of names of agents and counsel, and (d) appearance before the Court of states not parties to the Statute.

ORGANIZATION OF THE REGISTRY

The events of 1940 led to a dispersal of most of the staff of the Registry of the Court. Some of the personnel had been on the staff since the Court's earlier years. By faithful and efficient service, the staff had developed a remarkable *esprit de corps*. Quite naturally, therefore, all of the members of the staff (not including the former Registrar and the former Deputy Registrar) were recalled to their posts. This relieved the Court of the necessity of training new recruits, and it assured the continuance of a proved administration. A few new appointments have been made, however. The Staff Regulations and the Instructions for the Registry, which were previously in force, have been provisionally continued by the Court.

The revised Statute omits a provision previously included in Article 21, to the effect that "the duties of the Registrar of the Court shall not be deemed incompatible with those of the Secretary-General of the Permanent Court of Arbitration."⁵³ This omission was not due to a desire to establish an incompatibility, however, and on November 5, 1946, the American delegation informed the General Assembly that "the United States is proposing to the Administrative Council of the Permanent Court of Arbitration that the Registrar of the International Court of Justice be designated as the Secretary General of the Permanent Court of Arbitration."⁵⁴ The matter has become very timely because of the recent death of Dr. Crommelin, who had been the efficient Secretary General of the Permanent Court of Arbitration since 1929.

PRIVILEGES AND IMMUNITIES

On February 13, 1946, the General Assembly adopted a resolution inviting the Judges of the Court to consider and to formulate recommendations on the privileges, immunities, and facilities necessary "for the Court's exercise of its functions and the fulfilment of its purposes, in the country of its seat and elsewhere."⁵⁵ To give effect to this resolution negotiations were conducted between representatives of the Court and the Netherlands

⁵¹ See Hudson, *Permanent Court of International Justice, 1920-1942*, Ch. 13.

⁵² The text is included in Series D, No. 1, of the *Publications* of the International Court of Justice.

⁵³ On this omission, see the writer's comment in this JOURNAL, Vol. 40 (1946), p. 23.

⁵⁴ Document A/C.5/55, 5 November 1946.

⁵⁵ *Journal of the General Assembly*, 1st Session, No. 34, p. 704.

Government which resulted in "an agreement on the general principles that should govern the matter" in so far as the matter concerns the Netherlands. This agreement was confirmed in an exchange of notes between the President of the Court and the Netherlands Minister for Foreign Affairs on June 26, 1946.⁵⁶ The agreement does not cover "the question of precedence" which has given some concern in the past. On December 11, 1946, the General Assembly adopted a resolution approving the agreement thus reached.

The matter of privileges and immunities in countries other than the Netherlands was also studied by the Court, and its conclusions were communicated to the Secretary-General.⁵⁷ The series of recommendations adopted by the General Assembly on December 11, 1946,⁵⁸ relate to the privileges and immunities of the Judges, the Registrar and other Court officials, agents and counsel, assessors, witnesses and experts; and they provide for the recognition by states of *laissez-passer* issued by the Court.

EMOLUMENTS OF JUDGES AND OFFICIALS

The salaries of the Judges of the Court were fixed by a resolution adopted by the General Assembly on February 6, 1946, immediately prior to the election of Judges.⁵⁹ The annual salary of a Judge was set at 54,000 florins, with an additional allowance of 15,000 florins for the President and a maximum additional allowance of 10,000 florins for the Vice-President. The highest salary previously paid, from 1936 to 1939, was 45,000 florins; the increase was imperative, both because of the lower rate of exchange and the higher cost of living.

The Registrar's salary was fixed by the General Assembly on December 11, 1946, at 29,150 florins, with an additional non-pensionable allowance of 5,850 florins, the Registrar's salary being assimilated to that of a top-ranking director of the Secretariat.⁶⁰ Previously the salary of the Registrar had been 25,000 florins.

On April 13, 1946, the President addressed a letter to the Secretary-General of the United Nations suggesting that the salaries of the Judges and Registrar should be fixed in dollars instead of florins.⁶¹ When the question was examined by the Fifth and Sixth Committees of the General Assembly in November assurances of the stability of the florin and of facilities for exchange led the President to withdraw his suggestion.

On the recommendation of the Fifth and Sixth committees the General Assembly adopted regulations on December 11, 1946, concerning the pen-

⁵⁶ *Publications of the International Court of Justice*, Series D, No. 1, p. 84.

⁵⁷ *Document A/105*, 9 October 1946.

⁵⁸ *Journal of the General Assembly*, 1st Session, No. 53 (Supp. A), p. 465; *Document A/202*, 29 November 1946.

⁵⁹ *Journal of the General Assembly*, 1st Session, No. 34, p. 686.

⁶⁰ *Document A/226*, 8 December 1946.

⁶¹ *Document A/113*, 23 October 1946.

sions of the Judges and the Registrar;⁶² the most notable change was the addition of provisions for pensions for widows and children of deceased Judges. Regulations concerning reimbursement of travel expenses and subsistence allowances were also adopted by the General Assembly on December 11.⁶³

BUDGET OF THE COURT

In earlier years the authorized budget of the Court never exceeded the 1937 figure of 1,325,651.75 florins, and the actual expenditure never exceeded the 1932 figure of 1,214,854.32 florins.

The 1946 and 1947 budgets of the United Nations were adopted on December 14, 1946.⁶⁴ They include as the 1946 budget of the Court \$477,208, and as the 1947 budget of the Court \$638,412.⁶⁵ In view of the present rate of exchange as compared with earlier years,⁶⁶ this latter represents little if any increase over the 1937 Court budget.

PREMISES IN THE PEACE PALACE

In the past the Court enjoyed the use of certain parts of the Peace Palace at The Hague under an arrangement of March 8, 1924, a rider to which was put into effect in 1934.⁶⁷ Since 1933 the payments by the League of Nations to the Carnegie Foundation in respect of such premises have been at the rate of 60,000 florins a year, 20,000 of this sum being applied for repayment by the Foundation of loans contracted for the remodeling of the Peace Palace.⁶⁸

On February 12, 1946, the General Assembly of the United Nations approved the setting up of a small Negotiating Committee of eight members to assist the Secretary General in negotiating with the Carnegie Foundation at The Hague. This Committee visited The Hague and, without consulting the Registrar of the Permanent Court who was there, concluded an agreement calling for the payment of 48,000 florins a year instead of the 40,000 paid previously, and a separate agreement calling for the payment of 20,000 florins a year for repayment of the loans.⁶⁹ These two agreements were approved by the General Assembly on December 11, 1946.

⁶² Document A/217, 7 December 1946.

⁶³ Document A/226, 8 December 1946.

⁶⁴ *Journal of the General Assembly*, 1st Session, No. 63 (Supp. A), p. 659.

⁶⁵ Document A/272, 13 December 1946. See also Document A/C.5/87, 23 November 1946.

⁶⁶ The International Monetary Fund has announced the present par value of the florin as 37.6953 United States cents. United Nations Press Release ES/287, 18 December 1946.

⁶⁷ See Hudson, *Permanent Court of International Justice, 1920-1942*, p. 324.

⁶⁸ During the war years the payments were suspended.

⁶⁹ Document A/219, 7 December 1946. The period for repayment of the loans was extended, in view of the suspension of payments by the League of Nations during the war.

PUBLICATIONS OF THE COURT

The serial publications of the Court are projected for the future on the lines followed in the past. A new series D was inaugurated during the year by the publication of No. 1, containing the English and French versions of the Charter and the Statute, the English and French versions of the Rules of Court adopted on May 6, 1946, and the letters exchanged on June 26, 1946, between the President of the Court and the Netherlands Minister for Foreign Affairs, relating to the privileges and immunities of Judges and officials of the Registry. During the year a brochure was also published on the Inaugural Session of April 18, 1946.

The Court has also issued *communiqués* to the public from time to time, in English and in French.

* * *

The Court is now firmly established and thoroughly organized. It merits general confidence. It is not in any real sense a new Court. Few significant changes have been made in its Statute and continuity with the past is assured in many ways: in the presence of two of the former Judges on the new bench, in the continuance of Judge Guerrero as President, in the recalling to the staff of the Registry of all of the former officials with two exceptions, and in the but slight revision of the Rules of Court as they existed since 1936. This assurance means that the Court has passed beyond the experimental stage and that the path ahead is not untried.

In order that it may usefully serve the world of our time wide jurisdiction should be conferred on the Court and Governments should show a willingness to submit themselves to the exercise of the jurisdiction conferred. Yet the value of this great institution for the judicial application of international law is not to be gauged entirely by the cases which may be brought before it. The mere fact that it exists may exert an influence in behalf of the peaceful settlement of disputes between States without any resort to adjudication.

THE NUREMBERG TRIAL AND INTERNATIONAL LAW *

By GEORGE A. FINCH

Editor-in-Chief

Retribution for the shocking crimes and atrocities committed by the enemy during World War II was made imperative by the overwhelming demands emanating from the public conscience throughout the civilized world. Statesmen and jurists realized that another failure to vindicate the law such as followed World War I would prove their incapacity to make progress in strengthening the international law of the future.¹

It is not necessary to review the steps which led to the verdict of Nuremberg. They have been given full publicity. These observations will accordingly be confined to the indictment and the judgment upon it.²

All the crimes for which punishment was asked and administered are defined in the Charter establishing the International Military Tribunal.³ The agreement for the Charter⁴ is an executive agreement in the signing of which the American representative was the agent of the President of the United States acting in his capacity as Commander-in-Chief of the armed forces. The indictment and the verdict must be read and construed within the limits of the Charter. The Tribunal expressly held that the provisions of the Charter were binding upon it as the law to be applied to the case.

It will tend to clearer presentation of the subject to follow a logical instead of the numerical order of the charges in the indictment.

Count 3 charges War Crimes in violation of the laws and customs of war. These are defined to include, but not limited to, "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

No substantial objection lies to the trial of such war crimes, to the judgment, or to the execution of the sentences. The laws and customs of war,

* Revised, enlarged, and annotated version of an address delivered at Atlantic City, N. J., Oct. 29, 1946, before the Section of International and Comparative Law of the American Bar Association, as Chairman of the Committee on Punishment of War Criminals.

¹ See the author's "Retribution for War Crimes," in this JOURNAL, Vol. 37 (1943), p. 81.

² The complete official text of the judgment is printed below, pp. 172-333. It gives all the relevant facts.

³ Printed in this JOURNAL, Supplement, Vol. 39 (1945); p. 258.

⁴ Same, p. 257.

including those of military occupation, are well established in international law. They are enacted in national legislation, codified in military manuals, incorporated in binding international conventions, and affirmed by the memorial practice of states thus becoming a part of the common law of war. It is accepted international law, conventional as well as customary, that a belligerent has authority to try and punish individuals for crimes which constitute violations of the laws and customs of war, as well as of the laws of humanity, when such persons fall within his power.⁵

Objections from military sources that it is not legal to punish military and naval officers who, it is said, are merely following the orders of their superiors, cannot be well taken. In spite of any rules to this effect contained in military manuals, the law does not permit anyone to commit with impunity a crime prohibited by military or any other law upon the plea of *respondeat superior*. Limits are placed upon the application of this rule, taking into consideration the justice of the charge in each case.⁶ Moreover, it should not be overlooked that the maxim *respondeat superior* works in two directions. If a subordinate successfully pleads the rule the liability for the commission of the crime is not extinguished but is transferred to the superior who issued the order. The military and naval officers convicted at Nuremberg were found upon the evidence to be personally responsible for the signature or issuance of orders that violated the laws and customs of war. Had their contention that they acted upon the orders of Hitler been accepted as a valid defense, the rule *respondeat superior* would have served merely as a *reductio ad absurdum* for the purpose of frustrating the law. Upon such a theory it would have been impossible to punish anyone for the crimes of this war.⁷ All the perpetrators charged with offenses might have made the same defense, and the arch criminal, Hitler, by committing suicide, made it impossible to inflict punishment upon this earth.

Technical objections that might be raised to the legality of the Tribunal on the ground that it was an international military tribunal instead of a strictly national one, or similar objections raised to the competence of civilian judges to preside over a military tribunal, were sufficiently answered by Major Willard B. Cowles while he was in the Judge Advocate General's Department of the United States Army. In an article published in June, 1944, he wrote: "A military tribunal with mixed inter-allied personnel may properly be established by the commanding general of co-operating cobelligerent forces," and "In the United States, the personnel of military commissions have usually been commissioned officers. There is, however, no legal objection to the use of qualified civilians."⁸

⁵ Case of the German Saboteurs, *Ex parte Quirin* (1942), 317 U. S. 1; this JOURNAL, Vol. 37 (1943), p. 152. See "Universality of Jurisdiction over War Crimes," by Willard B. Cowles, in *California Law Review*, Vol. 33 (1945), pp. 177-218.

⁶ See the author's editorial "Superior Orders and War Crimes," in this JOURNAL, Vol. 15 (1921), p. 440.

⁷ "Trial of War Criminals by Military Tribunals," in *American Bar Association Journal*, Vol. 30, No. 6 (June, 1944), p. 330.

We therefore conclude that no question of *ex post facto* legislation or punishment was involved in the proceedings at Nuremberg on Count 3 of the indictment, and that they were legally adapted to the vindication of accepted principles of international law.

Count 4 of the indictment charges Crimes Against Humanity. These were defined in the Charter as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Such acts are closely related to war crimes and in most cases trial would be upon the same evidence. However, where crimes against humanity may not for any reason be cognizable as war crimes, the governments of the Allied Powers now in military occupation of Germany have jurisdiction to punish such crimes; otherwise, they would go unpunished. With the unconditional surrender of Germany, its government went out of existence as a sovereign state and its sovereignty is now held in trust by the condominium of the occupying powers. On this point, the Nuremberg Tribunal held: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."⁸ The International Military Tribunal was established after consultation with the Allied Control Council which exercises supreme authority in Germany.

There could be no more sacred trust than that of upholding the law against primitive and barbarous acts of inhumanity which shock the conscience of all civilized peoples and are forbidden by divine as well as human command. The circumstance that such acts may have been permitted or required by Nazi law either within Germany or in the countries invaded by the enemy is no bar to punishment of them by the military authorities of the Allies now in control of the government of Germany. They are not bound to respect the laws of the defeated enemy which are repugnant to their principles of law, justice, and individual rights.

It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to an-

⁸ See "The Legal Status of Germany according to the Declaration of Berlin," by Hans Kelsen, this JOURNAL, Vol. 39 (1945), p. 518, and "The Legal Status of Germany," by Egon Schwelb, in same, Vol. 40 (1946), p. 811. For General Eisenhower's proclamation establishing military government in Germany and vesting supreme legislative, judicial, and executive authority in the Supreme Commander of the Allied Expeditionary Forces, see "American Military Government Court in Germany," by E. E. Nobleman, in same, p. 803.

other . . . all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced.⁹

The Charter specifies that the International Military Tribunal shall have jurisdiction of crimes against humanity committed before or during the war and whether or not such crimes were in violation of the domestic law of the country where perpetrated. This broad jurisdictional clause was included for the obvious purpose of punishing acts committed by Nazi Germany against her own citizens in the course of persecutions on political, racial or religious grounds before the war started. There is no rule of international law, customary or conventional, by which such acts committed before the commencement of hostilities can be punished by the subsequent military occupants. The prosecuting governments were unable to establish the contrary of this statement of the law. On this point in the indictment the Tribunal held: "To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal." After considering the evidence and the arguments, the Tribunal held further "that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter. But," continued the Tribunal, "from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity, and in so far as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." It is not clear from the reasoning of the Tribunal, in view of its previous holding that it was bound by the Charter as the law of the case, why it felt free to disregard the express terms of the Charter on this particular definition.

All of the defendants who were convicted were found guilty on one or both of Counts 3 or 4 charging War Crimes and Crimes Against Humanity, except one who will be referred to later. The sentences imposed fitted either one or both of these crimes. The Herculean efforts of the prosecuting governments in rounding up the culprits and collecting the evidence against them merit the universal applause they have received. The fair treatment of the prisoners by the judges and the justice of their decision deserve the approval of the legal profession throughout the world. The ground lost in

⁹ Supreme Court of the United States in *Vilas v. City of Manila* (1911), 220 U. S. 345, affirming *Alvarez y Sanchez v. United States*, 216 U. S. 167, and *C. R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542.

the strengthening of international law by the failure to execute the penalty clauses of the Treaty of Versailles was recovered.

Had the indictment ended here, the trials and judgment would rest upon solid legal principles and practice. Conviction upon additional charges of doubtful legal validity added nothing to the satisfaction of retributive justice already meted out on Counts 3 and 4. Its contribution to the strengthening of international law is limited to an unprecedented decision by a military tribunal of the victors, trying captured enemies which it is hoped will institute a new custom establishing the juridical principle that aggressive war-making is illegal and criminal.

Novel precedents purposely designed to change existing international law are not new in the practice of nations. One of them came before a great English jurist during the Napoleonic Wars when France set up prize courts in neutral territory. Lord Stowell, then Sir William Scott, speaking for the British High Court of Admiralty, held:

"Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country, I must take my stand on the ancient and universal practice of mankind, and say that as far as that practice has gone, I am willing to go, and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit (he continued) that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind.

Speaking of the growth of international law from principle to practice, Lord Stowell commented that

A great part of the law of nations stands on no other foundation; it is introduced, indeed, by general principles, but it travels with those principles only to a certain extent; and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress.¹⁰

The invocation of principles of doubtful legality in the punishment of the Nazi defendants may lay the entire proceedings open to challenge by future generations of Germans. Hitler's amazing rise to political power received its initial impetus and was successful primarily because of his attack upon the "war guilt clause" im providently inserted for political rea-

¹⁰ (1799) 1 C. Rob. 135; Hudson, *Cases on International Law* (1936), p. 1395; Scott, *Cases on International Law* (1922), p. 1070.

sons in what he called the *Versailles Diktat*. The clause affirmed that World War I was imposed "by the aggression of Germany and her allies."¹¹

The defendants were charged in Count 1 with the Common Plan or Conspiracy to commit the other crimes charged in the indictment. Count 2 charged the defendants with Crimes Against Peace which were defined in the Charter as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." These two charges will be considered together as they were so considered in the judgment of the Nuremberg Tribunal.

The gravamen of the charges against the defendants under Counts 1 and 2 rests upon two premises: (1) that aggressive war has been outlawed by the Community of States, and (2) that acts committed in planning or waging of such a war are now international crimes for which individuals may be criminally punished. It should be carefully noted that neither the definition in the Charter of the International Military Tribunal nor the judgment of the Tribunal requires as elements of Crimes Against Peace that War Crimes or Crimes Against Humanity be associated with them.

In taking up the consideration of these charges, the Tribunal calls attention to the fact that

The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements or assurances."

The Tribunal proceeds to consider the matter further with the explanation,

But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the prosecution and the defense, and will express its view on the matter.

What follows in the Tribunal's judgment on these charges is, consequently, *obiter dictum* and the value of the views expressed on the questions of law involved will be measured accordingly in the future development of international law.

¹¹ This clause was part of Art. 231 of the Treaty of Versailles and should not be confused with Art. 227 which publicly arraigned the German Kaiser "for a supreme offense against international morality and the sanctity of treaties," or with Art. 228 which provided punishment by Allied military tribunals of acts "in violation of the laws and customs of war." See the author's editorial entitled "The settlement of the reparation problem," in this JOURNAL, Vol. 24 (1930), p. 339.

It cannot be denied that beginning with the establishment of the League of Nations the concept of preventing aggressive war has been growing. This is shown in the unratified Geneva Protocol of 1924; in resolutions passed by international conferences such as the Assembly of the League of Nations in 1927, and the International Conference of American States in February, 1928; by the conclusion of treaties such as the Pact of Paris for the Renunciation of War in 1928, and the Argentine Anti-War Treaty of 1933; and by the series of non-aggression pacts concluded in 1932 and 1933 by Soviet Russia with Afghanistan, Czechoslovakia, Estonia, Finland, Latvia, Persia, Poland, Roumania and Turkey. All such efforts deserve the utmost praise, sympathy, and support, for it is obvious that the prevention of aggression as a breach of the international peace must be the foundation stone upon which the whole structure of international order will have to stand in the future or it will be built upon sand as in the past.¹² But unratified protocols can not be cited to show acceptance of their provisions and resolutions of international conferences have no binding effect unless and until they are sanctioned by subsequent national or international action; and treaties of non-aggression that are flagrantly disregarded when it becomes expedient to do so can not be relied upon as evidence to prove the evolution of an international custom outlawing aggression.

The Nuremberg judgment contains an historical narrative of events upon which the Tribunal founds its conviction of the defendants of planning and engaging in aggressive war. This the Tribunal holds to be the "supreme international crime." Obvious omissions from this recital make it difficult to accept it as an impartial historical document. Moreover, the Tribunal failed to take into consideration or give due weight to the attitudes of the prosecuting governments toward the same events at the time they took place. For example, the prompt recognition of the annexation of Austria by Germany, and the failure of the League of Nations to act upon a protest filed by the Mexican Government demanding that the obligations of the Covenant be enforced at that time, would seem to negative the holding by the Nuremberg Tribunal that the planning and consummation of the annexation was part of an international crime.

In the matter of the German aggression upon Czechoslovakia, its initiation was celebrated by an agreement between the aggressors and some of the present prosecuting powers. Was it any less justifiable or legal for Great Britain and France to compel Czechoslovakia to consent to Germany's initial aggression in September, 1938, than it was for Germany six months later to obtain Czechoslovakia's consent under duress to the liquidation of the remainder of her territory? Professor Quincy Wright referred to the earlier agreement (that of September, 1938) as "the Dictate of Munich" comparable to "the Dictate of Versailles." He maintained

¹² See the writer's letters in *The New York Times* of Oct. 22 and Nov. 12, 1944, urging specific provisions to this end in the Charter of the United Nations then under public discussion.

that the Munich Agreement was made in violation of the legal obligations of Great Britain and France as well as other Powers:

France and Great Britain, instead of aiding to preserve the territorial integrity of Czechoslovakia as they were bound to do under the Covenant, . . . joined with Italy and Germany in demanding that Czechoslovakia give to Germany in less than a fortnight practically everything the latter had asked. It would appear that the action of the four Powers should be characterized not as peaceful change, but as intervention which, according to "Historicus," is "a high and summary procedure which may sometimes snatch a remedy beyond the reach of law."¹³

If the aggression against Czechoslovakia was an international criminal act, then all the participants in the Munich Agreement were equally guilty.

Finally, the Tribunal holds that "the war initiated by Germany against Poland on September 1, 1939, was most plainly an aggressive war which was to develop in due course into the war which embraced almost the whole world and resulted in the commission of countless crimes both against the laws and customs of war and against humanity." The Tribunal's account of the events leading up to the aggression against Poland omits reference to the vitally important part played by Soviet Russia both before and after the fact. The judgment refers to the non-aggression pact signed by Ribbentrop and Molotov on August 23, 1939, only in connection with the war which Germany started against Soviet Russia on June 22, 1941. The terms of that pact, the circumstances under which it was signed, and the conduct of Russia as well as of Germany immediately following its signature lead to a strong presumption that it was made in anticipation of a joint attack on Poland by both signatories.¹⁴ In view of the commitments of Great Britain and France to come to the assistance of Poland and of other facts recited in the Nuremberg judgment, there seems good reason to believe that Germany would not have launched her attack on Poland without having first obtained Soviet Russia's signature to the pact of August 23, 1939. Sixteen days after Germany invaded Poland on September 1, 1939, Soviet forces also entered Poland, in violation of the non-aggression pact between those two countries, and on the same day the Soviet Government informed the Polish Ambassador that "the Polish state and its government have in fact ceased to exist." Eleven days later, on September 28, Ribbentrop and Molotov entered into another agreement partitioning all of Poland between them.¹⁵ If the dictum of the Nuremberg Tribunal that the aggression against Poland constituted an international criminal act for which the per-

¹³ "The Munich Settlement and International Law," this JOURNAL, Vol. 33 (1939), p. 12 at pp. 28-29.

¹⁴ For the text of the Russo-German pact of Aug. 23, 1939, see this JOURNAL, Vol. 35 (1941), Supplement, p. 36.

¹⁵ For these and additional facts concerning Soviet Russia's aggression against Poland, see editorial entitled "The Polish Boundary Question," by Lester H. Woolsey, in this JOURNAL, Vol. 38 (1944), p. 441.

petrators were individually liable is good law, then there follows an irrefutable implication that Soviet Russia and its officials were participes criminis—

The attitude assumed by the Government of the United States with reference to the character of the war upon Poland, as well as the wars upon the other European states that were successively invaded, was shown by its official action in issuing on each of those occasions the usual proclamation of its neutrality. These proclamations recited that the United States "is on terms of friendship and amity" not only "with the contending Powers," but "with the persons inhabiting their several dominions."¹⁶ They stated the law and official position of the United States and were legally binding not only on the Government but on all American citizens, courts, and officials. To maintain retroactively that these invasions were international criminal acts involving personal responsibility is to suggest that the United States officially compounded international crime with international criminals. The United States continued to recognize the Government of Germany as legitimate, to receive its diplomatic representatives at Washington, and to accredit American diplomatic representatives to Berlin.

We are not urging the untenable proposition that all criminals of a class must be punished, or none at all; nor do we overlook the lack of jurisdiction by the Nuremberg Tribunal under its Charter to try and punish anybody but enemy nationals. Our criticisms are directed to the retroactive effect of the dictum of the Tribunal that certain acts not treated as criminal by the prosecuting governments at the time they took place were subsequently transformed into crimes or conspiracies against peace for which ex post facto punishment is now legally justifiable.

The charge of Crimes Against Peace is a new international criminal concept. It was not envisaged in the warnings issued by the Allies before hostilities ended nor made a part of the original terms of reference to the United Nations War Crimes Commission established in London during the war.¹⁷ It may be traced to the influence of Professor A. N. Trainin, of

¹⁶ See the first proclamation of the President proclaiming the neutrality of the United States after the outbreak of the war over Poland No. 2348, Sept. 5, 1939, 54 U. S. *Statutes at Large*, Pt. 2, p. 2629; this JOURNAL, Supplement, Vol. 34 (1940), p. 21. Identical proclamations were issued as additional countries became involved, on Sept. 8 and 10, 1939, April 25, May 11, June 10, and Nov. 15, 1940. They are all published in the same volume of the *Statutes at Large*, pp. 2643, 2652, 2699, 2704, 2707, 2764.

¹⁷ For the text of Allied statements on this subject, see the author's "Retribution for War Crimes," cited above, note 1, and Manfred Lachs, *War Crimes*, London: Stevens & Sons; 1945, pp. 94-98. In Dr. Lachs' collection of texts there is an *aide memoire* of the British Government issued August 6, 1942, stating that "in dealing with war criminals, whatever the Court, it should apply the laws already applicable and no special *ad hoc* law should be enacted." (p. 95). This seems to refute the argument that because the defendants were duly warned that they would be tried for war crimes, they were estopped from pleading the *ex post facto* character of the provisions of the London Agreement of August 8, 1945, enacting a special *ad hoc* law on the subject of crimes against peace.

the Institute of Law of the Moscow Academy of Sciences, who, in 1944, published a book entitled *Ugolovnaya Otvetstvennost Gitterovtzev*. An English translation was published in London under the title *Hitlerite Responsibility Under Criminal Law*.¹⁸

In his book Professor Trainin stated that Soviet Russia's punishment of the master Axis criminals would not be limited by traditional legalisms. The reason for the poor success of previous attempts by the "capitalist countries" to establish international criminal law was, he says, that "the object in reality was not to fight real international crime, but to organize a peculiar kind of united criminal front against the Soviet Union." This, he adds, "is far from accidental. Its origins lie in the general character of international juridical relations during the epoch of imperialism."¹⁹ Mr. Robert H. Jackson, Chief Counsel of the United States, in his report to President Truman on June 7, 1945, preceding the signature of the Charter, uses almost identical language: "The legal position which the United States will maintain," he reported, "being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable."²⁰ Two months later, on August 8, 1945, Mr. Jackson and Professor Trainin, as the representatives of their respective governments, signed the Charter for the Nuremberg Tribunal. A year before, in 1944, Professor Trainin had proposed in his book the immediate codification of international crimes including "crimes against peaceful relations between nations." Some of his definitions were prescribed for the Nuremberg Tribunal in its Charter. Personal guilt for crimes against peace is imputed by him not only to members of the armed forces and of the government, but to propagandists, capitalists and industrialists. It was no doubt due to the influence of these views that charges were brought against some of the defendants. The acquittal of two of them was protested by the Russian judge on the Tribunal.

The crux of the argument by which it is sought to establish personal responsibility for crimes against peace center around the Pact of Paris for the Renunciation of War. In accepting this argument, the Nuremberg Tribunal held as follows:

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are

¹⁸ This translation was in the possession of the American representatives who negotiated the agreement for the Charter of the International Military Tribunal. See "Background and Highlights of the Nuremberg Trials," by Sidney S. Alderman, in *I. C. C. Practitioners' Journal*, November, 1946, p. 106. A comprehensive review of the original Russian edition appeared in the *American Bar Association Journal* for July, 1945.

¹⁹ Trainin, work cited, p. 11.

²⁰ *Department of State Bulletin*, Vol. XII, No. 311 (June 10, 1945), p. 1076.



committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact.

The Pact itself makes no distinction between aggressive, defensive, or other kinds of war but renounces all wars. Secretary of State Kellogg in the negotiations with France preceding the signature of the act definitely declined to accede to the French proposal that the Pact be limited to the renunciation of "wars of aggression." He argued that if the proposed Pact "were accompanied by definitions of the word 'aggressor' and by expressions and qualifications stipulating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed." He reinforced his point of view by stating that "from the broad standpoint of humanity and civilization, all war is an assault upon the stability of human society, and should be suppressed in the common interest."²¹

The Pact does not mention sanctions for its enforcement other than the statement in the preamble that "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty." This provision, it will be noted, is not imperative but conditional in the discretion of each signatory. In identic notes submitting the draft treaty to the other signatories, Secretary of State Kellogg stated that the preamble "gives express recognition to the principle that if a state resorts to war in violation of the treaty, the other contracting parties are released from their obligations under the treaty to that state."²² Both by the preamble and Secretary Kellogg's interpretation, any action which might result from a violation of the Pact was to be directed against the violating government. Personal criminal responsibility was not stipulated nor even impliedly suggested.

In the years immediately following its conclusion, the meaning of the Pact became the subject of discussion in other countries. When the British Government signed the Optional Clause of the Statute of the Permanent Court of International Justice in 1929, it published a memorandum explaining its view of the position created by the acceptance of the Covenant of the League of Nations and the Pact of Paris:

The effect of those instruments, taken together, (the British Government maintained) is to deprive nations of the right to employ war as an instrument of national policy, and to forbid States which have signed them to give aid or comfort to an offender. As between such

²¹ Note to the French Ambassador, Feb. 27, 1928. Publication of the Department of State entitled *Notes Exchanged Between the United States and Other Powers on the Subject of a Multilateral Treaty for the Renunciation of War*, Washington, Government Printing Office, 1928.

²² Identic notes of June 23, 1928, same, p. 33.

States, there has been in consequence a fundamental change in the whole question of belligerent and neutral rights.²³

Upon receipt of the British memorandum, Hon. Henry L. Stimson, who had succeeded Mr. Kellogg as Secretary of State, made public a statement in which he denied that this British argument applied to the position of the United States as a signatory of the Kellogg-Briand Pact. "As has been pointed out many times," he emphasized, "the Pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor. Its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it,"²⁴

In September, 1934, the International Law Association, a private body, in its meeting at Budapest, adopted articles of interpretation of the Pact. The interpretation of these distinguished international law experts does not contain the remotest suggestion of criminal action against individuals for the violation of the Pact. They expressed the view that in case of a violation the other signatories would be justified in modifying their obligations as neutral states so as to favor the victim of the aggression against the state making war in violation of the Pact. This interpretation was relied upon in part in support of the modification of the attitude of the Government of the United States early in 1941 from that of traditional neutrality to the furnishing of official aid to the countries whose defense was considered necessary to the defense of the United States. Mr. Robert H. Jackson, then Attorney General of the United States, vigorously defended what he said was "the declared policy of the Government of the United States to extend to England all aid 'short of war' ", while "at the same time it is the declared determination of the Government to avoid entry into the war as a belligerent."²⁵ This change of policy did not take place until eighteen months after what the Nuremberg Tribunal says was the "supreme international crime" of aggressive war had been consummated. Even then the United States Government disclaimed any intention of taking direct action against the aggressors.

Earlier attempts were made in the United States to implement the Pact of Paris by legislation which would have authorized the Government to discriminate between the belligerents in future war, but all such attempts completely failed and resulted in the passage of more rigid laws to preserve the neutrality and peace of the United States. In January, 1933, during the aggression of Japan upon China in violation of the Nine-Power Treaty, the

²³ Misc. No. 12 (1929), Cmd. 3452; this JOURNAL, Supplement, Vol. 25 (1931), pp. 89-90.

²⁴ Statement of Hon. Henry L. Stimson made public Dec. 30, 1929, printed in this JOURNAL, Supplement, Vol. 25 (1931), p. 90, note.

²⁵ Address before the Inter-American Bar Association, Habana, Cuba, March 27, 1941. This JOURNAL, Vol. 35 (1941), pp. 348-359.



revised
 Covenant of the League of Nations and the Pact of Paris, Secretary of State Stimson recommended that Congress "confer upon the President authority in his discretion to limit or forbid, in coöperation with other producing nations, the shipment of arms and munitions of war to any foreign State when in his judgment such shipment may promote or encourage the employment of force in the course of a dispute or conflict between nations."²⁶ No Congressional action was taken upon this recommendation, but two years and a half later Congress passed the Neutrality Act of August 31, 1935, placing an embargo on the export of munitions of war to every belligerent state, in derogation of the accepted principle of international law that neutral persons may engage in contraband trade at their own risk. This law was put into effect by President Roosevelt in the war of Italy upon Ethiopia, which was plainly aggressive.²⁷ The Neutrality Law of 1935 was of a temporary character. It was replaced by permanent legislation in the Neutrality Act of May 1, 1937. This Act continued the embargo on the shipment of arms, ammunition, and implements of war to all belligerents and added a "cash and carry" provision covering the export of other materials to all belligerents.²⁸

Such was the state of our legislation when the war in Europe started by the invasion of Poland on September 1, 1939. Three weeks later, on September 21, President Roosevelt sent a message to Congress requesting the repeal of the embargo and a return to the "historic foreign policy" of the United States based on the "age-old doctrines of international law," that is, "on the solid footing of real and traditional neutrality," which, according to John Quincy Adams, "recognizes the cause of both parties to the contest as *just*—that is, it avoids all consideration of the merits of the contest."²⁹ In requesting this legislation, President Roosevelt not only did not suggest discrimination between the belligerents but expressly disclaimed it. He said to Congress,

You will all remember the long debates on the subject of what constitutes aggression, on the methods of determining who the aggressor might be, and, on who the aggressor in past wars had been. Academically this may have been instructive. . . . But in the light of problems of today and tomorrow responsibility for acts of aggression is not concealed, and the writing of the record can safely be left to future historians.³⁰

²⁶ This JOURNAL, Vol. 31 (1937), p. 76, note.

²⁷ Act of Aug. 31, 1935, 49 U. S. Stat. at L., Pt. 1, p. 1081; Proclamations Nos. 2141-2142, Oct. 5, 1935, the same, Pt. 2, pp. 3474-3476. Also in this JOURNAL, Supplement, Vol. 30 (1936), pp. 58 and 65.

²⁸ 50 U. S. Stat. at L., Pt. 1, p. 121. This JOURNAL, Supplement, Vol. 31 (1937), p. 147.

²⁹ Secretary of State J. Q. Adams to Mr. Gallatin, May 19, 1818. Moore, *International Law Digest*, Vol. VII, p. 860.

³⁰ Congressional Record, Vol. 85, Pt. 1, pp. 10-12. This JOURNAL, Supplement, Vol. 34 (1940), p. 37-38.

Congress promptly complied with the President's urgent request and passed the Neutrality Act of November 4, 1939. This Act repealed the embargo on the export of munitions and substituted a prohibition against American vessels or citizens entering or passing through combat areas. It was made unlawful for any American vessels to carry passengers or cargoes to any belligerent state, and the exportation of any articles or materials was forbidden until all right, title and interest in them had been transferred to some foreign government or agency. It was also made unlawful for American citizens to travel on any vessel of a belligerent state.³¹ These provisions remained the law of the United States, binding upon all of its citizens, courts, and officials until the passage of the Lend-Lease Act of March 11, 1941, which ended this country's status of traditional neutrality.

In the light of this legislative history of the official attitude of the Government of the United States toward the interpretation of the Pact of Paris for the Renunciation of War, it is impossible to accept the thesis of the Nuremberg Tribunal that a war in violation of the Pact was illegal in international law on September 1, 1939, and that those who planned and engaged in it were guilty of international criminal acts at the time they were committed, or at the date of signature of the Charter of the International Military Tribunal at London on August 8, 1945, or on October 1, 1946, the date of the judgment of the Nuremberg Tribunal. Capital

The Budapest articles of interpretation of the Pact of Paris were cited in support of the lend-lease legislation. It was argued that as the neutrality of the United States was the most vital benefit to the violators of the Pact, that benefit should be denied to them as expressly allowed by the Pact. However, it is one thing to justify a change of policy by the government from neutrality to non-neutrality as a logical interpretation of provisions included within the Pact. It requires an attenuated legal conceptualism to go farther and deduce *dehors* the written instrument personal criminal liability for non-observance of the Pact never before conceived of in international law as attaching to violations of treaties regulating state conduct.

The Nuremberg Tribunal denied that the maxim *nullum crimen sine lege, nulla poena sine lege* has any application to the present case. It said:

Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany outlawing recourse to war for the settlement of international disputes. They must have known that they were acting in defiance of international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case then, it would appear that the maxim has no application to the present facts.

In support of this statement no references are cited to law, international conventions, court decisions or customs showing that individuals had there-

³¹ 54 U. S. Stat. at L., Pt. 1, p. 4. This JOURNAL, Supplement, Vol. 34 (1940), p. 44.

tofore been criminally punishable in an international judicial forum for crimes against peace such as those charged.³²

The conviction of the defendants of Crimes Against Peace under Counts 1 and 2 was therefore undoubtedly *ex post facto* as that principle is understood and applied in the United States.³³ When construing the clauses of the Constitution of the United States prohibiting *ex post facto* legislation, Chief Justice Marshall defined an *ex post facto* law as "one which renders an act punishable in a manner in which it was not punishable when it was committed."³⁴ The Nuremberg Tribunal, recognizing the weakness of its reasoning, buttressed its position by falling back upon the Charter creating the Tribunal. "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime. Therefore," continued the Tribunal, "it is not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement." But the Charter being an international legislative act is itself subject to the same objection against *ex post facto* legislation. In the view of the Tribunal, "The Charter is not an arbitrary exercise of power on the part of the United Nations. It is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law." That is undoubtedly a correct view so far as the charges of war crimes and crimes against humanity are concerned.

War itself is the ultimate legal procedure against disturbers of the international peace, and from time immemorial nations have taken summary action against enemies who have fallen into their hands and who are not punishable according to law. The imprisonment of Napoleon without trial by agreement of his captors is the most outstanding modern example. The right is founded upon reasons of moral and political justification. Upon

³² Art. 227 of the Treaty of Versailles, referred to by the Nuremberg Tribunal, publicly arraigned the German Kaiser "for a supreme offence against international morality and the sanctity of treaties." It directed the special tribunal, which was never in fact constituted, to be guided in its decision "by the highest motives of international policy." It avoided any reference to law, national or international.

The writer's attention has been called to the article by Mr. Georg Schwarzenberger on the so-called Breisach War Crime Trial of 1474. This involved the trial of Sir Peter of Hagenbach, the Governor of the fortified town of Breisach on the Upper Rhine. He had been installed by Duke Charles of Burgundy to take possession of the town after it had been pledged to Charles by the Archduke of Austria as financial security. The charges were in the nature of war crimes or crimes against humanity and did not involve crimes against peace as charged at Nuremberg. *Manchester Guardian*, Sept. 28, 1946.

³³ For a discussion of the maxim *Nulla poena sine lege* in the United States and various other countries, see article by Jerome Hall in the *Yale Law Journal*, Vol. 47, No. 2 (December, 1937).

³⁴ *Fletcher v. Peck*, 6 Cranch 138. A fuller definition was given by the Supreme Court in *Calder v. Bull*, 3 Dallas 386.

the same grounds the Allied and Associated Powers in 1919 agreed to try the German Kaiser for starting World War I. Holland's refusal to extradite him because he was regarded as a political fugitive and therefore not legally extraditable was all that prevented adding the Kaiser as another important precedent to that of Napoleon. The principal allies in World War II agreed at Moscow on November 1, 1943, that the major enemy criminals "will be punished by the joint decision of the governments of the Allies." When appointing the American judges, President Truman was particularly anxious "that no disagreement should arise among the four great nations who on August 8, 1945, had signed the London Agreement and Charter providing for the trial, formulating the law and establishing the practice."³⁵ The sentences imposed by the Nuremberg Tribunal under Counts 1 and 2, including life imprisonment for Hess who was acquitted of the legal charges of War Crimes and Crimes Against Humanity, may be unquestionably approved as morally justifiable political acts.

Granting for the purpose of discussion the soundness of the Nuremberg dictum that individuals may now be punished for violations of treaties in the absence of express agreement to that effect, what progress have we made in the suppression of aggressive war? Fear of death has never deterred warriors in the past; it will not deter them in the future. A sanction which cannot be applied until hostilities are brought to a successful end and the personal offenders are in the custody of the victors is not one adapted to the prevention of war. In fact, it anticipates the occurrence of war. We must not lull the world into a false sense of security by making exaggerated claims concerning the verdict of Nuremberg. The Nuremberg Tribunal was a military tribunal. The authority of its decision as a precedent in time of peace is doubtful. Moreover, there exists no peacetime international court endowed with competence to carry on the work of the Nuremberg Tribunal.

The governments which have assumed responsibility for the executions at Nuremberg, if they wish to make good their assertions that the prosecutions for crimes against peace were not political punishment of the vanquished by the victors but were intended to establish international law applicable to all future offenders, should proceed to take action to make good these pretensions. Good faith and the preservation of the future peace of the world require them to do so.

The United Nations should make the Nuremberg principles and procedures applicable to all future aggressors without distinction as to their enemy or friendly character.³⁶ An International Court of Justice is al-

³⁵ Judge Biddle's report to the President cited below, footnote 36.

³⁶ Ten days following this suggestion at Atlantic City on Oct. 29, the Hon. Francis Biddle, American Judge on the Nuremberg Tribunal, submitted his report to President Truman on Nov. 9, 1946, in which he said:

"The conclusions of Nurnberg may be ephemeral or may be significant. That depends

ready in existence at The Hague to which might be delegated such functions and jurisdiction of the Nuremberg Tribunal as might seem appropriate to the principal judicial organ of the United Nations.

These proposals will no doubt be met with the same objection that Mr. Kellogg made to the outlawry of aggression in 1928, namely, that it is difficult and dangerous to attempt to define aggression in advance. The same position was assumed by the United States in 1945 when the Charter of the United Nations was drafted at San Francisco. The story is officially told in the report to the President by Secretary of State Stettinius, Chairman of the United States Delegation. He said:

One of the most significant lines upon which debate concerning the liberty of action of the Council proceeded, was that which concerned the proposed inclusion in the Charter of provisions with respect to determination of acts of aggression. Various amendments proposed on the subject . . . offered a list of sharply-defined eventualities (such as invasion of, or attack on, another state, interfering with its internal affairs, etc.) in which the Council would be bound to determine by formula not only the existence of aggression but also the identity of the aggressor. These proposals also implied that in such cases the action of the Council would be automatic. The United States Delegation, believing that the acceptance of such a concept was most undesirable, played an active part in opposing the amendments.⁸⁷

Consequently, the United Nations Charter leaves the determination of aggression to the Security Council in each case as it arises. No criteria are provided for reaching decisions and the Great Powers would have a veto over them.

An indefinable act cannot be prohibited in advance unless we are willing to acknowledge our constitutional heresy with respect to *ex post facto* legislation. A perfect definition to meet every possible future contingency is not required. One drawn from the lesson of Nuremberg would supply a good start. Another might apply to the use of atomic weapons and other scientific instruments of mass destruction, the outlawry of which is vitally necessary to safeguard not merely the future peace but civilization itself.

on whether we now take the next step. It is not enough to set one great precedent that brands as criminal aggressive wars between nations. Clearer definition is needed." He suggested that the time is opportune "for advancing the proposal that the United Nations as a whole reaffirm the principles of the Nurnberg Charter in the context of a general codification of offenses against the peace and security of mankind." Such action, he said, "would perpetuate the vital principle that war of aggression is the supreme crime."

In acknowledging receipt of Judge Biddle's report, President Truman on Nov. 12 wrote to him that "the setting up of such a code as that which you recommend . . . deserves to be studied and weighed by the best legal minds the world over. It is a fitting task to be undertaken by the governments of the United Nations." *Department of State Bulletin*, Vol. 15, No. 386 (Nov. 24, 1946), pp. 954-957.

⁸⁷ Department of State Publication No. 2349, *Conference Series* No. 71, p. 91.

The Government of the United States assumed the heaviest responsibility for the organization and conduct of the Nuremberg trial. It should not allow the slow processes of international agreement to defeat its sincerity of purpose. When President Washington and Secretary of State Thomas Jefferson declared neutrality to be the national policy of the United States, Congress promptly enacted the Neutrality Law of 1794 to give legal effect to the Government's policy. The Act defined offenses against neutrality, conferred jurisdiction upon the courts of the United States to try and punish them, and prescribed the penalties to follow conviction. Is there any sound reason why we should not now follow that precedent and enact national legislation defining and prescribing punishment for crimes against international peace? Surely the preservation of international peace is as much the concern of the Congress at the present day as the preservation of neutrality was in 1794 and for 150 years thereafter. Congressional action is necessary again to give effective support to the President's policy because in the United States the power to declare war as well as to define and punish offenses against the law of nations resides in the Congress by express provision of the Constitution. The time is ripe for the United States to assume the leadership in initiating the outlawry of aggressive war by making crimes against international peace punishable in national as well as in international courts. The judgment of Nuremberg makes that course imperative and points the way.

THE LAW OF THE NUREMBERG TRIAL

By QUINCY WRIGHT

Of the Board of Editors

On the afternoon of October 1, 1946, the International Military Tribunal at Nuremberg sentenced twelve of the twenty-two Nazi defendants to death by hanging and seven to imprisonment for terms ranging from ten years to life. Three were acquitted. Three of the six accused organizations were found to be criminal. The reading of these sentences was preceded by the reading, through the whole of September 30, of the general opinion of the Tribunal on the four counts of the indictment and, on the morning of October 1, of the opinion on the charges against each defendant.¹ The Control Council for Germany considered applications for clemency for most of those convicted but did not grant them and carried out the executions of those sentenced to death on October 16 with the exception of Martin Bormann who had not been found and Hermann Goering who had succeeded in committing suicide a few hours earlier. Thus came to an end what President Truman described as, "the first international criminal assize in history." "I have no hesitancy in declaring," continued the President, "that the historic precedent set at Nuremberg abundantly justifies the expenditure of effort, prodigious though it was. This precedent becomes basic in the international law of the future. The principles established and the results achieved place International Law on the side of peace as against aggressive warfare."²

A similar thought was expressed by Warren R. Austin, Chief Delegate of the United States, in his opening address to the General Assembly of the United Nations on October 30:

Besides being bound by the law of the United Nations Charter, twenty-three nations, members of this Assembly, including the United States, Soviet Russia, the United Kingdom and France, are also bound by the law of the Charter of the Nuremberg Tribunal. (That makes planning or waging a war of aggression a crime against humanity for which individuals as well as nations can be brought before the bar of international justice, tried and punished.)

¹ The judgment was mimeographed on 283 pages of legal size paper with a table of contents and also appeared, followed by the sentences, on pp. 16794 to 17077 of the daily record of the trial. The former is here referred to as "Judgment" and the latter as "Record." The judgment is reproduced below, pp. 172-331, and citations to it in these notes refer to that text.

² *Department of State Bulletin*, Vol. 15, p. 776 (Oct. 27, 1946).

³ *The New York Times*, Oct. 31, 1946. President Truman had made a similar statement in his address to the General Assembly on October 23, 1946: *Department of State Bulletin*, Vol. 15, p. 809 (Nov. 3, 1946).

Origin of the Trial

The trial originated in the declaration of German atrocities by Roosevelt, Churchill, and Stalin "speaking in the interest of the thirty-two United Nations" and released at the Moscow Conference on November 1, 1943. This declaration provided that:

Those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein . . . without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.⁴

Trials in accord with the first part of this declaration have been carried on in Allied military commissions and criminal courts and hundreds of war criminals have been dealt with.⁵ A plan for carrying out the second part concerning major criminals was proposed in his report to the President on June 7, 1945, by Justice Robert H. Jackson who had been appointed Chief of Counsel for the United States in prosecuting the principal Axis war criminals.⁶ In accordance with this plan Justice Jackson negotiated for the United States with representatives of Great Britain, France, and the Soviet Union with the result that an agreement for the establishment of an International Military Tribunal was signed in London on August 8, 1945. 5

⁴ Same, Vol. 9, p. 311 (Nov. 6, 1943). See declaration by nine governments in exile on "Punishment of War Crimes," Jan. 13, 1942, in United Nations Information Office, *War and Peace Aims*, January 30, 1943, p. 116. In the Yalta Conference of February 11, 1945, Messrs. Roosevelt, Churchill, and Stalin declared their "inflexible purpose to . . . bring all war criminals to just and swift punishment" and this purpose was affirmed in the Berlin Conference of August 2, 1945, by Stalin, Truman, and the United States. "regarded it as a matter of great importance that the trial of those should begin at the earliest possible date." United States Department of State, *Axis in Defeat, a Collection of Documents on American Policy*, Japan, 1945, pp. 7, 9, 12, 17; see also pp. 3, 46.

⁵ The United Nations War Crimes Commission reported on November 1, 1945, that Oct. 31 of that year 1108 war criminals had been tried in Europe, 485 imprisoned, and 210 acquitted. In the Far East 1350 had been tried, 704 to death, 704 imprisoned and 262 acquitted. In the case of *U. S. 1*, and *In re Yamashita*, 1946, 66 Sup. Ct. 340. The United States sustained the jurisdiction of United States courts.

⁶ *Department of State Bulletin*, Vol. 12, 1945, p. 10.

⁷ U. S. Executive Agreement Series No. 10,000. The documents with the trial were printed by the Department of State, *Documents*, Washington, 1945. See also similar documents, *Documents*, Washington, 1946.

The Charter and the Trial

Attached to this agreement was "The Charter of the International Military Tribunal." This document provided for a tribunal composed of one judge and one alternate from each of the four powers; for a procedure designed to assure the defendants a fair trial; and for jurisdiction "to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations," committed any of the crimes defined in the Charter. The Charter authorized a committee consisting of the chief prosecutors of each country to prepare the indictment and present the evidence on the basis of the law set forth in the Charter.*

The Tribunal was promptly established, consisting of Lord Justice Geoffrey Lawrence of the British Court of Appeals as President; Francis Biddle, former Attorney General of the United States; Major General I. T. Nikitchenko, Vice-Chairman of the Soviet Supreme Court; and Donnedieu de Vabres, Professor of Law at the University of Paris. The alternates were Sir Norman Birkett, Judge of the High Court of England; John J. Parker, Judge of the United States Circuit Court of Appeals; Lt.-Col. A. F. Volchkov, Judge of the Moscow District Court; and Robert Falco, Judge of the Court of Cassation of France. The Tribunal held its first public meeting in Berlin on October 18, 1945, and received the indictment from the Committee of the Chief Prosecutors consisting of Justice Robert H. Jackson for the United States, Sir Hartley Shawcross for Great Britain, Francois de Menthon for France, and General R. A. Rudenko for the Soviet Union.⁸ Twenty-four Nazi leaders were indicted each on two or more counts.

The Tribunal then established itself in the Palace of Justice at Nuremberg where it decided upon its rules and assisted the defendants, who had brought there, to find the counsel of their choice and to obtain the witnesses for their defense. It also decided that Gustav Krupp von Kalchauer, who had been indicted, was too sick to be tried; that Martin Bormann, who had been found, should be tried *in absentia*; that Rudolph Hess, who was found to be suffering from loss of memory, was not in such a condition to present his trial and that Julius Streicher was not in such a condition to prevent his trial. One defendant, Robert Ley, died while in custody.⁹ Thus only twenty-one defendants were tried at the trial.

⁸(45), Supplement, pp. 259-260.

⁹*Principals*, pp. 23-29. Sir Hartley Shawcross

British Prosecutor though the latter con-

M. Champetier de Ribes succeeded M. de

The trial was begun on November 20, 1945, and continued until October 1, 1946. It was conducted in four languages facilitated by a simultaneous interpretation device. The case of the prosecution was opened by the Americans who dealt with the first count, conspiracy to commit war crimes, on which all defendants had been indicted. The British prosecution followed with the second count, planning, preparing, initiating or waging aggressive war on which sixteen defendants had been indicted. The French prosecution then dealt with counts 3 and 4, as applied to the West, and the Soviet prosecution followed with the same counts in the East. Count 3 charged violation of the laws and customs of war, and count 4 crimes against humanity. Nineteen defendants were indicted under each of these counts. The prosecution consumed three months. The defense, represented by able German lawyers,¹⁰ then presented its case with many witnesses during five months, concluding with legal arguments in behalf of each defendant. The prosecution made its final arguments during the last days of July, 1946. The case of the accused organizations was then heard. On the last day of August the defendants each made final statements.¹¹ After a few weeks' adjournment the Court read its opinion and sentenced the defendants on the first of October. Three of the defendants (Schacht, von Papen, and Fritzsche) were found not guilty on any counts. Seven (Hess, Funk, Doenitz, Raeder, von Schirach, Speer, and von Neurath) were sentenced to prison terms varying from ten years to life. The remaining twelve (Goering, von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Saukel, Jodl, Bormann and Seyss-Inquart) were sentenced to hang. The Soviet judge dissented from the acquittals and thought Hess should have been sentenced to death.

Of the seventy-six counts on the indictment against the twenty-two defendants the Court sustained fifty-two. All those sentenced to hang were found guilty of crimes against humanity and in most cases of other crimes also. Four defendants,—Funk, Neurath, Schirach, and Speer,—though found guilty of crimes against humanity, were given prison sentences because of mitigating circumstances. Defendants found guilty of aggressive war or conspiracy to commit that crime were given life sentences (Hess, Raeder, and Funk) unless there were mitigating circumstances as in the case of Neurath and Doenitz.

¹⁰ They are listed on p. 4 of the original text; see p. 173, below.

¹¹ The Tribunal held 403 open sessions and listened to evidence from 33 witnesses for the prosecution and 80 witnesses for the individual defendants including 19 defendants themselves. One hundred and forty-three witnesses for the individual defendants gave evidence by written answers to interrogations and 1809 submitted affidavits. The Tribunal heard 22 witnesses for accused organizations and appointed a commission to hear 100 witnesses for such organizations. One thousand eight hundred and nine affidavits were submitted in behalf of accused organizations. In addition several thousand documents were received in evidence, the essential portion being, in most cases read into the record. Judgment, p. 173.

The Tribunal also declared that the SS (Black Shirts) and its subsidiary the SD, the Gestapo, and the Leadership Corps of the Nazi Party were criminal. The SA (Brown Shirts), the Reich Cabinet and the General Staff and High Command were acquitted without prejudice to the individual liability of members. The Soviet judge dissented from the acquittal of the two latter organizations. Rev.
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< The trial has had both champions and critics. > The former point out that it gave publicity to thousands of documents discovered by the prosecution and over 17,000 pages of oral evidence and argument of great historic and educational value in establishing the activities of the Nazis and the origins of the war.¹² It manifested the practicability of a fair trial of war crimes in an international tribunal, and may encourage the establishment of a permanent tribunal with a wider jurisdiction for the trial of such crimes and other offenses against the law of nations not dealt with by national tribunals.¹³ It established important precedents for the development of international law concerning the definition of certain crimes, particularly that of aggressive war, and concerning the criminal liability of individuals acting in the name of a state, under official orders, or as members of criminal conspiracies or organizations. These principles, if established, will add important sanctions to the numerous international agreements, including the Briand-Kellogg Pact and the Charter of the United Nations, outlawing war as an instrument of national policy. >

¹² Many of the Documents will appear in a publication in eight volumes entitled *Nazi Conspiracy and Aggression* prepared by the American Prosecution and published by the United States Government.

¹³ For past proposals of this type see Manley O. Hudson, *International Tribunals, Past and Future*, Washington, 1944, pp. 180 ff. and for the text of *Convention for Creation of an International Criminal Court* signed by thirteen states at Geneva in 1937, Hudson, *International Legislation*, Washington, 1946, Vol. 7, p. 878.

¹⁴ A number of jurists have considered the extent to which "war crimes" were crimes under international law before 1939. There seems to have been an almost unanimous opinion that war crimes in the narrow sense were, but with respect to the initiation of aggressive war there has been some dissent. The following support the criminality of "aggressive war" with arguments drawn from international custom, the Briand-Kellogg Pact, or other treaties: Lord Wright, "War Crimes Under International Law," in *Law Quarterly Review*, Vol. 62 (1946), pp. 40-52; Sheldon Glueck, "The Nuremberg Trial and Aggressive War," in *Harvard Law Review*, Vol. 59 (1946), pp. 396-456, reprinted by Knopf, New York, 1946 (differing on this point from the author's earlier volume, *War Criminals, Their Prosecution and Punishment*, New York, 1944, p. 37); Murray C. Bernays, "Legal Basis of Nuremberg Trials," in *Survey Graphic*, January, 1945, p. 5; A. N. Trainin, *Hitlerite Responsibility Under Criminal Law*, New York, 1945; Hans Kelsen, "Collective and Individual Responsibility in International Law, With Particular Regard to the Punishment of War Criminals," in *California Law Review*, Vol. 31 (1943), p. 530; the same, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," in *Judge Advocate Journal*, Vol. 2 (1945), p. 8; Willard B. Cowles, "Universality of Jurisdiction Over War Crimes," in *California Law Review*, Vol. 33 (1945), pp. 177-218; the same, "High Government Officials as War Criminals,"

Criticisms of the Trial

Critics of the trial fall into two classes, those who object to the decisions and sentences and those who object to the law. Critics of the first class question the judgment of the Tribunal in weighing the evidence and appraising the magnitude of offenses. No attempt can be made here to examine the careful weighing of evidence applicable to each individual defendant and each accused organization in the judgment. The Tribunal's theory in sentencing may, however, be considered. The Charter authorized death sentences or less, thus confirming the usual practice of military commissions. Some critics, including the Soviet judge, have expressed dissatisfaction that some of those found guilty on counts 1 and 2 (conspiracy and aggressive war), like Hess, were not given death sentences. The Tribunal declared that "to initiate a war of aggression is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole."¹⁵ It gave no reason for

in American Society of International Law, *Proceedings*, 1945, p. 54; the same, "Trial of War Criminals by Military Tribunals," in *American Bar Association Journal*, June, 1944; Albert G. D. Levy, "The Law and Procedure of War Crime Trials," in *American Political Science Review*, Vol. 37 (1943), pp. 1052-1081; the same, "Criminal Responsibility of Individuals and International Law," in *University of Chicago Law Review*, Vol. 12 (1945), pp. 313-332; A. N. Sack, "War Criminals and the Defense of Superior Orders in International Law," in *Lawyers Guild Review*, Vol. 5 (1945); H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes," in *British Year Book of International Law*, 1944, pp. 58-95; Nicholas Doman, "Political Consequences of the Nuremberg Trial," in American Academy of Political and Social Sciences, *Annals*, Vol. 246 (July, 1946), pp. 81-90; Q. Wright, "War Criminals," in this JOURNAL, Vol. 39 (1945), pp. 257-285; the same, "Due Process and International Law," in this JOURNAL, Vol. 40 (1946), pp. 398-406; the same, "The Nuremberg Trial," in *Chicago Bar Record*, Vol. 27 (1946), pp. 201-219; the same, "The Nuremberg Trial," in American Academy of Political and Social Science, *Annals*, Vol. 246 (July, 1946), pp. 72-80. The following are doubtful on this point: Charles E. Wyzanski, Jr., "The Nuremberg War Criminal Trial," a communication to the American Academy of Arts and Sciences, December 12, 1945; Max Radin, "War Crimes and the Crime of War," in *Virginia Law Review*, Vol. 21 (1945), p. 497; the same, "Justice at Nuremberg," in *Foreign Affairs*, Vol. 24 (1946), pp. 369-304; Georg Schwarzenberger, "War Crimes and the Problem of an International Criminal Court," in *Czechoslovak Year Book of International Law*, London, 1942, pp. 37-88; George Finch, "Retribution for War Crimes," in this JOURNAL, Vol. 37 (1943), pp. 81-88; Erich Hula, "Punishment for War Crimes," in *Social Research*, Vol. 13 (1946), p. 1; the same, "The Revival of the Idea of Punitive War," in *Thought*, Vol. 21 (1946), pp. 405-434. Reports of the Section on International and Comparative Law of the American Bar Association, July, 1945, and of the National Lawyers Guild, December, 1944 (*Lawyers Guild Review*, Vol. 4, p. 18), were inconclusive on this point. See also discussions in American Society of International Law participated in by C. C. Hyde, E. D. Dickinson, Charles Warren, Edvard Hambro, Quincy Wright, George A. Finch, and others (*Proceedings*, 1943, pp. 39-58), and by Willard B. Cowles, Edward Dumbault, Alwyn V. Freeman, Charles Prince, John B. Whitton, E. Thomas, George A. Finch, Frederick R. Coudert and others (same, 1945, pp. 68-76).

¹⁵ Judgment, p. 186.

deciding that this crime deserved a less severe punishment than crimes against humanity. The following explanation may be suggested. Though aggressive war may result in larger losses of life, property and social values than any other crime, yet the relationship of the acts constituting the crime to such losses is less close than in the case of crime against humanity. The latter implies acts indicating a direct responsibility for large-scale homicide, enslavement or deportation of innocent civilians. The initiation of aggressive war, on the other hand, implies only declarations or other acts of political or group leadership, the consequences of which depend upon the circumstances and the mode in which they are carried out, although to be called aggressive war there must be some hostilities.¹⁶ Some of the aggressions before the Tribunal resulted in the loss of millions of lives but others, such as the invasions of Austria and Czechoslovakia, resulted immediately in little loss of life because the victims submitted without resistance. The crime of aggressive war resembles those of piracy and filibustering. They may lead to large-scale hostilities and serious losses but they may, on the other hand, succeed or be suppressed without serious damage. A pirate, a filibusterer or an aggressor may be a gentleman or he may be a brute. Only those defendants in the Nuremberg trial who added brutality, manifested by other crimes, to aggression were sentenced to hang. The others were given life imprisonment or even less if there were special mitigating circumstances. It is interesting to notice that in 1794 when the Congress of the United States defined the setting on foot of a military expedition from American territory against a friendly country (filibustering) as an offense against the law of nations, it considered fine and imprisonment adequate punishment.¹⁷ Piracy as defined by the law of nations is now punishable under United States Statutes only by life imprisonment.¹⁸ Napoleon, who was sentenced by a political declaration of the allied powers, was not executed but condemned to life imprisonment.¹⁹

Critics from a legal point of view have contended that the Tribunal had no jurisdiction in international law and that it applied *ex post facto* law.²⁰

¹⁶ The judgment followed the indictment in distinguishing "acts of aggression," such as the seizures of Austria and Czechoslovakia, and "wars of aggression," including the operations against Poland, Denmark, Norway, The Netherlands, Belgium, Luxembourg, Yugoslavia, Greece, Soviet Union and the United States. Same, p. 186.

¹⁷ U. S. Code, Tit. 18, sec. 25.

¹⁸ U. S. Code, Tit. 18, sec. 481. Piracy was originally a capital offense.

¹⁹ Q. Wright, "The Legal Liability of the Kaiser," in *American Political Science Review*, Vol. 13 (1919), pp. 127 ff.

²⁰ These arguments were included in a motion by Goering's counsel at the opening of the trial. The Tribunal gave it consideration and declared on November 21, 1945: "Insofar as it may be a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained. Insofar as it may contain other arguments, which may be open to the defendants, they may be heard at a later stage." (Record, . . .) Unable to attack the jurisdiction of the Tribunal or the validity of the Charter, . . . arguments of defendant's counsel urged a restrictive, in some cases nullifying,

Related to these criticisms have been the contention that morally the trial was unfair because constituted by one side in a war²¹ or because some of the prosecuting states had been guilty of the same offenses for which they were trying their enemies²² and that politically the trial was inexpedient because it may make conciliation between victor and vanquished more difficult²³ because it may make heroes and martyrs of the defendants, or because its principles if generally accepted may reduce the unity of the state, increase the difficulties of maintaining domestic order, and deter statesmen from pursuing vigorous foreign policies when necessary in the national interests.²⁴ These moral and political arguments depend upon ethical, psychological, and sociological assumptions which are controversial. They should be distinguished from the legal arguments which alone are under consideration here.

Legally belligerent states have habitually assumed jurisdiction to try in their own military commissions captured enemy persons accused of war crimes and to try in their own prize courts captured enemy and neutral vessels. All states in time of peace have assumed jurisdiction to try cap-

interpretation of the law set forth in the Charter or confined themselves to evidence to sustain the "not guilty" pleas. Those in the first category sought to eliminate the aggressive war charge altogether by insisting that it was based on *ex post facto* law (Goering), or to restrict its interpretation by consideration of the practical necessities of diplomacy (Ribbentrop, p. 13058), and war (Goering thought the Hague Conventions were not applicable to total war) under existing conditions of international relations, technology and moral opinion in Germany (especially because of the "iniquities" of the Treaty of Versailles and the natural aspirations of a defeated people to rehabilitate themselves (Hess). Others, relying mainly on evidence, did not deny that crimes had taken place but sought to escape liability by pleading Hitler's orders, unawareness of the crimes at the time, lack of criminal intent in issuing orders, or lack of participation in any action which was criminal under the terms of the Charter (Schacht, Von Papen, Fritzsche).

²¹ This argument also appears in Goering's motion. It has been suggested that the Tribunal administered "political justice" based on the desire for "vengeance" sacrificing "democratic" for "totalitarian" concepts. See Barron's *National Business and Financial Weekly*, October 7, 1946. Senator Robert Taft mingled this argument with the suggestion that the defendants should not have been found liable because they were *ex post facto* and, rather inconsistently, that those sentenced to death should have been sentenced only to life imprisonment. See press reports of address, October 5, 1946.

²² Under the head "Aggressor Nations" *The Chicago Tribune*, October 2, 1946, writes: "The truth of the matter is that no one is free of the guilt which its judges attributed to the vanquished."

²³ C. Arnold Anderson, "The Utility of the Proposed Trial and the Role of the Leaders," in *American Political Science Review*, Vol. 37 (1942), pp. 405-415; Hula, "The Revival of the Idea of Punitive War," in *ibid.*, Vol. 38 (1943), pp. 405 ff.

²⁴ See *Chicago Tribune*, cartoon and editorial, Oct. 2, 1946. The arguments are discussed by the present writer: "War Criminals," *ibid.*, pp. 259, 263.

The object of legal procedure is to segregate issues sufficiently narrowly to permit of a thorough examination of the factual evidence and the legal sources bearing upon those issues. (Criminal courts have not considered it appropriate to inquire during a trial whether their jurisdiction ought to be wider, whether others ought to have been indicted, whether punishment for the crime charged or for any crime is expedient, but have concerned themselves only with the questions, Does the Court have jurisdiction? How should it proceed to assure a fair trial? Does the evidence support the charges? Do the charges if proved render the accused liable under the law? Whether some statesman of the United Nations should be accused of aggressive war or of crimes against humanity; whether some soldiers or sailors of the United Nations should be accused of war crimes; whether the court should have been differently constituted with a different jurisdiction, whether Goering and the other defendants will become heroes and martyrs, whether it is desirable that aggressive war be a crime or that national sovereignty be unable to throw a cloak of immunity around persons accused of crimes—all these are important questions, but not legal questions which the Tribunal could deal with.) They were doubtless considered by the four powers that made the agreement and Charter of August 8, 1945 and criticisms based on these questions are criticisms of these powers or of international law not of the Tribunal.

(Some of the critics who have emphasized these points appear to dislike the trend of international law recognized in the Charter. Opinion is coming to realize that international law cannot survive in the shrinking world, threatened by military instruments of increasing destructiveness, if sanctioned only by the good faith and self-help of governments. Sanctions to be effective must operate on individuals rather than on states. But regularly enforced world criminal law applicable to individuals necessarily makes inroads upon national sovereignty and tends to change the foundation of the international community from a balance of power among sovereign states to a universal federation directly controlling individuals in all countries on matters covered by international law. In such a regime of law, aggressive war is necessarily outlawed and with it the right of states to decide when forceable self-help is permissible.) Many, doubtless, look upon this reduction of national sovereignty with apprehension. Some even be concerned lest the free decision of their government to "preventive war" be impaired. (The Charter of the Tribunal principles generally believed to be essential for a law-governed present conditions, and naturally the said of a law governed world upon the not developed to a point that principles with apprehension International Military Tribunal performed an act of

the principles which must be accepted and applied if there is to be such a world.²⁹ The Tribunal did not hesitate to accept these principles as established in developing international law at the time the acts for which the defendants were being tried were committed.

The present article will not attempt to analyze or weigh the evidence. Few, if any, of the critics have questioned that if the law is accepted, the evidence justified the convictions.³⁰ The Tribunal recognized that it was bound by the Charter and that its jurisdiction established by the Charter could not be challenged.³¹ Nevertheless, it listened to arguments and expressed an opinion upon the principles of general international law which might effect the interpretation, if not the validity, of that instrument.

The defense contested the validity of the Charter if it were construed in a way to transgress fundamental principles of justice and argued that to apply *ex post facto* laws in a criminal trial and to judge one's own case would transgress such principles.³² It is a commonly asserted principle of international law that international agreements bind only the parties and cannot adversely modify the legal position of non-parties.³³ The Tribunal did not deny this principle but it failed to find that any rights of third parties, either Germany or the individual defendants, had been violated by the terms of the Charter establishing its jurisdiction, procedure, and law.

The Tribunal's Jurisdiction

(The making of the Charter (said the Tribunal) was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognized by the civilized world.) The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the

²⁹ The nature, extent, and reason for these commitments are discussed in a Symposium on World Organization, in *Yale Law Journal*, August, 1946. The general concern is suggested by Justice Wm. O. Douglas in his introduction: "The use of force by any nation may now destroy it as well as those against whom it is used. Internally and externally we must untie our Gordian knots; we cannot cut them except at our peril. The instruments with which we must contrive that men live peacefully together are more intricate and difficult ones. They are the instruments for peaceful adjustment of conflict between groups and nations. Those instruments are law—law administered in accordance with civilized traditions, law conceived and administered by politically competent men." Same, p. 868.

³⁰ The Soviet judge and the Prosecution, have thought that it would be better to convict the defendants. If the court erred it was in too liberal an application of the benefit of the doubt.

³¹ See also Judgment, p. 216.

³² The argument by Jodl's counsel, Dr. Otto Stahmer, July 4, 1946; T-12959, 16729.

³³ See also, *International Con-*

Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.³⁴

This statement suggests two distinct grounds of jurisdiction—that enjoyed by the four powers as the government of Germany and that enjoyed by any state to administer law. The latter statement is far from complete. International law does not permit states to administer criminal law over any defendant for any act. There are limits to the criminal jurisdiction of a state.³⁵ Every state does, however, have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offenses threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction given by the Charter.³⁶ If each party to the Charter could exercise such jurisdiction individually, they can agree to set up an international tribunal to exercise the jurisdiction jointly. The context of the Court's statement suggests that the Tribunal intended this limitation.

As already noted, states have habitually authorized military commissions, prize courts and criminal courts to exercise jurisdiction over many offenses against international law committed by aliens abroad.³⁷ While many states apply the universality principle of criminal jurisdiction only in the case of piracy,³⁸ some states have applied it to all offenses against the law of nations especially if dangerous to their security.³⁹ In principle international law imposes few limitations upon the competence of states to try individuals for such acts. In the case of the steamship *Lotus*, the Permanent Court of International Justice held that a state can extend its criminal jurisdiction to any case whatever unless a rule or principle of international law forbids.⁴⁰ There appears to be no rule or principle of international law which forbids the parties to the Charter from exercising

³⁴ Judgment, p. 216.

³⁵ Harvard Research, Jurisdiction with Respect to Crime, this JOURNAL, Vol. 29 (1925), Supplement, p. 439.

³⁶ See Cowles, "Universality of Jurisdiction over War Crimes," as cited, and below, notes 38, 39.

³⁷ See above, p. 45.

³⁸ Harvard Research, Piracy, this JOURNAL, Vol. 26 (1932), Supplement, p. 743; and same, Jurisdiction with Respect to Crime, Art. 9, at p. 563.

³⁹ Harvard Research, Jurisdiction with Respect to Crime, Arts. 7-10, pp. 440, 569-73, 579.

⁴⁰ The *Lotus* (France and Turkey), P. C. I. J., Publications, Ser. A., No. 10, 2 *World Court Reports* 34-35; Cowles, p. 178.

jurisdiction over the defendants for the offenses alleged in the Charter, provided they threatened the security of those states, a condition which can hardly be doubted, and that they were crimes under international law, a matter to be considered later.)

(The derivation of the Tribunal's jurisdiction from the sovereignty of Germany also appears to be well grounded. The Nazi government of Germany disappeared with the unconditional surrender of Germany in May, 1945, and on June 5, 1945, the four Allied powers, then in complete control of Germany by public declaration at Berlin, assumed "supreme authority with respect to Germany" including all the powers possessed by the German Government, the High Command, and any state, municipal, or local government or authority "in order "to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany, and for the administration of the country," but without intention to "effect the annexation of Germany." ⁴¹ Under international law a state may acquire sovereignty of territory by declaration of annexation after subjugation of the territory if that declaration is generally recognized by the other states of the world. The Declaration of Berlin was generally recognized, not only by the United Nations but also by neutral states. This Declaration, however, differed from the usual declaration of annexation in that it was by several states, its purposes were stated, and it was declared not to effect the annexation of Germany.

(There is no doubt but that sovereignty may be held jointly by several states as has been the case in a number of *condominia*. There also have been instances of temporary exercise of sovereignty for purposes more limited than permanent annexation. The American position in Cuba from 1899 to 1903 was of this type and so also are Mandates under the League of Nations and Trusteeships under the United Nations.^{41a} In principle it would appear that if a state or states are in a position to annex a territory they have the right to declare the lesser policy of exercising sovereignty temporarily for specified purposes with the intention of eventually transferring the sovereignty to someone else. This appears to be the proper construction of the Declaration of Berlin. The four Allied powers assumed the sovereignty of Germany in order, among other purposes, to administer the country until such time as they thought fit to recognize an independent German government. Their exercise of powers of legislation, adjudication, and administration in Germany during this period is permissible under international law, limited only by the rules of international law applicable to sovereign states in territory they have sub-

⁴¹ Department of State, *The Axis in Defeat*, p. 63.

^{41a} Q. Wright, *Mandates under the League of Nations*, Chicago, 1930, pp. 13, 306-9, 315-39, 530-37.

jugated. Their powers go beyond those of a military occupant.⁴² It would appear, therefore, that the four states who proclaimed the Charter of August 8, 1945, had the power to enact that Charter as a legislative act for Germany provided they did not transgress fundamental principles of justice which even a conqueror ought to observe toward the inhabitants of annexed territory.⁴³

The idea that the four powers acting in the interest of the United Nations had the right to legislate for the entire community of nations, though given some support by Art. 5 of the Moscow Declaration of November 1, 1943, and by Art. 2 (6) of the Charter of the United Nations was not referred to by the Tribunal. The preamble of the agreement of August 8, 1945, however, declares that the four powers in making the agreement "act in the interests of all the United Nations" and invited any government of the United Nations to adhere, and nineteen of them did so. Since the Charter of the United Nations assumed that that organization could declare principles binding on non-members, it may be that the United Nations in making the agreement for the Nuremberg Tribunal intended to act for the community of nations as a whole, thus making universal international law. While such an assumption of competence would theoretically be a novelty in international law, it would accord with the practice established during the nineteenth century under which leading powers exercised a predominant influence in initiating new rules of international law.⁴⁴ It is not, however, necessary to make any such assumption in order to support the right of the parties to the Charter to give the Tribunal the jurisdiction it asserted. That right can be amply supported by the position of these powers as the Government of Germany or from the sovereign right of each to exercise universal jurisdiction over the offenses stated.

Procedure of the Trial

"With regard to the constitution of the court," said the Tribunal, "all that the defendants are entitled to ask is to receive a fair trial on the facts and law."⁴⁵ International law requires that any state or group of states

⁴² Hans Kelsen, "The Legal Status of Germany According to the Declaration of Berlin," this JOURNAL, Vol. 39 (1945), p. 518.

⁴³ C. C. Hyde, *International Law*, Boston, 1945, 2nd ed., Vol. I, pp. 397-8.

⁴⁴ As in declaring rules of diplomatic precedence at Vienna, in 1815, rules of treaty validity at London, 1871, and rules of maritime international law at Paris, 1856; and London, 1909. *The International Law of the Future*, published by a group of American jurists in 1944, includes the statement: "It is assumed that at the conclusion of the present war the lodgment of power will be such that the states which desire an effective organization will have dominant voice, and that other states will be willing, or will feel themselves constrained, to follow the lead. If one or more states should hold aloof, competence might none the less be vested in the organization to act on behalf of the whole Community of States": p. 81.

⁴⁵ Judgment, pp. 216-217.

in exercising criminal jurisdiction over aliens shall not "deny justice."⁴⁶ The Charter provided suitable procedure with this in view.^{46a}

The rules adapted by the Tribunal in pursuance of Art. 13 of the Charter elaborated these provisions by assuring each individual defendant a period at least thirty days before his trial began to study the indictment and prepare his case, and ample opportunity to obtain the counsel of his choice, to obtain witnesses and documents, to examine all documents submitted by the prosecution, and to address motions, applications, and other requests to the Tribunal, and by assuring members of accused organizations opportunity to apply to be heard. At the first public session of the Tribunal, held in Berlin on October 18, 1945, the Presiding Judge, General Nikitchenko, called attention to these rules and said a "special clerk of the Tribunal has been appointed to advise the defendants of their right and to take instructions from them personally as to their choice of counsel, and generally to see that their rights of defense are made known to them."

In addition to requiring that the trial be "fair," the Charter required that it be "expeditious" and that the Tribunal "take strict measures" to prevent "unreasonable delay" and rule out "irrelevant issues and statements." Some critics have deplored the length of the trial but few have suggested any unfairness in the procedure. The Counsel of some of the defendants mildly objected to some rulings on the relevance of evidence or argument, to some limitation on the length of speeches, and to some admissions of affidavit evidence presented by the prosecution.⁴⁷ The Tribunal, if anything leaned over backwards to assure the defendants an opportunity to find and present all relevant evidence, to argue all legal problems related to the case and to present motions concerning the mental and physical competence of defendants which might bear upon their triability.⁴⁸

The Supreme Court of the United States held that General Yamashita was given due process of law in his trial by a United States Military Commission in the Philippines, but two dissenting Justices thought the admission of hearsay and opinion evidence and the haste of the proceedings giving

⁴⁶ Harvard Research, Responsibility of States for Damage done in their Territory to the Person and Property of Aliens, Art. 9, this JOURNAL, Vol. 23 (1929), Supplement, p. 173; Jurisdiction with Respect to Crime, Arts. 12, 13; Q. Wright, "Due Process and International Law, this JOURNAL, Vol. 40 (1946), pp. 398 ff.; A. V. Freeman, *The International Responsibility of States for Denial of Justice*. New York, 1938, pp. 262 ff., 547 ff.

^{46a} Art. 16; this JOURNAL, Vol. 39 (1945), Supplement, p. 260.

⁴⁷ The Tribunal curbed the disposition of some defendants' counsel to expand on what they considered the iniquities of the Versailles Treaty and to submit evidence concerning the policies or acts of members of the United Nations unless in support of a contention that the defendants initiated wars in necessary self defence or that war measures were justifiable reprisals.

⁴⁸ The Tribunal appointed expert commissions to examine Krupp von Bohlen, Hess, and Streicher and, after listening to argument, found Krupp too sick to be tried and the other two in a mental condition permitting trial.

the defense insufficient opportunity to present its case denied "due process of law."⁴⁹ The latter charge has not been made against the Nuremberg Tribunal. Like other international tribunals, like military commissions, and like continental European criminal courts, it did not apply common law rules of evidence, but it has never been contended that those rules of evidence are required by international law.⁵⁰

It seems to be generally recognized that the application of *ex post facto* laws in criminal cases constitutes a denial of justice under international law. Constitutional guarantees and proposed bills of human rights have usually forbidden the application of *ex post facto* criminal law.⁵¹ Though few international claims have turned on this issue that may be because modern states have rarely applied such laws.⁵² The Supreme Court of the United States in the Yamashita case⁵³ and the Nuremberg Tribunal seem to have assumed that the application of *ex post facto* laws would be a denial of justice because both took pains to show that the rules of international law which they applied were not *ex post facto*. They treated the issue as one of substantive law and not of procedure or jurisdiction.

⁴⁹ *In re Yamashita*, 1946, 66 Sup. Ct. 340 and comment, this JOURNAL, Vol. 40 (1946), p. 398.

⁵⁰ The Tribunal received affidavits if circumstances prevented personal attendance of witnesses whose evidence appeared to be relevant and important. It refused to receive documents or to summon witnesses if it considered the subject matter of their evidence irrelevant or merely cumulative (Charter, Arts. 17-21; Rules 4, 7). The task of considering applications consumed a great deal of the Tribunal's time in private sessions. To assure availability of all evidence in all the languages it required that the important part of all documents offered in evidence be read into the record unless copies were provided in advance in all four languages (Charter, Art. 25).

⁵¹ See Statement of Essential Human Rights by a Committee appointed by the American Law Institute, Art. 9; American Academy of Political and Social Science, *Annals*, Vol. 243 (Jan., 1946), p. 22; H. Lauterpacht, *An International Bill of the Rights of Man*, New York, 1945, p. 93, 99.

⁵² In the Van Bockelen Case (U. S. and Hayti, 1888) the United States contended "that continuous imprisonment for debt, when there is no criminal offense imputed, is contrary to what are now generally recognized principles of international law" but this aspect of the matter was not discussed in the arbitration: (J. B. Moore, *Digest of International Law*, Vol. 6, pp. 699, 772). See E. M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York, 1919, p. 99; A. V. Freeman, *The International Responsibility of States for Denial of Justice*, New York, 1938, pp. 522, 550. The Harvard Research did not include the application of *ex post facto* laws among prohibited procedures in its draft convention in jurisdiction with respect to crime (Arts. 12, 13) but did so in its draft convention on extradition (Arts. 2 (a), 12 (3) b): this JOURNAL, Vol. 29 (1935), Supplement, pp. 77, 163, 596 ff.

⁵³ Q. Wright, "Due Process and International Law," as cited. The dissenting justices thought the offense charged was inadequately defined in preëxisting international law and cited this among other reasons for believing that "due process" had been denied the defendant.

⁵⁴ "It is to be observed," says the Nuremberg judgment, "that the maxim *nullum crimen sine lege* is not a limitation of sovereignty but is in general a principle of justice": Judgment, p. 217.

The Law Applied

The law, defining the crimes and the conditions of liability to be applied in the trial, was set forth in the Charter ⁵⁵ and the Tribunal recognized that the law "is decisive and binding upon the Tribunal." ⁵⁶ Was this law declaratory of preëxisting international law binding the defendants at the time they committed the acts charged? The issue has been discussed particularly in regard to the crime of "aggressive war."

The Tribunal listened to argument on the question ⁵⁷ and concluded that a rule of international law, resting upon "general principles of justice," affirmed in this respect by several recent international declarations that aggressive war is an international crime, ⁵⁸ had been formally accepted by all the states concerned when they ratified the Pact of Paris which condemned recourse to war for the solution of international controversies and renounced it as an instrument of national policy. This rule had made "recourse to a war of aggression not merely illegal but criminal." ⁵⁹

The Tribunal therefore considered that the well-known legal maxim *nullum crimen sine lege* had been duly observed in the case. ⁶⁰

It quoted the text of the Pact of Paris of August 27, 1928, binding sixty-three nations, including Germany, Italy, and Japan at the outbreak of the war in 1939, referred to the analogous situation of the Hague Convention, violation of which created individual criminal liability, and held that the result was to make the waging of aggressive war illegal and those committing the act criminally liable. ⁶¹ The Tribunal then cited various draft treaties, and resolutions of the League of Nations and the Pan American Organization declaring aggressive war a crime and added:

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal places upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of Pacts and Treaties to which the Tribunal has just referred. ⁶²

Turning to the status of the individual in international law the Tribunal said:

It was submitted that international law is concerned with the actions of sovereign states, and provides for no punishment for individuals; and further, that where the action in question is an act of state, those

⁵⁵ Arts. 6-9, quoted above.

⁵⁶ Judgment, p. 216.

⁵⁷ See note 32, above.

⁵⁸ These include the Draft Treaty of Mutual Assistance, 1923; the Geneva Protocol, 1924; the League of Nations Assembly Resolution on Aggressive War of September 24, 1927; the Resolution of the Pan-American Conference of Havana, Feb. 18, 1928.

⁵⁹ Judgment, p. 220.

⁶⁰ Judgment, p. 217.

⁶¹ Same, pp. 218-219.

⁶² Same p. 220. The Tribunal also referred to Arts. 227 and 228 of the Treaty of Versailles for the trial of the Kaiser and German war criminals of World War I.

who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized.⁶³

After referring to the United States Supreme Court decision in *Ex parte Quirin*⁶⁴ and the practice cited in that case, the Tribunal said that individuals could be held responsible for criminal acts even if committed on behalf of their states "if the state in authorizing action moves outside its competence under international law."⁶⁵ Furthermore they could not shelter themselves behind the plea of superior orders if "moral choice was in fact possible."⁶⁵

These statements of the Tribunal will be commented on by examining the concept of offenses against the law of nations as it has developed in international practice and custom, the applicability of the *ex post facto* rule in a legal system which develops by practice, the extent to which the specific offenses laid down in the charter had been recognized in customary international law with especial reference to aggressive war and criminal conspiracy and organization, and the extent to which international law recognized "act of state" as a defense against criminal charges. //

Offenses Against the Law of Nations

The concept of offenses against the law of nations (*delicti juris gentium*) was recognized by the classical text writers on international law⁶⁶ and has been employed in national constitutions and statutes.^{66a} It was regarded

⁶³ Judgment, p. 220. ⁶⁴ *Ex parte Quirin*, 1942, 317 U. S. 1. ⁶⁵ Judgment, p. 221.

⁶⁶ "The fact must also be recognized that kings, and those who possess rights equal to those of kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. For liberty to serve the interests of human society through punishments, which originally, as we have said, rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one. For subjection has taken this right away from others": *De Jure Belli ac Pacis*, Bk. II, c. 20, sec. 40, Carnegie ed., p. 504. See Hackworth, *Digest of International Law*, Vol. 2, p. 687. According to R. W. Lee, "Since the First World War, and more than ever today, the Grotian conception of international law has reemerged into the light. The Nuremberg trial is a testimony to its cogency": *Law Quarterly Review*, Vol. 62 (1946), p. 56.

^{66a} A Dutch act of 1651 penalized persons who committed certain offenses against foreign diplomats as "violators of the law of nations" and the same term was used in the Statute of Anne which arose out of an assault upon the Czar's Ambassador (Harvard Research, *Draft Convention on Diplomatic Privileges and Immunities*, in this JOURNAL, Vol. 26 (1932), Supplement, p. 94; Feller and Hudson, *Diplomatic and Consular Laws and Regulations*, Washington, 1933, Vol. I, p. 211). The Continental Congress of the United States, in several resolutions adopted from 1779 to 1781, called upon the States

as sufficiently tangible in the eighteenth century so that United States Federal Courts sustained indictments charging acts as an offense against the law of nations, even if there were no statutes defining the offense.⁶⁷ Early in the nineteenth century it was held that the criminal jurisdiction of federal courts rested only on statutes⁶⁸ though the definition of crimes denounced by statutes might be left largely to international law. Thus "piracy as defined by the law of nations" is an indictable offense in federal courts⁶⁹ and all offenses against the law of nations are indictable at common law in state courts.⁷⁰

In the nineteenth century the development of the positivist doctrine that only states are subject to international law and that individuals are bound only by the municipal law of states with jurisdiction over them led to a decline in the application of the concept of offenses against the law of nations. This idea, however, has acquired renewed vigor in the twentieth century and has been discussed by numerous text writers⁷¹ and in many international conferences.⁷² There is, however, still disagreement as to the scope of the concept.⁷³ An analysis of general principles of international law and of criminal law suggests the following definition: A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state.⁷⁴

to provide for punishment of "offenses against the law of nations." The Constitution gives Congress power "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations": Art. 1, sec. 8, cl. 10. See Q. Wright, *The Enforcement of International Law Through Municipal Law in the United States*, Urbana, 1916, p. 221.

⁶⁷ *In re Henfield*, 1793. Fed. Cas. 6360; Moore, *Digest*, Vol. 7, p. 880; U. S. vs. Ravara, 1793, 2 Dall. 297, Moore, *Digest*, Vol. 5, p. 65; Q. Wright, *Control of American Foreign Relations*, New York, 1922, pp. 196-7.

⁶⁸ U. S. vs. Hudson, 7 Cranch 32; U. S. vs. Coolidge, 1 Wheat. 415; Wharton, *Criminal Law*, Vol. 1, sec. 254; Q. Wright, *Control of American Foreign Relations*, pp. 197-8.

⁶⁹ U. S. Criminal Code, 1909, sec. 290; U. S. vs. Smith, 1820, 5 Wheat. 153, 161-2, Hackworth, *Digest*, Vol. 2, p. 685.

⁷⁰ *Res Publica vs. Delongchamps*, 1 Dall. 111, Moore, *Digest*, Vol. 4, p. 622; Sec. of State Bayard to Mr. Harris, April 2, 1885, Moore, *Digest*, Vol. 2, p. 432; Q. Wright, *Control of American Foreign Relations*, pp. 177-9.

⁷¹ Maurice Traversé, *Le droit pénal international*, Paris, 1920-4, 6 vols., Donnedieu de Vabres, *Les principes modernes du droit pénal international*, Paris, 1928; Trainin, *Hitlerite Responsibility under Criminal Law*, New York, 1945; Cowles, "Universality of Jurisdiction over War Crimes," as cited; Harvard Research, Piracy, this JOURNAL, Vol. 26 (1932), Supplement, pp. 752-3.

⁷² For texts of resolutions, see this JOURNAL, Vol. 29 (1935), Supplement, pp. 641-5.

⁷³ Same, pp. 476-7, 569-72.

⁷⁴ If an interest is "protected by international law" every state is obliged by international law not to authorize, and to take due diligence within its jurisdiction to prevent, acts which would violate that interest. Consequently the individual who commits such

States ordinarily punish crime in the interest of their own peace and security and those interests are often parallel to the general interests of the community of nations, defined by international law. Consequently the latter interests are in considerable measure protected by the normal exercise of criminal jurisdiction by states. There are, however, circumstances when this exercise of normal criminal jurisdiction is not adequate. To protect itself in such circumstances international law has recognized four methods of supplementing the normal criminal jurisdiction of states.

✓ International law has imposed obligations on states to punish certain acts committed in their territory, punishment of which is primarily an interest of other states or of the community of nations and which therefore might be neglected in the absence of such a rule. Offenses against foreign diplomatic officers, against foreign currencies, or against the security of foreign states fall in this category.⁷⁶ (1)

✓ International law has permitted a state to exercise jurisdiction over acts committed by aliens abroad either on the ground that such acts endanger the prosecuting state's security or on the ground that they endanger all states or their nationals. The jurisdiction of military commissions over offenses against the law of war, of prize courts against contraband carriers and blockade runners, of admiralty courts against pirates, and of criminal courts against offenses defined in general international conventions or customary international law are of this character. (2)

International law has recognized the competence of states to establish international tribunals for the trial of grave offenses not dealt with by national tribunals such as terrorism and aggression.⁷⁷ (3)

International law has favored or, in the opinion of some writers, required, the coöperation of states in the apprehension and punishment of fugitive criminals through extradition or other treaties.⁷⁸ This coöperation concerns particularly persons accused of universally recognized crimes such as murder, rape, mayhem, arson, piracy, robbery, burglary, forgery, counterfeiting, embezzlement, and theft.⁷⁹ Political and military offenses are normally excluded.⁸⁰ Consequently many of the offenses dealt with in the preceding categories have escaped this procedure. (4)

an act enjoys no general immunity on the ground that he acted in pursuance of a lawful act of state. See *U. S. vs. Arjona*, 1887, 120 U. S. 479, Moore, *Digest*, Vol. 1, p. 61; *Donnedieu de Vabres*, pp. 143-4; *Trainin*, pp. 26, 32, 41; Q. Wright, *Study of War*, Chicago, 1942, pp. 912, 1345; and "War Criminals," this JOURNAL, Vol. 39 (1945), pp. 279-84.

⁷⁶ Same, pp. 280 ff.

⁷⁶ Same, pp. 274 ff, 282 ff.

⁷⁷ See discussion on *The Tribunal's Jurisdiction*, above; on the Geneva Conventions on Terrorism and an International Criminal Court, 1937, see Hudson, *International Legislation*, Vol. 7, pp. 862, 878, and *International Tribunals*, Washington, 1944, p. 183.

⁷⁸ Harvard Research, *Extradition*, this JOURNAL, Vol. 29 (1935), Supplement, pp. 32 ff.

⁷⁹ For list of offenses mentioned in extradition treaties see same, pp. 244 ff.

⁸⁰ Same, Arts. 5, 6, pp. 107-122.

From a consideration of the obligation arising from these principles of international law, of the fundamental interests of states and of the community of nations protected by international law, of the acts which violate these obligations and threaten these interests, and of the circumstances which are likely to prevent punishment of such acts by the exercise of the normal jurisdiction of states, it is possible to determine whether a given act is a crime against the law of nations.

The Ex Post Facto Principle

The sources of general international law are general conventions, general customs, general principles, judicial precedents and juristic analysis.⁸¹ International law, therefore, resembles the common law in its developing character. According to Sir James Stephen the common law is less like a series of commands than "like an art or a science, the principles of which are first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances."⁸²

Wharton discusses the meaning of the rule against *ex post facto* criminal law in the common law system as follows:

A crime can only be regarded as a violation of a law in existence at the time of its perpetration. When a punishment is inflicted at common law, then the case is brought within the principles just stated by the assumption that the case obviously falls within a general category to which the law attaches indictability. It may be said, for instance,—"all malicious mischief is indictable. This offense (although enumerated in no statute, and never in the concrete the subject of prior adjudication) is malicious mischief. Therefore this offense is indictable." Strike out "malicious mischief" and insert "nuisance," and the same conclusion is reached. It is no reply to this reasoning that we have, by this process, judge made law, which is *ex post facto*. Supposing the minor premise be correct, the objection just stated could not prevail without being equally destructive to most prosecutions for offenses prohibited by statute under a *nomen generalissimum*. In many of our States, for instance, neither murder, burglary, nor assault is so described as to leave nothing remaining to the court by way of explanation or application.⁸³

⁸¹ Statute, International Court of Justice, Art. 38.

⁸² J. F. Stephen, *Digest of Criminal Law*, 1877, Sec. 160, quoted by Francis Wharton, *A Treatise on Criminal Law*, Philadelphia, 1880 (8th ed.), Sec. 14, Vol. 1, p. 19; Stephen, *General View of the Criminal Law of England*, London, 1863, pp. 32 ff.; T. E. Holland, *Jurisprudence*, Oxford, 1910 (11th ed.), p. 66, quoting Willes, J., in *Millar vs. Taylor*, 4 Burr. 2312: "Justice, moral fitness, and public convenience, when applied to a new subject, make common law without a precedent." For meaning of the proposition that international law is part of the common law see Cyril M. Picciotto, *The Relation of International Law to the Law of England and of the United States*, London, 1915, pp. 75 ff.; Q. Wright, *Control of American Foreign Relation*, pp. 171, 196.

⁸³ Wharton, Sec. 29, Vol. I, pp. 41-2.

That such a conception of the *ex post facto* principle must apply in international law was recognized by the Tribunal when it said: "This law is not static, but by continual adaptation follows the needs of a changing world."⁸⁴ Baron Wright, Lord of Appeal in Ordinary and Chairman of the United Nations War Crimes Commission, has recently developed this thought:

The common lawyer is familiar with the idea of customs which developed into law and may eventually receive recognition from competent Courts and authorities. But the Court does not make the law, it merely declares it or decides that it exists, after hearing the rival contentions of those who assert and those who deny the law. . . .

International Law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind. The experience of two great world wars, within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an International Law which reflects international justice. I am convinced that International Law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity. An International Court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is, I think, entitled and bound to hold that it is.⁸⁵

Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources, "general principles of law," "international custom," and the "teachings of the most highly qualified publicists" no less than "international conventions" and "judicial decisions," there can be little doubt that international law had designated as crimes the acts so specified in the Charter long before the acts charged against the defendants were committed.

War Crimes and Crimes Against Humanity

No one has questioned this conclusion as regards the "war crimes" in the narrow sense. Military commissions in wars of the past have habitually tried and punished enemy persons captured and found to have been guilty of acts in violation of the customary and conventional law of war.⁸⁶ The

⁸⁴ Judgment, p. 219.

⁸⁵ "War Crimes under International Law," in *Law Quarterly Review*, Vol. 62 (1946), pp. 40, 51. To similar effect Mr. Justice Jackson said, in his opening address at Nuremberg: "The fact is that when the law evolves by the case method, as did the Common Law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error. The law, so far as international law can be decreed, had been clearly pronounced when these acts took place": *Record*, p. 166.

⁸⁶ *Ex parte Quirin*, 1942, 317 U. S. 1; *In re Yamashita*, 1946, 66 Sup. Ct. 340; Q. Wright; *War Criminals*, this JOURNAL, Vol. 39 (1945), pp. 274 ff.

Tribunal considered that the Hague Convention on land warfare was declaratory of customary international law binding all the belligerents,⁸⁷ and that it bound Germany in all the territories it had occupied,⁸⁸ but that the defendants were entitled to the benefit of the principle of reprisals recognized in the customary law of war.⁸⁹

The "crimes against humanity" were considered with the "war crimes" from which they differed only in being directed against German nationals rather than against enemies. The Tribunal had no doubt that the acts in pursuance of policies of "genocide" and clearing land by extermination of its population, if carried on in occupied territories or against enemy persons, constituted "war crimes."⁹⁰ Acts of that type, when carried on in a state's own territory against its own nationals have in the past often occasioned "humanitarian intervention" by other states.⁹¹ The preamble of the Hague Convention on laws and customs of war on land refers to the "laws of humanity" and the "dictates of the public conscience," which would apply to atrocities against nationals as well as against aliens. International conferences have proposed action when faced by brutalities within a particular country "in violation of the most elementary dictates of humanity" and "repugnant to the conscience of civilized nations."⁹² An international standard of justice has long been recognized as binding states in their treatment of resident aliens⁹³ and many conventions bind states to

⁸⁷ Some belligerents in the war were not parties to the Hague Convention on Land Warfare but the Tribunal considered it unnecessary to consider the effect of the "general participation clause" in this convention because "by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war": Judgment, p. 248.

⁸⁸ The defendants argued that Germany was not bound by the law of war in certain territories because they had been completely subjugated. The Tribunal suggested a doubt whether "subjugation" resulting from the crime of aggressive war could give any rights to the aggressor but rejected the argument on the ground that subjugation could never apply so long as "there was an army in the field attempting to restore the occupied countries to their true owners." The doctrine could not, therefore, apply to countries occupied after September, 1939, and as to countries occupied earlier the Tribunal pointed out that Bohemia and Moravia had not been annexed but merely made protectorates; consequently, after the war began in September, 1939, Germany was at war with these countries. The Tribunal did not make clear the position of Austria.

⁸⁹ Doenitz and Raeder were not held liable for unlimited submarine warfare against British vessels, which were under order to attack, nor for any submarine activity after the United States began to engage in unlimited submarine warfare in the Pacific as testified by Admiral Nimitz: Judgment, pp. 304, 305, 308. None of the defendants had been indicted for terror bombing of cities, a practice indulged in by all belligerents.

⁹⁰ Judgment, p. 248.

⁹¹ E. C. Stowell, *Intervention in International Law*, Washington, 1921, pp. 51 ff.

⁹² Resolution of the Council of the League of Nations, 1937, concerning conditions in Spain.

⁹³ E. M. Borchard, "The Minimum Standard in the Treatment of Aliens," in American Society of International Law, *Proceedings*, 1939, p. 61; Harvard Research, Responsibility of States, Arts. 7-13, this JOURNAL, Vol. 23 (1929), Supplement, pp. 133-5.

respect certain fundamental rights of minorities, backward peoples, workers, and other persons within their jurisdiction. (The idea that the individual is entitled to respect for fundamental rights, accepted by the earlier writers on international law, has come under extensive consideration recently and has been accepted in the United Nations Charter, one of whose purposes is "to achieve international coöperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."⁹⁴)

It is also to be noted that the acts which constitute "crimes against humanity" have habitually been the subject of extradition treaties. States have recognized the duty of coöperating in bringing persons guilty of such crimes to justice. As Wharton points out:

The presumption of knowledge of the unlawfulness of crimes *mala in se* is not limited by state boundaries. The unlawfulness of such crimes is assumed wherever civilization exists.⁹⁵

The Tribunal pointed out that, according to the Charter, "to constitute crimes against humanity the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."⁹⁶ It therefore declined to make a general declaration that acts of the character described committed before September 1, 1939, when the first war of aggression began, were crimes against humanity within the meaning of the Charter.⁹⁷ In general, liability for both war crimes and crimes against humanity was confined to acts committed after that date.⁹⁸

It is to be observed that a concrete plan for aggressive war was found to have been made at least as early as November, 1937. Furthermore the law of war has been held to apply to interventions, invasions, aggressions, and other uses of armed force in foreign territory even when there is no state of war.⁹⁹ Consequently the Tribunal might have found that some of the acts

⁹⁴ *International Law of the Future*, 1944, Principle 2, pp. 44-48; Q. Wright, "Human Rights and the World Order," in *International Conciliation*, No. 389 (April, 1943), pp. 238 ff.; H. Lauterpacht, *An International Bill of the Rights of Man*, New York, 1945.

⁹⁵ Work cited, Sec. 285.

⁹⁶ This was made clear by a supplementary agreement of the Powers on Oct. 6, 1945, conforming the English and French to the Russian text of the Charter by substituting a comma for the semi-colon which originally appeared after the word "war" in Art. 6: U. S. *Executive Agreement Series* No. 472, pp. 4, 25, 45. See also Jacob Robinson, "The Nuremberg Judgment, Crimes against Humanity," in *Institute of Jewish Affairs, Congress Weekly*, Oct. 25, 1946.

⁹⁷ Judgment, p. 248.

⁹⁸ Thus persons who, before Sept. 1, 1939, ceased to be members of organizations found to be criminal because of participation in war crimes or crimes against humanity, were excluded from the group declared criminal: Judgment, pp. 256, 262, 266-267.

⁹⁹ G. G. Wilson, *International Law*, St. Paul, 1939 (3rd ed.), p. 41; Q. Wright, "The Bombardment of Damascus," this JOURNAL, Vol. 20 (1926), p. 270; Harvard Research, Aggression, Art. 14, this JOURNAL, Vol. 33 (1939), Supplement, p. 905.

before that date were war crimes or crimes against humanity in the sense of the Charter. Its refusal to do so seems to have manifested its prevailing disposition to give the defendants the benefit of any doubt.

The Tribunal had no difficulty in assuming that war crimes and crimes against humanity in the narrow sense of the Charter were crimes under customary international at the time the acts were committed and felt it unnecessary to give to this question the elaborate discussion which it devoted to the "crimes against peace." It merely said:

In so far as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.¹⁰⁰

Crimes Against Peace

The argument has already been set forth by which the Tribunal reached the conclusion that the Charter declared preëxisting international law when it provided that individuals were liable for "crimes against peace."¹⁰¹

¹⁰⁰ Judgment, p. 249.

¹⁰¹ It dealt with the arguments which had been presented by defendants' counsel, emphasizing the sovereignty of states under international law, the right to resort to war traditionally deduced from that sovereignty, and the immunity of individuals acting in pursuance of an "act of state." It was contended that these principles had not been modified by the Pact of Paris or any other instrument because these agreements had become obsolete through non-observance in practice. International law, therefore, did not make resort to aggressive war illegal, much less an individual crime when the acts charged were committed. In view of this the Charter should be interpreted so as to give effect to the principle of justice, *nullum crimen sine lege* (argument by Jahrreiss, Counsel for Jodl, July 4, 1946, *Record*, pp. 12903-50). It was argued that the Tribunal was free to make such a construction and in fact was obliged to judge according to law rather than expediency (argument by Stahmer, Counsel for Goering, July 4, 1946, *Record*, pp. 12954-68). See also argument by Horn, Counsel for Ribbentrop, who contended that there was no generally accepted definition of "aggressive war" nor an institution for determining it and that the Soviet-Finnish hostilities of 1939 indicated that the effort to outlaw aggressive war had been abandoned (*Record*, July 5, 1946, pp. 13046-67). These arguments were answered in general by Mr. Justice Jackson who, in his concluding argument, emphasized the clear evidence of planning aggressive war by the defendants, the absence of any justification of necessary self defence, the absence of justification in superior orders of Hitler, and the propriety of assuming knowledge of the plan from the defendant's position and acts (*Record*, July 26, 1946, p. 14371). Sir Hartley Shawcross in his final address answered the defendants arguments in detail insisting that the Pact of Paris made aggressive war a crime, that this Pact continued valid in spite of some violations because the success of crime does not change the law, that the Pact was not invalidated by the reservations of self defense because self judgment on the necessity of self defense was permissible only in first instance and ultimate judgment must always be by an international procedure, that sovereignty did not imply superiority to international law, that international law imposes certain duties on individuals, that "acts of state do not confer immunities to commit crime, and that superior orders could give no immunity for acts which every one knew were contrary to the law of nature of which the law of nations was a part": *Record*, July 26, 1946, pp. 14442-51.

This argument emphasized the development of an international custom which regarded the initiation of aggressive war as illegal and which had been given formal sanction by substantially all states in the Pact of Paris of 1928.¹⁰² The nexus between the obligation of states not to resort to aggressive war and the criminal liability of individuals who contribute to the violation of this obligation was illustrated by analogy to the generally recognized individual liability for committing acts forbidden by the Hague Convention on land warfare. The argument holds that if an individual act is of a criminal character, that is *malum in se*, and is in violation of the state's international obligation, it is a crime against the law of nations. This conception conforms closely to that adopted by the Supreme Court of the United States in deciding whether criminal legislation of Congress can be justified by the constitutional power of Congress to define and punish offenses against the law of nations.¹⁰² The same argument was developed by Lord Wright who pointed out that the Pact of Paris converted the principle that aggressive war is illegal from a rule of "natural law" to a rule of "positive law," which like the rules of war is binding on individuals as well as states. He emphasized the multiple character of international crimes.

The nation is liable as a treaty-breaker, the statesmen are liable as violating a rule of International Law, namely, the rule that unjust or aggressive war is an international crime. The Pact of Paris is not a scrap of paper. This, in my opinion, is the position when the Pact of Paris is violated. It is on this principle, as I apprehend, that crimes against peace may be charged personally against the leading members of the Nazi government.¹⁰³

This exposition differs somewhat in emphasis from that presented to the Tribunal by counsel for the prosecution. Thus, Mr. Justice Jackson, Chief of the American Prosecution, said:

¹⁰² U. S. vs. Arjona, 1887, 120 U. S. 479, Moore, *Digest*, Vol. 1, p. 61; U. S. vs. White, 1886, 27 Fed. 200. In the following cases chiefs, or other high officers, of state were tried by judicial or political procedures for initiating or contributing to the initiation of aggressive war: in antiquity, Aristoniceus, Jugurtha, Artabasdus (Grotius, work cited, Bk. II, c. xxi, Sec. 4; Bk. III, c. xi, Secs. 7, 3, Carnegie ed., pp. 527, 733); in the middle ages, Henry the Lion, 1180; John Lackland, 1202; Otto von Wittelsbach, 1208; Conradin of Suabia, 1268; Robert of Anjou, King of Naples, 1313 (Albert Levy, "Criminal Responsibility of Individuals and International Law," in *University of Chicago Law Review*, Vol. 12 (1945), p. 319); Sir Peter of Hagenbach, 1474 (Georg Schwarzenberger, in *Manchester Guardian*, Sept. 28, 1946); in modern times, Mary Queen of Scots, 1568; Charles I of England, 1649; Lords Portland, Sommers, Orford, and Halifax, 1700; Napoleon Bonaparte, 1815; Kaiser Wilhelm II, 1919 (indicted-but not tried) (see Levy, as cited, and Q. Wright, "Legal Liability of the Kaiser," pp. 120 ff.). On distinction between international responsibility of individuals for starting wars, responsibility of states for failure to punish acts productive of wars, and responsibility of states for initiating aggressive wars, see Q. Wright, "The Outlawry of War," in this JOURNAL, Vol. 19 (1925), pp. 78 ff.

¹⁰³ *Law Quarterly Review*, Vol. 62 (1946), pp. 50-51.

Any resort to war—to any kind of a war—is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crime. . . .

The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established. That is what illegal warfare is. This principle of personal liability is a necessary as well as a logical one if International Law is to render real help to the maintenance of peace. . . . Only sanctions which reach individuals can peacefully and effectively be enforced. Hence the principle of the criminality of aggressive war is implemented by the charter with the principle of personal responsibility. Of course the idea that a state, any more than a corporation, commits crime, is a fiction. Crimes always are committed only by persons.¹⁰⁴

Mr. Jackson's theory seems to have been that aggressive war in the sense of the Charter is an individual offense differing from piracy, brigandage, and filibustering only in that it is done in the name of the state by persons in temporary control of the state. The significance of the Pact of Paris and of other anti-war treaties in which states themselves renounced war was to withdraw the "act of state" defense from those who initiate aggressive war.¹⁰⁵

Sir Hartley Shawcross, Chief of Counsel for Great Britain, argued:

International law, it may be said, does not attribute criminality to states and still less to individuals. But can it really be said on behalf of these Defendants that the offense of these aggressive wars, which plunged millions of people to their deaths, . . . is only an offense, only an illegality, only a matter of condemnation perhaps sounding in damages, but not a crime justiciable by any tribunal. . . . They (the powers responsible for the Charter) refused to reduce justice to impotence by subscribing to the out-worn doctrines that a sovereign state can commit no crime and that no crime can be committed on behalf of the sovereign state by individuals acting in its behalf.¹⁰⁶

Sir Hartley then adverted to the difficulties of collective punishment which fall upon the guilty and innocent alike and pointed out that the Charter imposes individual responsibility.

¹⁰⁴ *Record*, pp. 70-71.

¹⁰⁵ Such an argument was deduced by S. O. Levinson, the originator of the "outlawry of war" movement from the Pact. See John E. Stoner, *S. O. Levinson and the Pact of Paris*, Chicago, 1943, pp. 196, 209; Q. Wright, "War Criminals," in this JOURNAL, Vol. 39 (1945), p. 282.

¹⁰⁶ *Record*, Dec. 4, 1945, p. 832.

It is a salutary principle, a principle of law, that politicians who embark upon a particular policy of aggressive war should not be able to seek immunity behind the intangible personality of the State. It is a salutary legal rule that persons who, in violation of the law, plunge their own and other countries into an aggressive war should do so with a halter round their necks.

To say that those who aid and abet, who counsel and procure a crime are themselves criminals is a commonplace in our municipal law. Nor is the principle of individual international responsibility for offense against the law of nations altogether new. It has been applied not only to pirates. The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle of individual responsibility. The future of international law, and indeed, of the world itself, depends on its application in a much wider sphere, in particular, in that of safeguarding the peace of the world. There must be acknowledged not only, as in the Charter of the United Nations, fundamental human rights, but also, as in the Charter of this Tribunal, fundamental human duties, and of those none is more vital, none is more fundamental, than the duty not to vex the peace of nations in violation of the clearest legal prohibitions and undertakings. If this be an innovation, it is an innovation which we are prepared to defend and to justify, but it is not an innovation which creates a new crime. International law had already, before the Charter was adopted, constituted aggressive war a criminal act.¹⁰⁷

Sir Hartley emphasized the criminality of the aggressive state and deduced the criminality of individuals from a theory of accessoryship and procurement. This emphasis which rests on the doubtful ground that a state can commit a crime, a position generally denied by arbitral tribunals in refusing punitive damages,¹⁰⁸ seems unnecessary.

¹⁰⁷ Same, pp. 834-5.

¹⁰⁸ Sir Hartley stated that Tribunals "have held that a state may be bound to pay what is in effect penal demands" referring to the *I'm Alone* case between the United States and Canada in 1935 in which damages which may have been punitive were awarded against the United States with concurrence of the American member of the Tribunal (Marjorie M. Whiteman, *Damages in International Law*, Washington, 1937, Vol. 1, p. 154). He also referred to the "sanctions" article of the League of Nations Covenant and to a statement by Dr. Lushington, an English admiralty judge of the mid-nineteenth century, that a state might be a pirate (*Record*, Dec. 4, 1945, p. 833). Other instances might be cited and certainly early writers on international law developed the concept of the "criminal state" (Grotius, Bk. II, c. xx, Sec. 38; c. xxi; Carnegie ed., pp. 502, 522 ff.; C. Van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations*, The Hague, 1919, pp. 8 ff.), but the prevailing view has been that state responsibility is exclusively civil in character (Case of the *Lusitania*, U. S.-German mixed Commission, pp. 25, 27; Whiteman, Vol. 1, pp. 710 ff., Vol. 3, p. 1874; Clyde Eagleton, *The Responsibility of States in International Law*, New York, 1928, pp. 189-90; Oppenheim, *International Law*, Vol. I, Sec. 151; L. Reitzer, *Réparation comme conséquence de l'acte illicite en Droit international*, Paris, 1938, pp. 209 ff.). "At no time," writes Judge Manley O. Hudson, "has any authoritative formulation of international law been adopted which would brand specific state conduct as criminal, and no international tri-

The Tribunal's theory does not rest upon this assumption but rather upon the inherently criminal character of intentional initiation of aggressive war because of the probable consequence of such act in mass homicide and the inability to justify such action as an "act of state" when it is contrary to the state's specific international obligations.

The individual crime of aggressive war, therefore, differs from the international delinquency of aggressive war though both are involved in determining the criminal liability of a defendant.¹⁰⁹ Aggressive war as an international delinquency means any resort to hostilities by the government or from the state's territory in violation of the state's international obligations. Since these obligations are usually stated broadly, they ordinarily require interpretation by reference to the general rights of states under international law. With such interpretation a state is guilty of the international delinquency of aggressive war if it authorizes or tolerates hostilities proceeding from its territory, with or without declaration of war against another state, without consent of the state attacked, without a necessity for individual or collective defense, or without authorization by a competent international organ.¹¹⁰ The fact that operations against a peaceful state were planned long in advance and that they were stated to be for the advancement of expansive or predatory purposes creates a presumption that no justifying circumstances existed.¹¹¹ The international delinquency arises from an act or omission of the state, and the element of individual intention is not involved.

On the other hand, in the individual crime of aggression, the element of individual intention is of major importance. This crime as stated in the Charter consists in "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or

bunal has ever been given jurisdiction to find a state guilty of a crime" (*International Tribunals*, p. 180). On reluctance to ascribe criminal liability to corporate bodies see Wharton, *Criminal Law*, Sec. 91; Wright, *A Study of War*, pp. 911-15.

¹⁰⁹ Lord Wright emphasized the different liability of the state and the individual for aggressive war; above, note 103.

¹¹⁰ This resembles the definition proposed in the Soviet treaties of 1933, referred to by Mr. Justice Jackson with approval (*Record*, p. 168). See also Q. Wright, "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), p. 59; "The Concept of Aggression in International Law," in same, Vol. 29 (1935), p. 373; Harvard Research, Aggression, in same, Vol. 33 (1939), Supplement, pp. 847, 871). The defense attempted to prove that Austria had consented to the Nazi occupation in 1938 (Judgment, p. 194) and that the attack on Norway in 1940 was justified in defense against a planned British attack, and that on the Soviet Union in 1941 by danger that that country would attack Germany. But the Tribunal found that the evidence did not support these contentions. Since the wars began with Nazi aggression it was assumed that the United Nations were all justified in resorting to hostilities in individual or collective defense. It would, therefore, seem that the Soviet Government would have been justified in initiating hostilities against Germany if it did so as a measure of "collective defense," that is in aid of the states already the victims of Nazi aggression.

¹¹¹ Judgment, pp. 189-213.

assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." (To determine whether an individual is guilty of this crime it is necessary to examine the extent of his authority over the armed forces involved or his importance as an advisor of, or collaborator with, the person exercising such authority, and his intention in authorizing, or in advising or collaborating in authorizing, the use of such forces.)

The Tribunal made it clear that an individual's activity or authority in the Nazi conspiracy was not conclusive evidence that he was guilty of aggressive war, if that activity or authority ended before concrete plans to make aggressive war had been arrived at or if it began at a time after the aggressive war had begun and the German position had become defensive.¹¹² Thus Schacht's financial and armament building activity which he terminated in November, 1937, as soon as he had discovered Hitler's intention to resort to aggressive war, was not considered "preparation" of aggressive war¹¹³ and Fritzsche's propaganda activity to sustain morale after Germany was involved in war was not considered "waging" of aggressive war.¹¹⁴ These activities were not considered inconsistent with the defensive intent which these defendants claimed to have.

This interpretation narrows the meaning of the words "planning" and "preparation" to activities intended by the individual to contribute to the "initiation" of a war which he knows will be "aggressive," and it narrows the word "waging" to activities intended by the individual to win such a war. The soldier who wages war which he thinks is defensive, the factory worker who makes weapons with no knowledge of the nature of the war in which they will be or are being used, the cabinet member who advises defensive armament building are not presumed to be guilty of "aggressive war." The planning, preparation, initiation and waging must be related to an actual or concretely planned war which the individual believes has been, or is about to be, initiated for aggressive purposes in the sense that the hostilities do, or would, constitute the international delinquency of aggressive war. Proof that the individual intended his acts for necessary defense or other object consistent with the international obligations of the state in whose name or from whose territory the attack has been or is to be launched will demonstrate that his intent was not aggressive. Even if his intent was aggressive, he would still be immune from liability if he acted in pursuance of a lawful act of state, that is if in fact the war was not aggressive. He is not guilty unless both in his intention and in international law the war was, or would be, aggressive.

Criminal Conspiracy and Criminal Organization

The Tribunal found that the conspiracy charge could apply only to the crime of aggressive war, although in the indictment it had been applied to

¹¹² Judgment, p. 222 and interrogation by Judge Biddle, *Record*, p. 5266.

¹¹³ Judgment, pp. 300-301.

¹¹⁴ Same, pp. 327-328.

all the offenses named in the Charter. The prosecution had treated the final paragraph of Article 6 as an independent crime but the Tribunal held that this paragraph was "designed to establish the responsibility of persons participating in a common plan,"¹¹⁵ that is, it was intended to include accomplices as well as principals in each crime, not to add a crime of conspiracy. Consequently, the Tribunal considered the conspiracy charge on the basis of Article 6, paragraph (a), which makes "participation in a common plan or conspiracy for the accomplishment" of aggressive war a crime. This crime, however, differs little from "planning and preparation" of aggressive war. The evidence showed that concrete plans to make aggressive war were made as early as November 5, 1937.¹¹⁶ Consequently persons aware of and aiding in these plans after that date were guilty of the conspiracy charge. The prosecution's theory that "any significant participation in the affairs of the Nazi party or government is evidence of a participation in a conspiracy that is in itself criminal" was rejected.¹¹⁷

In the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the twenty-five points of the Nazi party, announced in 1920, or the political affirmations expressed in "Mein Kampf" in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.¹¹⁸

In this sense the Tribunal found that the evidence "establishes the permanent planning to prepare and wage war by certain of the defendants" and considered it immaterial whether there were several plans or a single conspiracy. Furthermore, they were not impressed by the idea of the defense that a dictatorship was incompatible with "common planning."

A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the coöperation of statesmen, military leaders, diplomats and business men. When they, with knowledge of his aims, gave him their coöperation, they made themselves part to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, but they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.¹¹⁹

¹¹⁵ Same, p. 224.

¹¹⁶ Same, pp. 189, 222.

¹¹⁷ Same, p. 222.

¹¹⁸ Same, p. 222.

¹¹⁹ Same, p. 223.

With this interpretation, the court found only twelve of the twenty-two defendants indicted on the conspiracy charge guilty, that is, those whom the evidence showed were significantly engaged in the inner Nazi circle after November, 1937 and who participated in the planning of aggressive war. The Austrian and Czech occupations, though aggressive acts, were not aggressive wars.¹²⁰ Consequently, activities intended to bring about these occupations such as those of von Papen who was German ambassador to Austria, did not in themselves prove guilt on this charge unless there was specific evidence that the defendant was aware of the plan to resort to aggressive war in these cases if it had proved necessary. In its treatment of the conspiracy charge the Tribunal applied the rule of strict construction of criminal statutes and gave the defendants the benefit of the doubt when the evidence of criminal intent was not clear.¹²¹

In exercising its power to declare organizations criminal, the Tribunal limited its declarations by definitions and recommendations so that in practice members of the organization could not be found liable unless guilty of conspiracy in the sense in which that term was used by the Tribunal. The Tribunal recognized that under the Charter and the laws passed by the Control Council of Germany in pursuance thereof

A member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.¹²²

Emphasizing that the Charter gave it discretion whether to declare any organization criminal, the Tribunal stated that it would exercise its discretion in accord with "well settled legal principles, one of the most important of which is that criminal guilt is personal and that mass punishments should be avoided." While the Tribunal would not hesitate to declare an organization or group criminal because "the theory of group criminality is new" or "because it might be unjustly applied by some subsequent tribunals," the Tribunal "should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished."¹²³ It, therefore, applied the following definition:

A criminal organization is analogous to a criminal conspiracy in that the essence of both is coöperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the

¹²⁰ Same, p. 186.

¹²¹ Same, pp. 302, 318.

¹²² Same, p. 250.

¹²³ Same, p. 251.

criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.¹²⁴

Furthermore the Tribunal recommended that classifications, sanctions, and penalties applied by other tribunals dealing with members of criminal organizations be standardized, that the penalties under Law No. 10 passed by the Control Council for Germany should not exceed those under the de-Nazification laws, and that the Control Council amend Law No. 10 to this effect.¹²⁵

In its declarations finding three of the accused organizations to be criminal the Tribunal in each case limited its declaration to those

who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organizations in the commission of such crimes.¹²⁶

Since in each case the finding of criminality resulted because the organization participated in war crimes and crimes against humanity connected with the war, the group declared criminal did not include persons who ceased to be members prior to September 1, 1939.¹²⁷ In the case of the SS persons drafted into membership who had committed no individual crimes were also excluded.¹²⁸

It is clear that in dealing with the problem of conspiracy and criminal organization the Tribunal took great care to observe the principles of criminal justice which interpret criminal statutes restrictively, which consider criminal responsibility an individual matter, and which give the benefit of the doubt to the accused. Under its rules no person could be convicted unless as an individual he had conspired in criminal activities or purposes.

"Acts of State"

The notion that a government or officer acting in the name of a sovereign state enjoys an unlimited power to shield individuals from liability for acts otherwise criminal developed as a deduction from absolute sovereignty. The state, it was said, is the only subject of international law and if it adopts the act of an individual as its own the individual is immune and reclamations can be made only against the state. The doctrine was applied not only to give wide immunity to heads of state and diplomatic officers, where it had some justification because such officials must be personally immune if they are to represent states properly, but also to consuls perform-

¹²⁴ Same, p. 251.

¹²⁵ Same, p. 251.

¹²⁶ Same, pp. 256, 262, 266.

¹²⁷ Same.

¹²⁸ Same, p. 266.

ing official functions, and to soldiers and seamen acting under superior orders. In accordance with this doctrine, Secretary of State Webster wrote the British Minister in the McLeod case:

That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute.¹²⁹

This position was disputed by many at the time on the ground that the government's authority could not confer immunity upon its agents for acts beyond its powers under international law.¹³⁰ The latter position has been sustained in the numerous trials of soldiers for breaches of the law of war even when acting in pursuance of the authority of their government.¹³¹ The limits of the immunity of individuals for acts otherwise criminal committed in pursuance of official functions or under official orders is well stated by Sir James Stephen.

In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior; but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders.¹³²

The foregoing discussions suggest that the law stated in Articles 7 and 8 of the Charter and supported by the Tribunal¹³³ was amply supported by general principles of law which constitute a source of international law.

The opinion of the Nuremberg Tribunal marks an important step in the development of international criminal law. This law will be further developed in the trial of major Japanese war criminals proceeding at this writing in Tokyo¹³⁴ and by the trial of numerous lesser war criminals in national military commissions.¹³⁵ Especially significant is the clear pronouncement

¹²⁹ Moore, *Digest*, Vol. 2, p. 25; Q. Wright, "War Criminals," this JOURNAL, Vol. 39 (1945), p. 271; Wharton, *Criminal Law*, Sec. 284.

¹³⁰ Wright, "War Criminals," p. 266; Wharton, *Digest of International Law*, Vol. 1, p. 67.

¹³¹ *Ex parte Quirin*, 1942, 317 U. S. 1.

¹³² Stephen, *Digest of Criminal Law*, Art. 202, quoted in Wharton, *Criminal Law*, Sec. 94, Vol. 1, p. 130. See also case of Dithmar and Boldt, German Reichsgericht, 1921, this JOURNAL, Vol. 16 (1925), p. 708.

¹³³ Judgment, p. 221.

¹³⁴ State Department, *Trial of Japanese War Criminals*, 1946.

¹³⁵ Above, note 5.

that aggressive war is an individual crime, and the development of the conception of that crime.

War (said Judge Biddle in his report of the results of the trial to President Truman) is not outlawed by such pronouncements, but men learn a little better to detest it when as here, its horrors are told day after day, and its aggressive savagery is thus branded as criminal. Aggressive war was once romantic; now it is criminal. For nations have come to realize that it means the death not only of individual human beings, but of whole nations, not only with defeat, but in the slow degradation and decay of civilized life that follows that defeat.¹²⁶

The world shattered by two world wars needs to have its confidence in law restored. Such confidence can only develop if people believe that formal law embodies justice and that it will be enforced. The Nuremberg trial is likely to contribute to both of these ends. The general opinion that aggressive war and mass massacre are crimes has been recognized in formal international law and that law has been sanctioned by trial and punishment of many of the guilty. Much remains to be done but opinion will be reassured that international law is neither esoteric nor helpless. The time may be ripe for further development by the establishment of a permanent international criminal court as drafted in the Geneva Convention of 1937 and the codification of international criminal law as suggested by Judge Biddle with President Truman's approval,¹²⁷ and recommended by the General Assembly of the United Nations on December 11, 1946.

¹²⁶ *Department of State Bulletin*, Vol. 15, No. 6 (Nov. 24, 1946), p. 956.

¹²⁷ Same, pp. 954, 957.

THE AMERICAN FOREIGN SERVICE SINCE 1939 *

BY ELTON ATWATER

The Foreign Service of the United States has entered a new era in its development which is as significant as was the period following the Rogers Act of 1924. The signing of the Foreign Service Act of 1946 on August 13 of last year marked the culmination of a series of steps taken during World War II to enable the American Foreign Service to discharge more effectively its increasing responsibilities. Tremendous demands have been placed on the Foreign Service since 1939 as a result of the War and the decision of the United States to assume a leading rôle in world affairs and the preservation of international peace. Having turned its back on the relative isolation of the 1920's and early 1930's, the United States discovered that a Foreign Service which was adequate to carry out the policies of twenty years ago was far from adequate to carry out the policies of today.

The Director of the Office of the Foreign Service put the problem very pointedly a year ago when he declared: "At present the Service is undermanned, clogged with deadwood, insufficiently trained, underpaid, inadequately housed, and clumsily administered."¹ Today it can be said that thoroughgoing efforts are being made to overcome all of these weaknesses. Some of these, originating a few years ago, were administrative in character—such as the creation of the Foreign Service Auxiliary in 1941, and the establishment of the Office of the Foreign Service in 1944. Others have been legislative in character—notably the interim act of May 3, 1945, the so-called Foreign Service Manpower Act of July 3, 1946, and the Foreign Service Act of August 13, 1946.

On October 1, 1939, there were 833 career officers in the Foreign Service. This included about 720 diplomatic and consular officers who were engaged principally in the well established duties of political and economic reporting, negotiations with foreign governments, protection of American citizens and interests abroad, trade promotion, and various legal and administrative activities such as issuing visas, passports, and consular invoices, and supervising American merchant shipping in foreign ports. This had been for some time the traditional framework of Foreign Service work. In addition to these 720 diplomatic and consular officers there were about 113

* This article was prepared under a grant from The American University, Washington, D. C. The author is at present Director of the Foreign Service Training Program of the American Friends Service Committee, Philadelphia, Pennsylvania.

¹ Selden Chapin, "The Future of the Foreign Service," address of January 22, 1946, *Department of State Bulletin*, February 3, 1946, p. 165.

commercial and agricultural officers who were engaged in more specialized work in these fields. They had just been transferred from the former Foreign Commerce and Foreign Agricultural Services when the latter had been merged with the Foreign Service administered by the Department of State in July, 1939.

In addition to the 833 career officers, there were approximately 55 chiefs of mission, 221 non-career Vice Consuls who assisted in routine consular and administrative duties, 1,662 clerks and 1,250 miscellaneous employees (messengers, couriers, custodial employees, etc.), making a total of about 4,020 in the entire service.² By June 30, 1946, the entire service had more than doubled in size to include 8,541 members in all categories.³

Increased Demands on the Foreign Service

Down to approximately the spring of 1941, the added demands placed upon the Foreign Service as a result of the war were not so great as to call for much additional personnel except in the Department of State itself. These new demands involved chiefly such matters as the protection of beligerent interests (as British and French interests in Germany), the exchange of prisoners of war, liaison work with the Red Cross, evacuation of some 130,000 American citizens from war zones, and increasingly complicated visa and refugee problems. Where there was a need for extra officers abroad, it was usually filled with men whose offices had been closed because of the war. Otherwise the work remained pretty much within the traditional limits of foreign relations activity.⁴ The cultural relations program which was just getting under way was one of the few indications of the changes which were imminent in the usual Foreign Service work.

The traditional lines however were soon destined to break down. Ever since the fall of France in June, 1940, the United States had been moving steadily in the direction of all-out aid for the Allies. Finally, in March, 1941, after a long debate on American foreign policy, Congress passed the famous Lend-Lease Act, and two months later, on May 27, 1941, the President proclaimed a state of unlimited national emergency.

These acts had not only a profound effect on the general direction of American foreign policy and the position of the United States in world affairs, but they also were followed by a vast expansion in our foreign activity which required considerable increase in foreign personnel. This occurred chiefly in the following kinds of work:

² *American Foreign Service Journal*, September, 1945, pp. 13, 47. Unless otherwise noted, the statistics and other factual information for this article were obtained from the appropriate divisions of the Department of State.

³ For a breakdown of this figure, see below, p. 93, note 34.

⁴ See Walton C. Ferris, "Concerning the Auxiliary," *The American Foreign Service Journal*, July, 1944, p. 354.

1. The operation of the Lend-Lease program, involving the negotiation of Lend-Lease agreements, the supplying of materials under these agreements to the United Kingdom and other eligible countries, and the procurement of additional foodstuffs and raw materials for the manufacture of Lend-Lease goods.

2. The procurement abroad of additional foodstuffs and strategic materials needed within the United States for its own defense and war effort.

3. The supervision of exports of goods and funds from the United States to prevent their shipment directly or indirectly to Axis countries. This involved considerable economic intelligence work abroad, particularly in Latin America, where there were a large number of individuals and firms believed to be engaging in trade with the Axis states. It also involved supervision of a "black-list" of several thousand such persons and firms to whom it was forbidden to export any defense materials except under special circumstances.

4. The distribution of information abroad to provide a more accurate and complete picture concerning the United States, its policies, and later its war activities.

5. The operation of the cultural relations program.

6. The conduct of the added political relations involved in maintaining the Allied coalition and developing the United Nations.

These six new fields of activity necessitated personnel for foreign duty far in excess of what the Foreign Service in 1941 could supply. They also raised the very fundamental question of whether new foreign operating functions should be undertaken by the State Department or by new specially created agencies. A real conflict developed within the State Department between those who felt that all foreign relations work, including operational tasks, should be handled by the State Department, and those who felt that it would be better for the Department to steer clear of operating responsibilities and confine its work to those activities most nearly related to the traditional foreign relations field.

Under the influence of Secretary Hull, it was the second group whose ideas prevailed at that time. Mr. Hull strongly resisted the assumption of foreign operational functions by the Department of State, and it was this view which prevailed while he was in office. Following his resignation late in 1944, and under the leadership of Secretaries Stettinius and Byrnes, this view gradually gave way to the position that all foreign relations work should be centered in the State Department and conducted by a unified Foreign Service. The absorption by the State Department in 1945 of various foreign responsibilities of the Office of War Information, the Office of Inter-American Affairs, the Foreign Economic Administration, the Office of Strategic Services and the Surplus Property Administration indicated the trend toward the greater assumption of foreign operations work.

Because Mr. Hull's views prevailed in 1941, however, it was necessary to create several emergency agencies to handle the new operational tasks which had arisen. The principal ones were the Economic Defense Board (later the Board of Economic Warfare), the Lend-Lease Administration, the Coordinator of Inter-American Affairs, and the Office of War Information. The Economic Defense Board and its successor, the Board of Economic Warfare, handled such operations as the procurement of supplies abroad and the preclusive buying of materials to keep them out of the hands of the Axis. The Lend-Lease Administration was responsible for the operation of the Lend-Lease program. The Office of the Coordinator of Inter-American Affairs assumed important responsibilities in the cultural relations field and in the furtherance of Western Hemisphere solidarity and defense. The Office of War Information, through its Overseas Branch, supplied information abroad concerning United States activities and policies, and conducted the program of psychological warfare.

The creation of several new agencies authorized to operate abroad on behalf of the United States had many disadvantages from the standpoint of effective administration and coordination of our foreign relations activity. With the B.E.W., C.I.A.A., and O.W.I. each sending large numbers of their own representatives abroad, a very confusing picture developed in our foreign representation. Foreign governments and our own regular Foreign Service officials were in some cases equally bewildered. In the fall of 1944, for example, when the United States Ambassador to China resigned, it was reported in the *Army and Navy Journal* that he had done so because of embarrassment over the presence of so many other American representatives in the Chinese capital and his ignorance of their dealings with Chinese officials.

In their operations the new agencies were expected to conform to the general foreign policy of the United States as set forth by the Secretary of State. At the same time the representatives whom they sent abroad were made responsible to the United States Ambassador, Minister or Chief of Mission in the particular country concerned. In Washington liaison arrangements between the State Department and the new agencies were made to provide for close cooperation in the planning of the operations of the later. In some cases this worked satisfactorily and in some cases it did not for it was often difficult to establish a clear dividing line between policy making and operations. Furthermore those who were operating in the field were called upon every day to give specific meaning and direction to the policies emanating from Washington. These actions might or might not coincide with the interpretations of those in Washington who had formulated the policies. Actually the success of these arrangements depended largely on the personalities involved. Where the individuals on both sides had confidence in each other and a determination to find a solution to their problems despite the weaknesses of the administrative machinery the pro-

gram operated reasonably satisfactorily and harmoniously. Where these conditions were not present the results were far from satisfactory.

It has been estimated that nearly 90 percent of the expansion in civilian personnel sent out for foreign duty between 1939 and 1944 took place outside the Department of State and outside the career Foreign Service.⁵ This is a very revealing indication of what happened as a result of the State Department's decision to confine its activities to those tasks most closely related to the traditional foreign relations field and to steer clear of operating responsibilities.

Creation of the Foreign Service Auxiliary

Significant steps, however, were about to be taken within the State Department to enable the Foreign Service to carry out its increased activities. By the Spring of 1941 it was evident that there were not enough experienced Foreign Service officers to carry on the State Department's share of the economic defense and cultural relations programs in Latin America. The chief duties requiring additional foreign personnel at this time were (1) analysis of the import requirements of Latin American countries to make sure that their needs for materials from the United States were met as fully as possible—this was a specialized phase of economic reporting, closely related to regular Foreign Service work in this field; (2) supervision of the black-list of Latin American persons and firms, and observation of their business transactions with the Axis—another specialized phase of economic work; and (3) cultural relations work.

At this point, the Division of American Republics, in collaboration with the Division of Foreign Service Personnel, took the initiative in surveying the needs of all divisions in the State Department which were requesting additional personnel for Latin America. It quickly became apparent that the demand far exceeded the available supply and that if enough qualified individuals were to be obtained it would be necessary to go outside the regular channels of recruitment. Consultations followed with the Bureau of the Budget and an allocation was secured from the President's Emergency Fund to finance the recruitment of qualified personnel from outside the Foreign Service. Such persons were to be appointed only for the duration of the emergency and only after a careful investigation of their experience and qualifications. The formal written examinations given to candidates for the career service were not required for these emergency appointments.

This new category of personnel became known as the Foreign Service Auxiliary. The decisions to create it were made administratively in the early Summer of 1941 and on July 21 of that year the first group of Auxili-

⁵ Walton C. Ferris, "Concerning the Auxiliary," *The American Foreign Service Journal*, July, 1944, p. 355.

ary officers was assigned to various posts in Latin America.⁶ No public announcement concerning the Auxiliary was made until October, 1941, at which time it was indicated that approximately 60 officers had been appointed. This group included economic analysts who were to be responsible for securing information needed in the economic defense program, cultural relations assistants, public relations assistants, and a small group of junior officers assigned to general consular duties.⁷ Appointments to the Auxiliary were made from individuals who were either not liable for military service, who had been given military deferments or who had been honorably discharged from the armed services. A number of women were subsequently selected as Auxiliary officers, a larger proportion, in fact, than have ever been chosen as career Foreign Service officers.

Although the Auxiliary was created to meet the need for increased personnel in Latin America it was used later to fill similar needs in other parts of the world as they became felt. The work at posts like London, Moscow, and Chungking was steadily increasing, as well as at strategic posts elsewhere such as Madrid, Vichy, Stockholm, Lisbon, Ankara, and Teheran. On top of this, wartime difficulties in communication and transportation meant that much greater effort was consumed in achieving given results than in pre-war days. The 100 or more Foreign Service officers released in the Summer of 1941 by the closing of our consulates in Germany, Italy, and Axis-occupied countries were very quickly absorbed elsewhere, and by October, 1941, the Foreign Service was facing the worst personnel shortage in four years.⁸

Following the attack on Pearl Harbor in December, 1941, the State Department suspended the recruitment of young men of military age for the career Foreign Service through the regular procedure of written and oral examinations. This further intensified the personnel problem for it meant that entrance into the career service was suspended for the duration of the war except for the relatively small number of individuals who might be transferred to the career service either from the Department of State or from the clerical personnel of the Foreign Service after five years' continuous service therein.

At a time, therefore, when demands for officers were greater than ever before the career Foreign Service found itself unable to expand. Its basic

⁶ Department of State, *Foreign Service List*, April 1, 1942. This was the first *Foreign Service List* to indicate the temporary officers appointed to the Auxiliary. All subsequent lists have carried this information.

⁷ *Department of State Bulletin*, October 11, 1941, pp. 283-284. *The American Foreign Service Journal*, October, 1941, p. 553.

⁸ *Department of State Appropriation Bill for 1943*. Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 77th Congress, 2nd Session, pp. 12-13.

structure proved to be too inflexible to meet the emergency situation and only through the Auxiliary was the necessary personnel obtained.

Up to the summer of 1942 practically all Auxiliary officers were assigned to Latin American posts but by the fall of that year, with the Allied invasion of North Africa imminent, the State Department began to send more of such officers to strategic European posts. This trend toward a wider geographic distribution of Auxiliary officers continued steadily thereafter as the European theater of war, and later the Far Eastern theater, assumed increasing importance. After the close of the war the Auxiliary played a very significant rôle in supplying personnel for the reestablishment of our Foreign Service posts in both Europe and the Far East. By January, 1946, there were 976 Auxiliary officers, in contrast to 820 in the career service, and they were distributed among most of our Foreign Service establishments throughout the world. Despite this very significant rôle which the Auxiliary played in the Foreign Service program it remained one of the little publicized developments under the Department of State throughout the war.

In general there were two types of officers in the Foreign Service Auxiliary—the specialists and the junior officers. The specialists were older and more experienced individuals who had already done considerable work in such fields as international trade and finance, foreign agricultural matters, cultural relations, labor problems, civil aviation, petroleum, minerals and strategic raw materials, and press and information services. Individuals with the desired qualifications in these fields were appointed to the Auxiliary at salaries and levels commensurate with their age, experience, and responsibilities.⁹ They received the same living and transportation allowances as regular Foreign Service officers and had the same practical status in the field as the latter except that they could not be left in charge of a Foreign Service post during the absence of a career officer.

The junior Auxiliary officers were younger persons, comparable to those who might be entering the Foreign Service in normal times. They were assigned to general duties as Vice Consuls at various posts.

A number of accounting and disbursing officers and administrative assistants for the Foreign Service establishments were also recruited through the Auxiliary.

A good idea of the various kinds of Auxiliary officers, with the approximate number in each group, can be gathered from the following table which indicates the situation as of October, 1945:¹⁰

⁹ In some cases Auxiliary officers received higher salaries and grades than career officers doing comparable work. See below, p. 85.

¹⁰ *Foreign Service List*, October, 1945. In a few cases the figures have been adjusted by the writer on the basis of supplementary information from pertinent divisions of the Department of State.

Total number of Auxiliary officers	843 ¹¹
Specialists	
Economic Analysts (all grades)	204
Economic Counselors, and Advisers	8
Agricultural Attachés and Assistants	69
Commercial Attachés and Assistants	13
Cultural Attachés and Assistants	41
Civil Air Attachés	9
Minerals Attachés	8
Petroleum Attachés	21
Labor Attachés	21
Rural Sociologists	2
Information Officers	4
Press Attachés	2
Publications Procurement Officers	3
Assistant Maritime Delegates	2
Special Assistants	42
Others with no particular title	9
Administrative Assistants	32
Vice Consuls (junior officers)	230
In training or awaiting assignment	123

A few regular Foreign Service officers were listed as specialists, as the following table will indicate, but it was almost entirely through the Auxiliary that specialized personnel was obtained. The career officers serving as commercial and agricultural attachés were the remaining members of the former Foreign Commerce and Agricultural Services who had been transferred to the Foreign Service of the United States in 1939.

Specialists in the Career Foreign Service

(October, 1945)

Commercial Attachés and Assistants	approximately 33
Agricultural Attachés and Assistants	approximately 8
Economic Counselors	approximately 11
Labor Attachés	approximately 4
Civil Air Attachés	approximately 1

A brief glance at these tables is enough to show how the pre-war character of the Foreign Service had changed, and how it was no longer accurate to consider the Foreign Service as made up primarily of diplomatic and consular officers. Like other agencies of the Government, the Foreign Service had found that there was an increasing number of technical problems which it had to handle which called for personnel with specialized training and experience.

The largest single group of specialists within the Auxiliary was that of economic analysts. During the war these officials did much of the intelligence work for our economic warfare program, as well as general analysis

¹¹ Over 2,000 clerks were also appointed under the Auxiliary. These appointments were made in the same manner as clerical appointments in the regular Foreign Service.

in connection with our long-run foreign economic policy. During the subsequent transition from war to peace they made extensive studies of economic conditions abroad in connection with the restoration of industry, the revival of foreign investments, and the reestablishment of a freer international trade. Since the advent of the Auxiliary economic officers there has been a much greater broadening of our foreign economic work than ever before. A survey made in 1945, for example, indicated that 37% of the work performed by Foreign Service officers and Auxiliary officers concerned economic and commercial affairs.¹² The promotion of American foreign trade, which has always been one of the principal phases of our foreign economic work, is now being supplemented by increased emphasis on the encouragement of conditions throughout the world which will contribute to the economic recovery and welfare of all countries.

The Auxiliary played another important rôle in supplying a considerable number of agricultural and commercial attachés, and in thereby enabling the Department of State to meet its responsibilities under Reorganization Plan II of 1939 which merged the Foreign Commerce and Foreign Agricultural Services with the Foreign Service administered by the Department of State. Under this plan the State Department became responsible for the recruitment of all Foreign Service officers, including agricultural and commercial officers. But with the suspension of general recruitments after December, 1941, the Department would have been unable without the Auxiliary to have met these responsibilities. Furthermore in seeking agricultural and commercial attachés it was often desired to secure experienced personnel qualified to assume senior responsibilities at foreign posts. The career Foreign Service had no machinery by which such persons could be recruited from the outside at senior grades and salaries. Through the Auxiliary, however, such personnel could be employed at grades commensurate with their qualifications.

The work of the cultural attachés and labor attachés is a good example of how our foreign relations activity has expanded during the past few years. The cultural attachés have been concerned primarily with reaching the people of other countries and trying to develop better understanding between those people and the people of the United States. Whereas the work of many of the regular Foreign Service officers has been concerned principally with the relations between governments, the cultural attachés have been more concerned with the relations between peoples and the improvement of these relations. For example late in 1943 the cultural attaché in Nicaragua took a portable motion picture projector into the interior of the country where he showed a series of educational and documentary films of the United States in the public squares of the various communities. Several thousand people attended these performances, most of

¹² *American Foreign Service Journal*, September, 1945, p. 47.

them farmers, and many of whom had never before seen a motion picture. Another cultural attaché traveling in Uruguay gave a two-weeks lecture course on the political system of the United States to the faculties of law and economics at the state university, and also over a nation-wide radio broadcast. Wherever they are stationed cultural attachés spend considerable time consulting with students or educators who wish to study in the United States, with university presidents who wish to secure professors from the United States, with high school teachers of English, and with leaders in other phases of cultural and intellectual life. They plan radio broadcasts, prepare articles on the United States for distribution in the country where they are stationed, assist in the establishment of libraries and cultural centers where books and publications of the United States are available, and offer whatever further services they can to foster better understanding between the United States and the country to which they are assigned.¹³

In the field of labor relations, it has been realized for some time that domestic labor conditions in various countries have an important influence on international economic conditions. But not until the establishment of the Foreign Service Auxiliary was it possible to recruit specialists and assign them as labor attachés abroad to report comprehensively on these matters. They are responsible for collecting information on labor conditions, trade union developments, labor legislation, and similar subjects in the countries where they are stationed. This information is reported to the United States for use in the formulation of our foreign economic policy as well as for use by those agencies of the Government concerned with the problems of labor and by the American representatives on such groups as the International Labor Organization and the Economic and Social Council of the United Nations. The labor attachés also make information on labor conditions in the United States available to interested officials and persons abroad. They likewise are able to assist the labor leaders of other countries in making contacts with American labor leaders and in helping them thus to work out their problems through informal discussions and exchange of views without the necessity of formal governmental action.¹⁴

The value of the Auxiliary as a means of obtaining technical specialists for the Foreign Service was nowhere more clearly shown than in the cases of the civil air attachés, the petroleum attachés, and the minerals attachés who have all been men with considerable experience in their respective fields. The civil air attachés have played an important rôle in connection

¹³ The cultural relations program is described in detail in the pamphlet, *The Cultural-Coöperation Program, 1938-1943*, Department of State Publication No. 2137. See also "The Work of the Cultural Relations Attaché," by Morrill Cody, *Department of State Bulletin*, April 1, 1945, p. 574.

¹⁴ For a further discussion, see "Labor and International Affairs," by Acting Secretary of State Dean Acheson, *Department of State Bulletin*, September 30, 1945, p. 467.

with the establishment and expansion of international air routes for civil aviation and the negotiation of international agreements permitting the operation of such routes. The petroleum attachés have been responsible for keeping the United States Government accurately informed on all conditions affecting foreign oil production and distribution. They have also been concerned with promoting and protecting the foreign operations and investments of American oil companies and representing the United States in all petroleum negotiations with foreign governments.¹⁵ The minerals attachés, whose work has been done primarily for the Bureau of Mines of the Department of the Interior, have been responsible for the survey of foreign mineral resources and production, the promotion of American foreign trade in minerals, and for work on various subjects relating to the procurement abroad of minerals needed by the United States.

One of the latest categories of Auxiliary specialists to be created was that of the publication procurement officers. Their responsibility has been to collect documents and publications of other countries which are needed by various agencies of the United States. The usual channels of document procurement which have been relied upon in the past—such as commercial book dealers, intergovernmental agreements for the exchange of documents, or traveling purchasing agents—have satisfied less than 50% of the documentary needs of the United States Government. One of the principal deficiencies, for example, has consisted of publications of foreign provincial and municipal bodies which contain a wealth of information on local conditions abroad but which are often difficult to obtain through ordinary foreign purchasing channels. To remedy such deficiencies and to assure the coördinated purchasing on behalf of all our government agencies of adequate documentary material on conditions abroad, the publication procurement officers were appointed. They have all been individuals with considerable experience in document publications and library acquisitions.¹⁶

In addition to the Auxiliary officers several hundred officers engaged in foreign information work were transferred in the Fall of 1945 from the O.W.I. to the State Department. They could not be listed as Auxiliary officers because there were too many of them to be absorbed at that time within the authorized strength of the Auxiliary. They were therefore carried as overseas personnel of the State Department and paid out of unexpended O.W.I. funds which were transferred to the State Department.¹⁷

¹⁵ The work of the petroleum attachés is further discussed in the *Department of State Bulletin*, December 2, 1945, pp. 894-895.

¹⁶ For further information, see "Procurement of Foreign Research Materials," by Richard A. Humphrey, *Department of State Bulletin*, January 6 and 13, 1946, p. 22.

¹⁷ *Department of State Appropriation Bill for 1947*, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 79th Congress, 2nd Session, pp. 431 ff., 518 ff.

Up to the present time the structure of the career Foreign Service has not envisaged the appointment of specialists such as those who have been recruited through the Auxiliary. Rather has it been grounded on the principle of selecting young men with good general educational background and letting them advance from the bottom up on the basis of merit. The emphasis has been upon individuals who would be readily adaptable to all kinds of work rather than upon the so-called specialist. Insofar as anything was done about it the need for specialized officers in the past was met by assigning career officers to a particular field and letting them become specialized over a period of time. The Auxiliary, on the other hand, was much more flexible at this point, and operated more like the United States Civil Service in that persons could be appointed at any grade for which they were qualified.

The existence of the Auxiliary provoked much discussion within the Department of State and the Foreign Service as to how the necessary specialized personnel for our foreign relations work could best be obtained. There were some who felt that the career officers themselves could be trained for whatever form of specialized reporting or negotiation appeared to be needed. They pointed out that when outside specialists were brought in who were unfamiliar with a country, its language, its officials, and leading citizens, a great deal of time was lost in finding one's way around. In such cases the regular Foreign Service officers often had to break a good bit of the ground for the specialists and in some cases had to supply much of the basic material for the latter's reports.

On the other hand it was felt that a man without real technical training and experience could not be expected to do adequately such jobs as those of a minerals or petroleum engineer, an agricultural analyst or a civil aeronautics specialist. It was also felt that there was real advantage in bringing in outsiders with a fresh point of view—a distinguished scholar in the field of cultural relations, a labor or social welfare specialist in the field of labor reporting, or a newspaper editor in the field of information work.

The Foreign Service Act of 1946 attempted to solve this problem, although not completely in favor of either of the above points of view. On the one hand more intensive in-service training for career officers was authorized; on the other provision was made for new categories of specialized personnel in the Foreign Service on both a temporary and a long-term basis. This will be discussed below in greater detail.

A word should be said regarding the problem of morale in the Foreign Service as affected by the addition of such a large number of Auxiliary officers. There were misgivings at first among the career officers and some lack of appreciation regarding the necessity and potential value of the Auxiliary. In a few cases Auxiliary officers received little coöperation from their career colleagues and were actually made to feel unwelcome at

their posts of assignment. The regular officers were disturbed by the unorthodox methods which the Auxiliaries sometimes followed and by their unfamiliarity with customary Foreign Service techniques and conduct. Many were alarmed by the fact that Auxiliary officers did not all enter at the bottom of the scale and that numbers were appointed at higher salaries and grades than those of career officers doing comparable work. This was justified on the ground that the appointments were only temporary and that it was necessary to pay higher salaries in order to get qualified personnel from private employment. It pointed, however, to the urgent need for a general increase in the salaries of the career officers.

The regular Foreign Service officers were also apprehensive in many cases that large numbers of Auxiliary officers might subsequently be blanketed into the Foreign Service without regard to the career principle. For many months prior to its enactment on July 3, 1946, legislation was being considered permitting the appointment to the upper grades of the career service of a limited number of officers from the Auxiliary or other government agencies or the armed services. While most career officers eventually came to recognize that something like this, if administered carefully, would strengthen the career service at a time when it had great need for experienced personnel, there was still a natural fear as to what effect it might have on the future of the career principle.

On the whole, however, it can be said that the career officers felt that the Auxiliary performed its job well and that it was necessary to have it during the emergency period when additional career personnel could not be recruited.¹⁸ The significance of the Auxiliary to the entire Foreign Service program is more clearly appreciated when it is realized that at its peak in 1945 Auxiliary officers were performing over 90% of the cultural and informational work, 67% of the economic and commercial work, 23% of the consular and administrative work, and 9% of the political work. The career officers, on the other hand, carried practically all the political work and the bulk of the consular and administrative work.¹⁹

The Auxiliary came to an end on November 13, 1946, when the new Foreign Service Act of 1946 took effect. The purposes which it had served, however, were fully provided for in the new legislation, and the way had

¹⁸ See the Summary and Analysis of the Prize Essay Contest on Suggestions for Improving the Foreign Service, *American Foreign Service Journal*, March, 1945, pp. 7, 10. Also the editorial, "Well Done," same, October, 1946, p. 22.

¹⁹ "Personnel Inventory of the Foreign Service," *American Foreign Service Journal*, September, 1945, p. 47. According to this survey the total work of the Foreign Service at this time was divided as follows among the different fields: economic and commercial, 37.3%; consular, 21.7%; administrative, 20.8%; political, 17.3%; cultural, 1.9%; informational, 1%. These figures were compiled prior to the time when the information work of OWI and the Office of Inter-American Affairs was taken over by the State Department. At the present writing (November, 1946), cultural and informational work probably constitutes over 10% of the total Foreign Service program.

been paved for its ultimate liquidation by two earlier acts of Congress—that of May 3, 1945, and that of July 3, 1946.

Creation and Development of the Office of the Foreign Service

Before discussing the legislative steps which have been taken during the past two years to strengthen the Foreign Service mention should be made of the administrative improvements in the offices of the State Department responsible for the operation of the Foreign Service. The first step in this direction occurred in January, 1944, as part of the first basic reorganization of the Department of State.²⁰ At this time four separate divisions previously charged with Foreign Service affairs²¹ were grouped together in a new Office of Foreign Service Administration, comprising two subordinate divisions—Foreign Service Personnel and Foreign Service Administration. The director of this office became the top administrative officer of the Foreign Service, responsible to the Assistant Secretary of State in charge of the administration of the Department. Prior to this time the four divisions handling Foreign Service matters had each been responsible directly to the Assistant Secretary of State. Since the latter had nine other divisions reporting directly to him it is easy to see how overloaded his position had become.

The new Office of Foreign Service Administration, by centralizing the responsibility for all Foreign Service matters, took a great deal of the administrative burden from the shoulders of the Assistant Secretary of State. It has continued in this position up to the present time and has been broadened and strengthened in several respects since its creation. The establishment of a Planning Staff on March 6, 1944, for example, was symptomatic of the trend toward better administration which had started two months earlier.²² The Planning Staff was charged with rendering staff assistance in planning the work of the Foreign Service with a view toward continual adjustment and improvement in its over-all administration. Among other things it set up a Joint Survey Group, comprising both departmental and Foreign Service officers, to study and recommend ways of improving the administration of the Foreign Service.

On May 6, 1944, the name of the new office was changed to the Office of the Foreign Service. At the same time the Division of Foreign Buildings Operations, which had been absorbed by the Division of Foreign Service

²⁰ Departmental Order 1218, January 15, 1944: *Department of State Bulletin*, January 15, 1944, pp. 61-63.

²¹ Division of Foreign Service Personnel, Division of Foreign Service Administration, Foreign Service Buildings Office, and Office of Foreign Service Furnishings.

²² Departmental Order 1234, March 6, 1944: *Department of State Bulletin*, March 11, 1944, p. 241.

Administration in the reorganization of the preceding January, reappeared separately as the third division in the office.²³

The most significant development in the Office of the Foreign Service occurred in April, 1945, when there was an extensive reorganization of its structure, more comprehensive definition of responsibilities, and creation of three additional divisions.²⁴ This clearly established the central responsibility of the office for the over-all administration and coordination of Foreign Service activities and the relations between the Foreign Service and other interested government agencies. The three previously existing Divisions of Foreign Service Personnel, Foreign Service Administration, and Foreign Buildings Operations were continued with certain realignments of functions and responsibilities. The three new divisions were given responsibilities in the fields of planning, personnel training, and reporting.

In addition to the work previously performed by the Planning Staff, the new Division of Foreign Service Planning was to assist in legislative and budgetary programming for the Foreign Service. A comprehensive list of twelve responsibilities was assigned to the new division, only a few of which can be indicated here: initiating projects, programs, and surveys to be undertaken by the Foreign Service; analyzing and recommending ways of improving the organization and management of Foreign Service establishments; preparing recommendations for the personnel program of the Foreign Service; initiating legislative proposals to meet the continuing needs of the Foreign Service; formulating the budgetary requirements of the Foreign Service; working to assure close coordination between the administration of the Foreign Service and that of the State Department and other interested government agencies. It was in the Division of Foreign Service Planning that the Manpower Act of July, 1946, and the Foreign Service Act of August, 1946, were prepared.²⁵

The new Division of Training Services represented another extremely significant development. It constituted a recognition of the need for much more thorough in-service training not only to prepare new personnel for their duties but also to aid existing personnel in keeping up-to-date in the many fields relating to Foreign Service work. Previously the training of personnel had been limited largely to (a) a brief basic orientation course arranged by the Foreign Service Officers' Training School for all new officers on entry into the Service; and (b) specialized training in such languages as Chinese, Japanese, Russian, and Arabic for a few who were ex-

²³ Departmental Order 1273, May 6, 1944: *Department of State Bulletin*, May 20, 1944, pp. 488-490.

²⁴ Departmental Order 1314, effective April 1, 1945: *Department of State Bulletin*, April 22, 1945, pp. 777-784. See also Monnett B. Davis, "Reorganization of the Office of the Foreign Service," *American Foreign Service Journal*, May, 1945, pp. 20-21.

²⁵ Andrew B. Foster, "The Division of Foreign Service Planning," *American Foreign Service Journal*, August, 1946, pp. 11-12, 46.

pected to become language officers. During recent years a few officers had been assigned to certain universities for special training in economics and to the Army and Navy Staff colleges.

It was now proposed to go much farther than this by having the Division of Training Services develop comprehensive programs such as: (1) basic orientation in the organization and work of the Department of State; (2) special courses for junior Foreign Service officers, in addition to the basic orientation, to acquaint them with their duties abroad; (3) special courses in administrative, fiscal, and clerical work for both Foreign Service and State Department personnel; (4) advanced specialized training planned on an individual basis, in coöperation with private educational institutions and other government agencies, to develop individual officers and provide the particular skills necessary in the increasingly diversified work of the Foreign Service; (5) language courses designed to familiarize Foreign Service officers with the principal language of the country to which they were to be sent. These were ambitious goals, but considerable progress had been made towards them by 1946. A glance at the *State Department Bulletin* during September, 1946, indicated a variety of orientation lectures scheduled from week to week, and a series of classes in typing, stenography and State Department correspondence for clerical employees. Material for the individual study of more than 25 languages was also available.

The Division of Foreign Reporting Services, the third new division created in April, 1945, was made responsible for reviewing and coördinating all requests for Foreign Service reports and for seeing that the legitimate needs of the State Department and other government agencies were adequately met. Among other things this involved making sure that the staffs in the field were large enough to supply the reports which were requested and that they were kept constantly abreast of policy developments at Washington. Since good reports are the basis for sound policy formulation this strengthening of the reporting arm of the Foreign Service was an improvement of great importance.

As a result of these developments the Office of the Foreign Service came to possess far better machinery than ever before for administering the service and adapting it to its new responsibilities. Nor was it just a coincidence that the strengthening of the Office of the Foreign Service should be followed within the next year by major legislation reorganizing the entire Foreign Service system.

The Act of May 3, 1945

This measure, which had been pending before Congress since February, 1944,²⁶ was intended only as a temporary step until more comprehensive

²⁶ Message from the President, February 29, 1944, transmitting the proposed legislation to the Congress with a report from the Department of State: House Document 457, 78th Congress, 2nd Session. Also *Department of State Bulletin*, March 4, 1944, pp. 227-230. Public Law 48, 79th Congress.

legislation could be secured. It made several needed changes and improvements in the organization of the Foreign Service which were discussed in detail in an earlier issue of this JOURNAL.²⁷ Among the most significant of these was the provision amending the section of the Moses-Linthicum Act of 1931 concerning Foreign Service clerks and creating a new and broader group of administrative, fiscal, and clerical personnel within the Foreign Service. In place of the two categories of Foreign Service clerks provided under the 1931 law, with salaries ranging from about \$1,800 to \$4,000, there was created a new category of administrative officers with salaries ranging from \$3,500 to \$5,600; also a new category of administrative assistants with salaries from \$2,600 to \$3,800; and a category of clerks with salaries ranging up to \$2,900.

The purpose of this action was to permit the recruitment from both within and outside the Foreign Service of individuals qualified to handle the administrative and fiscal work at foreign posts, such as office administration, accounting and disbursing of funds, citizenship and immigration work, visa applications or keeping records of American shipping in foreign ports. Another purpose of the legislation was to provide for more equitable classification and salaries for personnel performing these duties. Prior to this time, with no special category of administrative personnel, the work had been done either by regular Foreign Service officers or by senior clerical employees who had been promoted from the lower grades. Some of the latter had been actually performing administrative duties which were considerably above the level of their classification and salary. The new legislation was intended to release the regular Foreign Service officers from these duties and free them for other work for which they were particularly qualified. It was also designed to assure more correct classification and salaries for clerical personnel engaged in administrative work.

It was clear from the outset that a number of Auxiliary officers could be classified as administrative or fiscal officers under the new legislation and thereby given a regular status in the Foreign Service. While it has not been possible to determine the exact number who were thus transferred some idea may be gained from the facts that the size of the Auxiliary decreased from 976 on January 1, 1946, to 369 on July 1, 1946, and that the number of administrative and fiscal officers and assistants on the latter date was 577. The figure 577 does not of course represent entirely former Auxiliary personnel since a number of former clerks who had previously been performing administrative duties were also transferred to the new category.²⁸ The State Department indicated at the time its intention of

²⁷ Elton Atwater, "Recent Legislation Affecting the American Foreign Service," this JOURNAL, Vol. 39 (1945), pp. 559-565.

²⁸ The figure 577 does not include those who were still classified as clerks in the Foreign Service. On July 1, 1946, there were 2,189 American clerks and 1,757 persons of foreign nationality serving as clerks at the various foreign posts.

seeing that all clerical employees with capacity for administrative work were promoted to suitable classifications in the new corps.

The new category of administrative, fiscal, and clerical personnel existed only up to November 13, 1946, at which time it was absorbed as part of a still broader group of Foreign Service Staff officers and employees created by the Foreign Service Act of 1946. This will be discussed below.

The Act of May 3, 1945, contained another provision which facilitated the liquidation of at least a small portion of the Foreign Service Auxiliary. This was Section 10 (c) which authorized the appointment for special duty in the Foreign Service for periods up to four years of qualified personnel from the Department of State or other federal agencies. Persons from outside of the State Department were required to have previously rendered five years or more of government service in order to be eligible. Under this provision it was possible for any government agency desiring specialized personnel for foreign duty to assign certain of its own qualified employees to the Foreign Service for periods up to four years. The Bureau of Mines, for example, which formerly had eight Auxiliary officers serving as minerals attachés, could have thus met its subsequent personnel needs by requesting that a corresponding number of its own minerals experts be given Foreign Service assignments. Likewise the State Department, finding that it needed certain specialized Foreign Service officers and that it could not obtain them from within the existing service or through the regular channels of recruitment, might select qualified persons either from its own staff in Washington or from another federal agency and appoint them for four-year terms. Nineteen officers had been appointed under Section 10 (c) up to July 1, 1946, although it is likely that some of these had come from other agencies than the Auxiliary.

If the Foreign Service Act of 1946 had not been passed as soon as it was, Section 10 (c) would have played an important part in enabling the Foreign Service to expand or contract as needed and to obtain qualified personnel for temporary periods in excess of its regular authorized strength. The substance of Section 10 (c) was included in the provisions for the Foreign Service Reserve of the Foreign Service Act of 1946 which will be considered below.

As a corollary to Section 10 (c), the Act of May 3, 1945, provided that regular Foreign Service officers could be assigned to other government departments or agencies for periods up to three years (or four years in cases of special need). This gave legal recognition to the practice of occasionally "lending" Foreign Service officers to other agencies to perform specific jobs. It was designed to permit a wider utilization by all government departments of the special experience of Foreign Service officers and, in conjunction with Section 10 (c), to make possible a mutually advantageous exchange of personnel between the Foreign Service and other government

agencies. Its provisions have been continued in the Foreign Service Act of 1946.

The act of May 3, 1945, made one other major improvement in the organization of the Foreign Service, namely, the removal of the so-called percentage limitations on the number of officers in the various classes. Under the Rogers Act of 1924 and the Moses-Linthicum Act of 1931, the number of officers in the six upper classes had been limited to the following percentages of the total number of officers in the service: Class I, 6 percent; Class II, 7 percent; Class III, 8 percent; Class IV, 9 percent; Class V, 10 percent; and Class VI, 14 percent. By this provision no more than 54 percent of the total officer personnel could be included in the first six classes at the same time. The purpose of this was apparently to provide a legislative safeguard against any overloading of the upper classes.

During the war, owing to the increased demands and the shortage of experienced personnel, many officers in the top classes remained at their posts instead of retiring as they normally would have done. This meant that the legal quotas for the upper classes remained filled and that the opportunity for promotion of officers from the lower ranks was greatly narrowed. This resulted in an understandable lowering of morale and efficiency among many officers who deserved promotions but could not receive them. The removal of the percentage limitations made it finally possible to accord promotions where deserved, and action in this direction, including a few double promotions in cases of special merit, was taken shortly after the legislation was adopted.²⁹

The Act of July 3, 1946—the Manpower Problem

Known popularly as the Foreign Service Manpower Bill, this measure embodied a principle which had been included in the original drafts of the Act of May 3, 1945, but which had been dropped in the final stages because its controversial character would probably have delayed the adoption of that much-needed legislation. The controversial principle was the proposal that a certain number of specialized technical personnel from the Foreign Service Auxiliary, the administrative, fiscal, and clerical staff of the Foreign Service, or other government agencies be appointed to the career Foreign Service at whatever grades and salaries were commensurate with their age, qualifications, and experience.³⁰

Designed to meet the recognized need for experienced and specialized personnel within the Foreign Service, this proposal contemplated a significant departure from the regular method of recruitment for the career service. Though the number of persons to be appointed in this manner was expressly limited to five percent of the total officers in the service, the implications of

²⁹ *Department of State Bulletin*, May 20, 1945, p. 939.

³⁰ H.R. 4312, March 2, 1944; H.R. 4902, May 31, 1944; H.R. 5474, November 16, 1944 (78th Congress, 2nd Session).

the plan were far-reaching. Grave apprehension was expressed among some officers that the career principle would be endangered by such a step and the upshot of it was the elimination of this section from the bill which finally became law on May 3, 1945.

The end of the war in Europe, however, and the abrupt end of hostilities in the Far East three months later, created an immediate need for additional officers to reopen the Foreign Service posts in those areas. Likewise, it was becoming increasingly clear that if the Foreign Service were to remain a unified service operating effectively on behalf of all civilian government agencies there would be a continued need for personnel in much greater numbers than in pre-war days. With the Auxiliary destined to be terminated sometime in the early post-war period increased manpower for the regular Foreign Service became a problem the solution to which could not be postponed much longer.

This was the general background against which the Foreign Service Manpower Bill was presented to Congress early in 1946 and finally adopted on July 3.³¹ It authorized within a period of two years the appointment of 250 additional career officers. These may be appointed to any classified grade in the Foreign Service depending upon their age, experience, and ability. In order to be eligible for such appointment, they must:

- (1) be American citizens and have been such for fifteen years;
- (2) be 31 years of age at the time of application;
- (3) have served either (a) in the American armed forces for 90 days or more since September, 1940, and been honorably discharged; or (b) in the American merchant marine during the war emergency period; or (c) in responsible positions of the United States Government for two years or more since December 7, 1941, where the experience would qualify them for the Foreign Service;
- (4) have passed such examinations as the Secretary of State may prescribe.

These provisions were not repealed by the Foreign Service Act of 1946 which was adopted a month later.

The figure of 250 was arrived at after a careful inventory had been made, in consultation with the Bureau of the Budget, of the manpower needs of the State Department and other government agencies which rely on the Foreign Service to meet their needs abroad. Only 120 of the 250 will be appointed during the fiscal year 1947, under appropriations which have been made, and the remainder will not be selected until the following year. The figure of 120 is closely related to the requirements of the thirty-five posts being reopened in the Far East. While officers recruited under this provision will not necessarily be assigned to this area, their entry into the

³¹ H.R. 5244, January 28, 1946. Public Law 488, 79th Congress.

service will make possible the assignment of other qualified officers to these posts.³²

The important advantage of the Manpower Act is that it permits the recruitment of experienced officers who will be ready to assume major positions of responsibility immediately. In this respect, it will make the career service more flexible by broadening the basis of selection and modifying the principle that all new officers must start at the bottom of the scale. It gives credit to pertinent experience outside the Foreign Service, and, within the limits of the 250 appointments, places selection on a basis more like that of the civil service.

There is every indication that great care will be observed in selecting officers under the Manpower Act, and that due regard will be given to the career principle. A nineteen-page application must be submitted including a 300 word explanation of how the candidate's experience qualifies him for the work, and another 300 word statement on why he wishes to join the Foreign Service and what contribution he feels he can make to it. Those who appear from these applications to have the necessary qualifications will then take competitive oral examinations, and those who are successful here will receive appointments.³³ As a further safeguard to the career principle, it is planned to appoint no new officer to any class if he is younger than the average of the youngest 10 percent in that class.

The authorized strength of the career service for the fiscal year 1947 is 1,280 officers. Prior to July, 1945, it had been only 860, but it was increased by law at that time to 1,160. The appropriations to appoint 120 additional officers under the Manpower Act during the fiscal year 1947 bring the authorized strength to 1,280.

The number of career officers had not begun to approach the authorized strength of 1,160 by July 1, 1946, there being only 838 at that time.³⁴ But there were still 369 Auxiliary officers under assignment, and it may be assumed that they enabled the service to meet its manpower needs for the time being.

An expansion in the career service is now under way entirely apart from the Manpower Act. This is taking place through the regular procedure of

³² "Implementing the Manpower Bill," *American Foreign Service Journal*, August, 1946, pp. 22, 64.

³³ *American Foreign Service Journal*, September, 1946, p. 29.

³⁴ The Foreign Service comprised the following personnel on June 30, 1946:

Chiefs of Mission	50
Career officers	838
Auxiliary officers	369
Administrative and fiscal officers	577
Temporary specialists (Sec. 10(c) of Act of May 3, 1945)	19
Clerks	3,946
Miscellaneous employees	2,742

8,541

For a comparison with the personnel in 1939, see above, p. at note 3.

written and oral examinations. In the Spring of 1945 such examinations were given to personnel of the Department of State and the clerical branch of the Foreign Service who wished to become career officers. These were the first examinations given since September, 1941, and as a result 38 appointments were made in December, 1945, and a few more in the early months of 1946.

In November, 1945, special written examinations were given to members of the armed services and veterans desiring to apply for appointment to the Foreign Service. They were not open to applicants from the general public. Over 3,400 took these examinations, the largest ever to take a Foreign Service examination. Of these, only 632 passed the written examinations, and, up to September, 1946, only 186 had succeeded in the orals.³⁵ It was expected that these would quickly receive their appointments, thereby bringing the career service up to over 1,000. Another group of written examinations for members of the armed services and veterans was given at the end of September, 1946, and over 5,000 applicants were designated as eligible to take them. In all probability, there will be enough successful candidates, together with the 120 to be appointed under the Manpower Act, to bring the service up to its present authorized strength of 1,280.

The Foreign Service Act of 1946

This is the most comprehensive piece of legislation ever adopted concerning the United States Foreign Service. It codifies all previous legislation on the subject, and becomes the new organic act, replacing the Rogers Act of 1924 and the Moses-Linthicum Act of 1931. It was approved on August 13, 1946, and took effect three months later, namely, on November 13, 1946.³⁶

Designed to provide the Foreign Service with adequate personnel and organization to fulfill the post-war demands being made upon it, it is predicated on two assumptions: (a) that the United States is committed to a policy of active participation and coöperation in world affairs; and (b) that there should be a single unified service, under the direction of the Department of State, capable of operating abroad effectively on behalf of all government departments and agencies.

Drawn on the lessons of wartime experience, the Act was in the process of preparation for over two years and represents the thinking of a large number of Foreign Service officers, State Department officers, officers of other government agencies concerned with the Foreign Service, and members of Congress.³⁷ In May, 1946, a subcommittee of the House Commit-

³⁵ 112 did not take the oral examinations, and 48 received a grade which was not passing but which would entitle them to return for a second oral examination after one year.

³⁶ Public Law 724, 79th Congress.

³⁷ See, for example, the summary of the papers submitted in the prize essay contest conducted by *The American Foreign Service Journal* during 1944 to encourage sugges-

tee on Foreign Affairs went over the complete draft of the legislation very carefully in a series of conferences with State Department officials. A number of changes were made, most of which concerned greater detailed provisions for the administrative structure of the Foreign Service—notably the creation of the position of the Director General of the Foreign Service, the Board of the Foreign Service, the Board of Examiners for the Foreign Service, and the Foreign Service Institute. The Bureau of the Budget objected to this spelling out of administrative structure in the basic statute, and favored broad legislation authorizing the Secretary of State to prescribe the necessary regulations and to create such positions or bodies as the above by administrative order. The House subcommittee, however, wished to strengthen the existing statutory provisions on Foreign Service administration and even insisted on establishing by statute for the first time the Board of Examiners for the Foreign Service. The Board had previously existed by virtue of an Executive Order. These views prevailed in the final text of the law.

The House of Representatives adopted the bill by unanimous consent on July 20, with numerous commendatory remarks by members of both parties as to how carefully it had been prepared.³⁸ In the Senate it almost failed at one point to obtain the unanimous agreement which was necessary for such speedy action during the closing days of Congress. There was a feeling that a measure of such importance should be debated carefully and only after continued effort by Senators Connally and Vandenberg was unanimous consent finally obtained and legislative action completed.³⁹ This was indeed fortunate for the prospect of holding lengthy debate on the bill at that time would have meant postponement of final action until the following session of the Congress and delayed adoption of the legislation for at least several months.

Final signature by the President was also delayed because the objections of the Budget Bureau to the administrative provisions of the bill apparently carried great weight with him. The Congress had adjourned, and a pocket veto might have resulted had it not been for strong pleas from Secretary Byrnes and Assistant Secretary Russell which brought forth the President's signature just in time.⁴⁰

The principal provisions of the act are analyzed in the following paragraphs:⁴¹

tions from Foreign Service officers on how to improve the Foreign Service. *The American Foreign Service Journal*, March, 1945, pp. 7 ff.

³⁸ *Congressional Record*, July 20, 1946 (daily ed.), pp. 9712-9717.

³⁹ Same, July 29, 1946, pp. 10485-10486, 10494.

⁴⁰ "How the Legislation Developed," *American Foreign Service Journal*, September, 1946, pp. 7-9, 52.

⁴¹ *Reorganization of the Foreign Service*, House Report No. 2508, 79th Congress, 2nd Session. This contains not only a detailed analysis of the changes effected by the bill, but also a parallel-column comparison of the texts of the proposed legislation and the previously existing legislation.

1. Stronger Administrative Direction of the Foreign Service

The act creates the position of Director General of the Foreign Service who, under general supervision of the Secretary of State and Assistant Secretary in charge of Departmental administration, is given broad powers and responsibilities. Since this is the top administrative position in the service, the Director General is to be a Foreign Service officer appointed by the Secretary of State from those in the class of career minister or in Class I. Statutory recognition is thus given to the position which had been first created administratively in 1944, and its importance is emphasized by changing its title from "Director" to "Director General."

A Deputy Director General is also provided for in the act. He is not required to be a Foreign Service officer, and may therefore become something like a Permanent Undersecretary.

No mention is made in the Act of the Office of the Foreign Service but this will of course continue to be the office in the State Department where responsibility for all Foreign Service matters will be centralized. It will be headed by the Deputy Director General of the Foreign Service.

The Act further creates the Board of the Foreign Service, replacing the previous Board of Foreign Service Personnel. Like its predecessor, the new Board will make recommendations to the Secretary of State regarding the personnel management of the Foreign Service. In addition it will advise the Secretary on the more general fields of the functions and the administration of the Foreign Service. The legislation attempts to make the new Board a more effective instrument by relieving it of many of the detailed responsibilities of its predecessor (such as recommending promotions), and freeing it for the consideration of policy questions. The detailed administrative responsibilities have been transferred to the Director General.

The composition of the new Board will differ in some respects from that of its predecessor. Prior to 1939, the Board of Foreign Service Personnel consisted of three Assistant Secretaries of State, including the Assistant Secretary in charge of Departmental administration who acted as chairman. Following the transfer of the Foreign Commerce and Foreign Agricultural Services in 1939, representatives from the Departments of Commerce and Agriculture were authorized to sit as members of the Board whenever matters of interest to their respective departments were under consideration—such as the selection, assignment or training of foreign commerce or agricultural officers.

It was originally expected that the same members would make up the new Board but during the final stages of preparing the bill consultations among the various interested departments took place which resulted in two significant changes: (a) the Director General of the Foreign Service was made a full member of the Board, thereby further enhancing his position

and giving a top career officer a place on the Board; (b) representatives from the Departments of Commerce and Agriculture, together with a representative from the Department of Labor, were given full membership on the Board in place of the right to sit only when matters of special interest to them were being considered. This assures broader representation of the other principal interested Departments in the formulation of general policy concerning the Foreign Service. But it will also probably make the procedure of such policy formulation much more slow and cumbersome inasmuch as all major questions will have to be cleared with the staffs of three other departments besides the Department of State.

2. Increases in Salaries and Allowances

This feature has received the widest publicity of any of the changes effected by the new Foreign Service Act. It has long been recognized that our ambassadors and ministers have been grossly underpaid and that in many cases it would be impossible for a deserving individual without private means to hold such a position. The \$17,500 maximum salary for ambassadors and \$10,000 salary for nearly all ministers have not been changed since 1855, and the available allowances to meet the cost of maintaining a suitable diplomatic establishment have been far from adequate. The British Ambassador in Washington, for example, receives about \$70,000 in salary and allowances tax free, whereas the United States Ambassador in London up until now received a total of only about \$30,000, of which his \$17,500 salary was subject to tax. A survey in June, 1945, indicated that the Spanish, Brazilian, Peruvian, Swiss, Swedish, and Canadian chiefs of mission in the United States also received in total compensation more than was received by the chiefs of mission of the United States in those countries.⁴²

Under the new legislation the posts held by Ambassadors and Ministers are divided into four classes depending upon their importance in the foreign relationships of the United States: Class I, \$25,000 per year (as London); Class II, \$20,000 per year (The Hague); Class III, \$17,500 per year (as Cairo); and Class IV, \$15,000 per year (as Managua). In addition to these salary increases a substantial new allowance is provided (Section 902) for each post to assist in maintaining a residence suitable for the chief of mission of the United States. This is designed to meet the unusual expenses incidental to maintaining a large official residence abroad and will cover expenses which in the past have usually had to come out of the personal funds of the Ambassador or Minister. Since it is an allotment to a post rather than to an individual it means that funds will be available to maintain the official residence and staff between the departure of one Ambassador or Minister and the arrival of his successor.

⁴² *Reorganization of the Foreign Service*, House Report No. 2508, 79th Congress, 2nd Session, p. 129.

The Department of State intends to seek appropriations to provide allotments under this section of up to \$25,000 a year for the most expensive posts. Taken in connection with other allowances which are available this should bring the total funds of the American Ambassador in London up to about \$65,000 which is more comparable to the income of his British counterpart in Washington.

Salaries of Foreign Service career officers are also increased under the new law, although it will be the upper classes which will be the principal beneficiaries. Prior to the general federal pay increases of 1945 and 1946, these salaries ranged from \$2,500 to \$10,000. The general pay increases for all federal employees raised Foreign Service salaries \$770 to \$1,200 a year for those in the lower classes, and \$1,300 to \$1,900 for those in the upper classes. Officers in Class I did not benefit so much since the top limit on their salaries was fixed at \$10,000, the same level as that of ministers. The Foreign Service Act of 1946 increased this top ceiling to \$13,500 and established a salary range for career officers of \$3,300 to \$13,500. Under this, Class I officers will receive increases of \$2,000 to \$3,500 (old level: \$10,000; new level \$12,000 to \$13,500). Class II officers will receive increases up to \$1,900 (old level: \$9,975 to \$10,000; new level: \$10,000 to \$11,900). Officers in the other classes will receive virtually no increases or relatively small increases, although they will of course retain the gains resulting from the general federal pay increases of the past two years.⁴³

Foreign Service officers will also benefit by two new allowances established by the Foreign Service Act of 1946.⁴⁴ The first of these (Section 901 (2) ii) will cover unusual expenses incurred in establishing residence at a new post. Such expenses, which have frequently caused serious personal hardship in the past, might include the purchase of new clothing when an officer is transferred from a post in the north to a tropical post, or the acquisition of furnishings and equipment suitable for a different location such as electrical appliances to fit a different voltage. Other miscellaneous expenses involved in setting up a new residence are also covered by this allowance.

The second new allowance (Sections 941-943) covers medical and hospital expenses incurred by American personnel in the line of duty abroad. This will be of particular help to those stationed at unhealthful and tropical posts where diseases like malaria and dysentery are often contracted and where adequate medical and hospital care are usually not available.

The previously existing allowances covering such things as living quarters, higher costs of living abroad, and official entertainment are continued in the new legislation.

⁴³ "What Will My Salary Be?" *American Foreign Service Journal*, September, 1946, p. 21.

⁴⁴ Other Foreign Service employees who are American citizens will receive these allowances.

3. Fewer Classes of Foreign Service Officers

The number of classes of Foreign Service officers is reduced from eleven to seven, including a new class of Career Minister which is created. The purpose of this is to provide a more realistic basis for classifying the officers and administering the system of promotions. It had been found during the time since the Rogers Act that there were not eleven different levels of responsibility in the Foreign Service, and that the maintenance of that number of classes was unduly cumbersome.

The establishment of a new class of Career Minister, at a salary level of \$13,500, brings the top rewards of the Foreign Service within the career itself rather than outside as heretofore. This rank will be held by occupants of certain key positions including those of chief of mission, Counselor of Embassy at the largest capitals, Consul General at the most important consular posts, and positions of marked responsibility in the Department of State. The title of Career Minister will have currency chiefly within the Foreign Service itself as opposed to the local title of Ambassador or Consul General.

4. Foreign Service Reserve Officers

A new category of Foreign Service Reserve officers is created by the Foreign Service Act of 1946. These will be individuals with specialized skills, appointed for temporary periods up to four years from within or outside the government service. During the war this kind of personnel was obtained through the Foreign Service Auxiliary. The Reserve replaces the Auxiliary in this respect and will provide a flexibility in meeting temporary needs in all the specialized fields. It will include such officers as cultural attachés, labor attachés, and information officers.

Reserve officers will be grouped in six classes comparable to those of regular officers and with corresponding salaries. They will be appointed at whatever rank for which they are qualified and will not be obliged to enter at the bottom of the scale.

The establishment of the Reserve is one of the most important improvements brought about by the new legislation. It will strengthen the Foreign Service through the addition of highly qualified individuals from the outside, and will provide a body of personnel who, upon returning to their own professions, can interpret the Foreign Service program to their local communities.

5. Foreign Service Staff Officers and Employees

The recent legislation also creates a group of Foreign Service Staff officers and employees. This will include those who were previously in the administrative, fiscal, and clerical service established by the Act of May 3, 1945, and all other American citizens in the Foreign Service working as miscel-

laneous and custodial employees. Some Auxiliary officers will likewise be absorbed in it. Twenty-two classes of personnel are provided, covering the entire range of technical, administrative, fiscal, clerical, and custodial work, with salaries running from \$720 to \$10,000 per year. The middle and upper ranks will comprise senior administrative and fiscal personnel, together with specialists (such as economic analysts, civil air attachés) who have been given long-term appointments as compared with the temporary appointments of Reserve officers. The lower ranks will include junior administrative personnel, clerks, radio operators, couriers, custodial, and other miscellaneous employees. Appointments to the staff corps will be made on a basis similar to that for the regular civil service.

6. Transfer of Reserve or Staff Officers to the Career Service

The basic principles of the career system in the Foreign Service have been maintained, but greater flexibility and adaptability have been sought in the new legislation. To this end provision is made that Reserve officers or Staff officers may be appointed to the middle or upper grades of the career service after four years' experience (three years if one is over 31 years of age), provided they are qualified and pass certain examinations.

7. Revision of the Promotion System

The new law embodies the Navy system of "promotion-up or selection-out" for Foreign Service officers. Under this, deserving officers are able to receive prompt advancements, and officers who fail to win promotions within a prescribed number of years are retired from the service with either an annuity or lump-sum settlements. The purpose of the new system is to give greater weight to merit than to seniority in the according of promotions.

Selection boards will be appointed to evaluate the performance of Foreign Service officers and determine who shall receive promotions. It is planned that these boards shall consist of several Foreign Service officers and departmental officers, and that their composition shall completely change each year. This will assure every officer that his case will be considered by a group of officers reasonably near him in rank, and that if he fails to win a promotion during any one year his case can be reconsidered the following year by a new board. It is the virtue of the system that "selection-out" becomes automatic through an officer's failure to be promoted within a given period and does not depend upon the affirmative action of those in the personnel administration.

Under the former promotion system, promotions were dependent upon recommendation by the Board of Foreign Service Personnel, upon which no career officers sat, together with possession of an efficiency rating of satisfactory or better from one's supervisory officer. Since these ratings were confidential in character, and were kept secret even from the officer con-

cerned, there was widespread criticism of this procedure. The new legislation changes this by permitting individuals to be informed of their efficiency records and the way is thereby opened for the use of such records to enable a person to overcome his weaknesses.

8. Establishment of a Foreign Service Institute

A Foreign Service Institute is created to furnish in-service training for Foreign Service and State Department personnel and for personnel of other government agencies who need instruction in foreign affairs. It will replace the Division of Training Services in the Office of the Foreign Service and continue the excellent program already begun by it. The faculty of the Institute will be recruited from the leading scholars of the country as well as from the State Department and Foreign Service. In addition to formal instruction to be given at the Institute itself arrangements will be made for Foreign Service officers to work and consult at high levels in the Department of State or any agency, business or research organization or educational institution where possibilities exist for widening the background and raising the professional competence of Foreign Service personnel.⁴⁵ The emphasis will be not alone on training at the beginning of an officers career, but at recurrent periods throughout his service.

9. More Frequent Contact with the United States

One of the most general criticisms expressed by Foreign Service officers has concerned the lack of sufficient opportunity to keep in touch with trends of thought and activity in the United States. The new legislation recognizes this by providing for more frequent and regular return to the United States through increased opportunity for home leaves, assignment to the Department of State or other agencies, and in-service training.

10. Other Administrative Provisions

(a) The retirement system for Foreign Service officers is improved and expanded in several respects.

(b) Foreign Service Staff personnel are granted a salary differential for periods at posts where there are unusually difficult or unhealthful living conditions (Section 443).

⁴⁵ Closely related to this was the establishment of the National War College, July 1, 1946, under the joint sponsorship of the Departments of State, War, and Navy, to provide training for a select group of officers from the armed forces and the Foreign Service. The training, which began in September, 1946, and will continue until June, 1947, deals with political-military subjects, military strategy and the integration of foreign policy with military policy. Ten Foreign Service officers are taking this course. See Perry N. Jesper, "National War College and Department of State," *Department of State Bulletin*, November 10, 1946, pp. 837-840.

(c) Foreign Service officers assigned to positions in Washington which under civil service have higher salaries than their regular salaries will receive a salary differential to bring their salaries up to the civil service level (Section 571 (d)).

(d) All alien employees of the Foreign Service are grouped together in one category for purposes of administration.

The foregoing analysis gives some idea of the thorough renovation of the Foreign Service which has been effected by the legislative and administrative developments of the past two years. They embody many of the lessons of the past and while they may not represent a perfect solution they do constitute a sincere attempt to provide the Foreign Service with adequate machinery and personnel for its tremendous post-war duties. Gigantic tasks lie ahead in the development of better understanding between peoples, and the Foreign Service can exercise tremendous leadership in this field. It constitutes our first line of national defense, and, provided it is given sufficient appropriations, will now be in a much stronger position to do the job successfully.

EDITORIAL COMMENT

THE INTERNATIONAL COURT OF JUSTICE

In this number of the JOURNAL appears the twenty-fifth annual article by our colleague, Judge Manley O. Hudson, on what is popularly known as "The World Court." To publish twenty-five consecutive articles on any subject is a unique achievement for both the author and the publication which carries them. A quarter of a century's accomplishment is generally marked as a jubilee year and celebrated as such. A record of twenty-five years in the judicial settlement of international disputes is not only cause for jubilation over the past but raises the greatest hopes for the future.

No one, clearly, is better qualified than Judge Hudson to inform the readers of the JOURNAL on the organization, procedure, meetings, advisory opinions, and decisions of the World Court, to offer constructive criticism. He was present at the Court's inception at Paris in 1919 and was a keen observer of its establishment in 1920. As a faithful follower, he watched its work with sympathy and supported it with zeal until 1936 when his interest and devotion were rewarded by election to the Bench of the Court. His judicial labors were performed with characteristic energy, constancy, and distinction until the Court's enforced silence during the military occupation of The Hague by an enemy who knew not law or justice.

Judge Hudson took an active part at the Washington and San Francisco conferences of 1945 in promoting the restoration of the Court substantially in its original form and for continuously identical purposes. His four volumes of *World Court Reports* covering the years 1922 to 1942,¹ and his two treatises published in 1934 and 1943,² are standard reference works indispensable to every international law library.

The American Society of International Law has reason to be justly proud of its contribution to the knowledge of the World Court and its accomplishments by the publication of Judge Hudson's twenty-five annual articles. It also feels the greatest satisfaction in the part taken by its officers and members in the pioneering years for an international court of justice. Outstanding in this work were the initiative of Elihu Root, for many years President of the Society, who, as Secretary of State, proposed the transformation of the Court of Arbitration at The Hague into a permanent court, and the indefatigable labors of our predecessor, Dr. James Brown Scott, one of the founders of the Society and the founder of its Journal,

¹ *World Court Reports*, Vols. 1-4, Washington, Carnegie Endowment for International Peace, 1934-1943.

² *The Permanent Court of International Justice, a Treatise*, New York, Macmillan, 1934; *The Permanent Court of International Justice, 1926-1942*, New York, Macmillan, 1943.

in seeking, while Solicitor of the Department of State and later as a private citizen, to bring into being the Court of Arbitral Justice recommended by the Second Hague Peace Conference of 1907. Both Mr. Root and Dr. Scott later participated in the formulation of the Statute of the Permanent Court of International Justice, the signature of which actually brought the Court into being. Both suffered the disappointment of seeing the Court rejected by the Government of the United States, and neither lived to see their Government become a member.

Judge Hudson's career spans the three eras, first, when there was no international court in existence, then during the Court's twenty years of successful operation without membership of or assistance from the United States, and, finally, after the Court survived a devastating World War and has been restored with the United States a fully supporting member. His articles are consequently completely informative and highly authoritative. They deserve republication in a single volume marking the first twenty-fifth anniversary in recorded history of the judicial settlement of international disputes. An evolutionary concept which has become an actual reality and persisted in the life of nations for a quarter of a century cannot die. It can only progress.

GEORGE A. FINCH

Editor-in-Chief

ENCOURAGEMENT OF THE DEVELOPMENT OF INTERNATIONAL LAW
BY THE UNITED NATIONS

In pursuance of its mandate under Article 13 of the Charter, the General Assembly of the United Nations has taken a significant step toward encouraging "the progressive development of international law and its codification." On December 11, 1946, it adopted the following resolution:¹

The General Assembly

Resolves to establish a committee of sixteen Members of the United Nations to be appointed by the General Assembly on the recommendation of the President, each of these Members to have one representative on the committee.

¹ Journal, No. 58 (Supp. A), p. 470.

The preamble proposed by the Sixth Committee but not read to the General Assembly, ran as follows (Document A/222, 6 December 1946):

"The General Assembly recognizes the obligation laid upon it by Article 13, paragraph (2), of the Charter to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

"Realizes the need for a careful and thorough study of what has already been accomplished in this field as well as of the projects and activities of official and unofficial bodies engaged in efforts to promote the progressive development and formulation of public and private international law, and the need for a report on the methods whereby the General Assembly may most effectively discharge its obligations under the above-mentioned provision."

A Secretariat paper, Document A/122, 17 October 1946, traced the historical background of the provision in Article 13.

Directs the committee to study:

(a) the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification;

(b) methods of securing the coöperation of the several organs of the United Nations to this end;

(c) methods of enlisting the assistance of such national or international bodies as might aid in the attainment of this objective and to report to the General Assembly at its next regular session.

Requests the Secretary-General to provide such assistance as the committee may require for its work.

This matter had been placed upon the agenda at the request of the United States delegation, and a first draft was offered by the American and Chinese representatives;² proposals were made also by the delegations of the Argentine Republic³ and Saudi Arabia.⁴ On the other hand several delegations deemed the present world situation to be unfavorable for the work of the codification of international law and, without opposing it in principle, would have postponed a consideration of the subject.

The matter was first considered by a sub-committee of the Sixth Committee, and later by the Sixth Committee itself.⁵ Account was taken of the doubts expressed by the insertion of the word "eventual" before codification. It was generally agreed that the initial task was to study methods, and the mandate of the committee was thus limited. Sub-paragraph (b) of the resolution grew out of a proposal for consultation with the Economic and Social Council. Sub-paragraph (c) is notable for its recognition of the essential rôle of "national and international bodies" which may be official or unofficial. The size of the committee was debated at some length, a smaller number of members having been proposed. The report of the Sixth Committee⁶ envisaged a "fresh approach" to the problem, "in view of difficulties encountered in past efforts"; and it wished the committee to be set up to be "genuinely representative of the main forms of civilization and of the principal legal systems of the world."

The President of the General Assembly designated the following States to be represented on the committee: Argentina, Australia, China, Colombia, Egypt, France, India, The Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republic, United Kingdom, United States of America, Venezuela and Yugoslavia. Later, after a tribute to the "strong legal tradition" of South American countries, he added Brazil and thus increased the membership to seventeen. A meeting of the Committee is now scheduled for an early date.

² Document A/C.6/54, 6 November 1946.

³ Document A/C.6/72, 17 November 1946.

⁴ Document A/C.6/81, 21 November 1946, and Document A/C.6/108, 3 December 1946.

⁵ Journal, No. 53, Supp. No. 6, pp. 122-127.

⁶ Document A/222, 6 December 1946.

The General Assembly referred to the same committee the draft declaration on the rights and duties of States, proposed by the Panamanian delegation, and it directed the committee "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."

A new vista thus opens for developing international law! Those who work in the field will take an intense interest in the work of the committee, and they will feel reassured if it includes among its members men who, having lived with the subject, are capable both of valuing the methods followed in the past and of appraising the changes in the world which now necessitate a "fresh approach." It is gratifying to feel that our progress in international organization may mean that continuous attention can now be given to "revitalizing and strengthening international law," and it is a happy augury that a high official of the United Nations Secretariat, Mr. Y. L. Liang, has been charged with responsibility to that end.⁷

A significant contribution to the committee's deliberations was made in the paper⁸ read by Sir Cecil Hurst before the Grotius Society in London on October 16, 1946. Out of his long experience, Sir Cecil submitted that the work to be done with respect to codification, to have "any chance of success," (1) "cannot be done by Governments or by delegates working under Government instructions"; (2) "cannot be done upon a purely individual basis" as the "work of one man alone"; and (3) "must be undertaken on both a national and an international basis."⁹ Even if these views should not be wholly shared by the members of the committee they are stated with such cogency that they merit the most serious consideration.

MANLEY O. HUDSON

INTERNATIONAL LAW AND INTERNATIONAL ORGANIZATION

International law is a law between independent states. The effort to form a centralized or super government, evident during the last thirty years, implies on the other hand an abolition of independent states. This finds its reflection in the League of Nations, which had to recognize the continued existence of states, and less strongly in the United Nations Organization, which may have abolished the independence of the small states not possessing a veto power. It is inherent in the proposal of Judge Roberts and his friends for a world government. They would have domestic de-control, but believe in international control, even of individuals. All

⁷ Journal, No. 58 (Supp. A), pp. 475, 485.

⁸ Printed privately, under the title "A Plea for the Codification of International Law on New Lines."

⁹ See Elihu Root, "The Function of Private Codification of International Law," this JOURNAL, Vol. 5 (1911), p. 577.

these movements contemplate so fundamental a change in international law, and a substitution of some new municipal law, that attention must be called to the transformation. The effort of the United Nations to pay lip service to the continued prevalence of international law is in a sense contradictory, for if the United Nations were successful in creating a superstate they would have to abolish international law. Perhaps the federalized state still will require international law for its members.

The latest evidence of the change from international to a superstate municipal law is found in the proceedings of the Nuremberg trials. However little sympathy needs to be wasted on the Nazi big-wigs there condemned, attention must be called to the fact that it was not an old or a new international law which was applied, but a new municipal law, a criminal law which was not theretofore known. To punish people for making war contemplates that judges of other states are in a position to reach such a conclusion, whereas international law had not given anybody authority to reach such a judgment. It must be, therefore, that the victors have simply availed themselves of their power as victors to judge the vanquished, and for that reason it seems unlikely, in spite of Justice Jackson's predictions, that the judgment, however just, will commend itself as an authority in international law.¹ Leaving aside the contradiction in terms, the verdict is more likely to involve a condemnation, judicial or otherwise, of the leaders of the losing cause. The efforts to abolish war, however commendable, do not seem impressive to those charged with the duty of safeguarding the defense of the state. Armaments are today higher than ever before in peacetime, and a condition of apprehension and mistrust prevails. These facts are largely due to recent departures from international law as we have known it heretofore. With the existence of the atomic bomb humanity may well be apprehensive as to its future.

It is to be noted that the really vital international decisions, the peace treaties which are supposed to chart the future, have no relation to law. They are dictated by political considerations involving all the factors that enter into politics. The law is hampered by such arrangements, for they become a superior authority.

We are therefore faced with the condition whether international law can prevail in the face of the trend, however unsuccessful, toward a unified centralized state. The law's continuance may be evidenced in the fact that treaties on trade and other matters continue to be adopted, and that the states regard themselves as independent.

¹ We leave aside the fact that the judges of the Tribunal, in characterizing "aggressive" war as a crime, were each condemning the history of their own nation, that the Kellogg Pact had numerous exceptions upon which the signatory nations insisted and that the Kellogg Pact had not heretofore been regarded as applying to individuals: *The New York Times*, Oct. 1, 1946, p. 12, col. 3, and Oct. 2, 1946, p. 22. Moreover, a military order leaves no "moral choice" to the soldier commanded.

The United States Undersecretary of State has recently observed that our intervention in the Dardanelles is due to the fact that the United States has an interest in all matters which might disturb the peace of nations.² If the country is thus to intervene promiscuously in all matters occurring anywhere, it is likely to have its fingers burned badly. It is a justification for the superstate theory consistent only with municipal law, which began with the assumption that individuals were subject to the control of international law, and was continued by the theory that independent states no longer exist. The discredited theory of the "just war" plays its part in this wishful thinking. All this of course is contrary to fact, but logically a superstate must intervene on behalf of every injured person, whatever his nationality, to redress wrongs which international law had heretofore left to the exclusive jurisdiction of his national state. There is an obvious contradiction, therefore, in leaving the diplomatic protection of the citizen abroad within the jurisdiction of his national state. Logically this should be the function of the superstate, whether a non-existent international community or one of the states arrogating to itself a temporary superiority. That this superiority is likely to be challenged and that it leads to alliances and combinations and imperialism is left unnoticed.

This is not to say that independent states have not common interests, which they have heretofore evidenced in their subservience to law and in their promotion of administrative unions, a function largely taken over now by the Social and Economic Council of the United Nations and its Commissions. This is worth while work and there is no intention of disparaging it. But when it comes to political centralization, a fundamental change in state life is inherent. The states show no evidence of a voluntary willingness to forego their sovereignty, so that we are left in some dilemma as to whether the new theory of subordination can prove effective. To speak of international law fitting the new theory is to try to fit a square peg into a round hole. This mechanical operation has usually been unsuccessful. Whether it can be more successful in political international life is problematical. The subject deserves more consideration than it has thus far received.

EDWIN BORCHARD

THE PROBLEM OF WORLD GOVERNMENT

The United Nations Charter came into force on October 24, 1945, less than four months after it was signed. Its inadequacies were not the result of any oversight but were deliberately written into the Charter in order that the Organization might be firmly grounded in the political environment in which it must operate.

In the period between the signing of the Charter and its coming into force atomic energy had been turned by man against man. The calculable

² *The New York Times*, Oct. 2, 1946, p. 14.

effects of the release of nuclear energy merged swiftly into the incalculable. Was the United Nations Organization already out of date before it came into existence? Would the desire for freedom from fear overcome the traditions of national freedom? Was world government the counterpart in human affairs of the atomic bomb in the realm of science?

Apparently many thought so. Atomic physicists, Supreme Court Justices, and radio commentators signed manifestoes for a world state, a world government, a limited world government, or perhaps a government of one-half a world. The logicians attempted to substitute logic for experience as a solvent for problems of politics. The practical problem of how to get from here to there—how to go about setting up a world government—apparently troubled few of those who regarded world government as a solution. It was natural that advocates of world government should object to discussing its probability—since it was so improbable that the United States and Soviet Russia would wreck the United Nations to please the perfectionists. It was natural that advocates of world government preferred discussing its desirability to its probability. The United Nations is a living reality, and, because it is a human institution, it is not without fault. World government has no existence except as a figment of the imagination and may easily be imagined as flawless by the untutored mind.

For those who face the problem at all the favored first step towards world government is usually termed "the abolition of sovereignty." But sovereignty is not a fact; nor is it actual power; it is a legal theory, concerning the authority of the state in the field of law. If you could abolish the concept, power would remain. Man-power, natural resources, and industrial potentials would remain in Soviet Russia or the United States even if the legal concept of "sovereignty" could be "renounced" or "transferred."

Even if next year a world state could be set up and endowed by its Charter with supreme executive, legislative, judicial, and administrative powers the gap between its legal authority and social and political realities would be so enormous as to condemn it in advance to futility. Social life is regulated not only by law and institutions of government, but by differing usages, traditions, moral and religious conceptions, and political and economic ideologies.¹ The creation of any world state is more likely to be the result of an evolutionary development. In any particular stage of development law must have roots in these social and political realities or be reduced to the fatuity of a Kellogg Pact. In the present stage the very defects of the United Nations are evidence that it accords with basic realities; but evolution towards the next stage is already noticeable. The decision of the Security Council to retain jurisdiction over the Soviet-Iranian con-

¹ See Dietrich Schindler, *Contribution à l'étude des facteurs sociologiques et psychologiques du droit international*, in *Recueil des Cours de l'Académie de Droit International de la Haye*, Vol. 45 (1933), p. 237.

troversy even though both states asked for the dismissal of the case is an important example of the way in which an international organization can, by evolutionary process, increase its authority at the expense of its members. The gathering pressure against the veto privilege will serve to test whether the atomic bomb has or has not advanced political possibilities beyond existing legal techniques. Further stages might include an increase in the number of non-sovereign Members of the United Nations, a gradually advanced legislative process, dispensing with ratifications, the enactment by special majority of rules of law binding on Members, even the enactment of laws directly binding upon individuals in delimited fields. By a process of evolution, during which the gap between law and social reality is never allowed to become too great, an international organization can gradually acquire authority and power never delegated to it. Thus the last stage—the creation of a world state—although a revolution in legal theory, might come to seem but a relatively slight change in practice.

This dream, it should be noted, is anathema to the advocates of world state or world government. The first immediate step, writes Thomas K. Finletter² is to set up "a rule of law." Later on he changes his timetable by stating that law cannot exist without government; but let us quote him: ". . . We must avoid being taken in by the idea of working into the rule of law by gradual steps. Gradualism is just another way of avoiding the issue. . . . The fallacy of the gradualist notion lies . . . in its failure to recognize that the first step must necessarily be the final one; that no nation can give up its nationalist defences before . . ." it has security. Now if this statement means anything at all, it seems to say that there is, indeed, no hope for a world state.

It might be well to investigate some of the assumptions which seem to make a world state so desirable to its advocates. Where did they ever pick up the notion that a world state would rest on democracy? If the population of the world is two billion, simple arithmetic and an elementary knowledge of government are sufficient to show that over one and one-half billion people either do not live in states or territories with a democratic form of government or are governed by regimes militantly opposed to political democracy. Many less than 500,000,000 people, or less than one-fourth of the world's population, live under a democratic form of government, let alone the many republics here included which are democracies only in name. Even if we assume that all men in their hearts are democratic, we must not overlook the traditions and political realities under which they have grown to adulthood, or the ignorance, illiteracy, inertia, or active ideological hostility to majority rule. Moreover a world legislature based upon popular representation—assuming that we could establish it—would find itself without any community of values and standards, the

² "Timetable for World Government," in *The Atlantic Monthly*, Vol. 177, No. 3 (March, 1946), pp. 53-60.

indispensable minimum for viable government. The alternative would be the exercise of arbitrary world power by the few. "Because of the vastness of the territory over which it ruled," writes Gerhart Niemeyer, "a world government would become . . . less dependent on consent, . . . more standardized, and therefore culturally more oppressive, than any other government." Against a government so divided that it is unable to govern, or against governmental absolutism, force is an alternative which cannot be ruled out by law.

This leads to further assumptions underlying the plea for a world state. One writer seems to assume that as soon as political units lose their sovereignty wars must automatically cease between them as a mechanical consequence of their being merged into a larger unit. This assumption overlooks civil war. We shall have gained nothing by changing the name of war to civil war. Others favor passing a law against war and placing "the collective might of the world community" or "preponderant military power" behind its enforcement. Unfortunately collective might or preponderant military power must have a geographical location, and this collective might appears, on examination, to be Russian or American or the might of other national groups. True, the assumption of the world government dreamer is that there will be no Russian state, but it is clear that the Russian nation will remain and the people of Russia will think like Russians and believe what Russians believe; they may even act like Russians. What this suggests is that there may be such a thing as politics—even in a world state. Politics is a struggle for power; and where men hold deeply entrenched views on nationalism, politics, and economics, the assumedly automatic application of the collective might of the world community turns out to be a matter of power politics—as it is today. Nor is the issue avoided by the assumption that since world law would apply directly to individuals organized national resistance to political, economic or social legislation, applicable *urbi et orbi*, would become unlikely or impossible. In fine, any belief that by setting up a world state, making its laws directly applicable to individuals, passing laws to solve problems which have baffled the efforts of men since the beginning of time, and devising automatic sanctions for their enforcement, any such belief rests upon the greatest assumption of all, namely, that human nature and the world upon which the world state emerges will already have changed so as to ease the tasks of world government.

This line of reasoning is considered irrelevant and even unfair by those who advocate not a world state but "a limited world government." However, their "limited world government" appears indistinguishable from a world state. Thus, Thomas Finletter, after advocating "a limited world government," or "a government narrowly limited to the essential powers . . . necessary to stop war," proceeds to refer to it as "a super-state . . . of narrowly limited powers." The confusion here exhibited is more than

verbal. The question is one of jurisprudence as well as of politics. It is not the *quantum* of powers exercised by a governmental entity which determines its juristic character, but its competence to define the limits of its own authority. If Mr. Finletter's "limited world government" is competent to set the limits of its own authority and is, as he says, "superior to the national states," it is more than a world "government"—it is a world state even though it delegates to its central world government only the powers "necessary to stop war" and leaves other powers elsewhere. The juridical alternative to a "world state" is not a "world government" but an "international government," whose authority is conferred and delimited by treaty. This alternative is rejected with scorn by Mr. Finletter, who suggests that if Russia declines our offer of "a limited world government . . . we should form the supra-national government with those nations who are willing to join it." This is only another way of urging Two Worlds instead of One—a fatality to which we are so close that it should not be encouraged.

In politics there are no automatic or permanent solutions. The grave problems which divide Soviet Russia from the nations of the western world cannot be solved by changing the words in a written document. The United Nations' Charter already provides adequate procedures. With unconquerable persistence we can develop the scarcely tapped resources of the Charter and extend its metes and bounds. The present alternative to the United Nations is not world government but chaos.

HERBERT W. BRIGGS

THE PROBLEM OF MORAL DISARMAMENT

A decade ago it was a common criticism of the Covenant of the League of Nations that it had made provision for military disarmament but no provision for economic disarmament. Hostile critics of the League pointed to the collective security provisions of the League as insuring the maintenance of the *status quo*, found that the world was divided into the "haves" and the "have-nots," and pronounced the doom of the League unless its members were prepared to make the League an instrument of justice as well as a means of preventing aggression. Friendly critics, while not denying the disturbing factor of the unequal distribution of resources among the leading nations, insisted that the proper solution was not to attempt to establish new political frontiers but to lower the economic barriers between states, to remove the obstacles to the free flow of trade, to open up the channels of commerce, to promote economic disarmament side by side with political disarmament. Only a few critics saw clearly the importance of a third factor, that of moral disarmament; and none were able, under the circumstances, to formulate it in terms of a rule of law.

It remained for the development of the Nazi Government in Germany to bring home to the international community the danger latent in the com-

bination of national fanaticism and the newest instruments of aerial warfare. Nationalism of an exaggerated character was not a new phenomenon in international relations, and it had been a provocative cause of war long before the doctrines underlying *Mein Kampf* came to form the basis of a new order in Germany. But with the Nazi regime nationalism took on a fanatical character. It became a pathological condition dominating not merely the constitutional organization of the state but its foreign policy as well. Constitutional liberties disappeared. Government was no longer based upon the will of a free people, but upon the will of the Fuehrer. In foreign relations the basic principle of the juridical equality of states was denied. Expansion by means of the conquest of inferior peoples was openly proclaimed, and the conception of world domination became no longer the dream of visionaries but the program of men in power.

How was it that ideas so contrary to the inheritance of great masses of the German people could have taken so strong a hold upon them? Neither the economic grievances caused by the Treaty of Versailles nor the intrinsic worth of the new conceptions constituted of themselves a sufficient explanation of the unanimity with which a whole people responded to the call of their leader. Intimidation played a large part. But in addition to intimidation there was the ever-present and all-pervading power of the government to control and direct public opinion. On the one hand the Nazi Government was able to shut off the sources of information from abroad and the exchange of ideas within the country. By a rigorous suppression of public meetings, by denial of the freedom of the press, by a system of espionage, and by control of the instruments of communication with foreign countries, the Nazi regime was able to deny the free play of ideas that might have corrected the extravagances of its own ideology.

But of equal or perhaps greater effectiveness than mere suppression of freedom of information and expression was the power of the regime to direct the thought of the people by its monopoly of education and of radio broadcasting, which enabled it to instill into the minds of young and old alike sentiments of suspicion and distrust of other peoples. Every ill from which Germany suffered could be attributed to the acts and policies of foreign governments. Germany could be made to appear in danger of attack from states which themselves were fearful of a German attack. By persistent reiteration, ideas could be made to take on the character of fixed complexes, to which even normally fair-minded people fell victims.

By the time that the international community realized the imminent threat to the peace presented by the combination in the German Government of totalitarian control over the domestic life of the country and aggressive nationalism in its foreign relations it was already too late to act. For the German leaders had in their possession instruments of warfare which made it possible for them to inflict irreparable destruction upon individual states before the international community could organize its combined forces

to overcome the aggressor. What conclusion are international lawyers to draw from the experience? Clearly that the international community has the right to anticipate the purposes of such a government and to take measures in due time to prevent their accomplishment. This means, in practical terms, that in determining what constitutes a threat to the peace, in accordance with the terms of Chapter VII of the Charter, the United Nations may consider not merely the size and the strategic disposition of the military forces of a country but the totalitarian character of its government and the degree of aggressive nationalism which it manifests in the conduct of its foreign relations.

But these are elusive factors upon which to base a decision to take action to protect the peace of the community. The totalitarian character of the government might be agreed upon without difficulty. But the existence of a dangerous form of aggressive nationalism would be a more subtle matter to determine. Proclamations of national policy can not always be read literally. Ideologies do not always bear translation into terms of actual intent. It is scarcely to be expected that another Hitler, if he should arise, would proclaim his intentions so openly. Moreover, democracies are by their very nature slow to attribute to other states intentions of aggression which are contrary to their own constitutional traditions. Those which might be called upon to take the lead in anticipating acts of aggression would be by their very traditions of liberty and their respect for the rights of others reluctant to have recourse to force except in the presence of a threat to the peace so imminent as to leave no doubt of the danger of delay. Unhappily, as in the case of Germany, the final act of aggression, if a state should be intent upon committing one, would be carefully timed; and with the newest instruments of destruction at hand the act of aggression would probably have attained its objective before the international community had come to a decision to take action.

It would seem, therefore, that measures taken by the United Nations for the solution of the problem of military disarmament can only be partly effective unless accompanied by measures looking also to moral disarmament, to the elimination as far as possible of the spirit of fanatical nationalism that might lead a country to use new weapons of aggression when they became available to it. The fact that investigation by an international authority of the conditions existing in each country is made an essential condition of the plan of control of atomic energy proposed by the United States is of itself a confession that in so crucial a matter states are not prepared to trust their pledged word. That is not a matter of surprise, in view of past traditions of national defense and the complexes that have developed during years of political isolation. But even the most effective methods of investigation that may be adopted as a means of controlling the use of atomic energy may prove to be only partly successful unless some degree of mutual confidence can be created between states whose conflicting

ideologies are at present a cause of suspicion and distrust. Obviously this confidence can not be brought about by mere declarations of good intentions; it must be founded on mutual understanding based upon the recognition of common interests that surpass in scope and importance any differences that may exist in lesser matters. To bring about this recognition of common interests dominating all others, new rules of law are in process of development.

It is significant that whereas the Covenant of the League of Nations contained no suggestion of an international "bill of rights" the Charter of the United Nations refers to "human rights and fundamental freedoms" from the beginning to the end of that document. In summary the member governments pledge themselves to take joint and separate action, in coöperation with the organization, for the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This is a far-reaching agreement, with clear implications of moral disarmament. If it can be given practical effect within a reasonable time there is hope that military and economic disarmament may become a reality. What does it mean in terms of international law?

In the first place it means that the political status of a people within its own borders is now a matter of concern to the international community. It is no longer a purely domestic question what liberties a state may choose to grant to its individual citizens. If the international community now demands certain fundamental rights for the citizens of every state, it does so not merely for altruistic reasons, to elevate the status of man as a human being, but rather as a condition of its own survival. Almost thirty years ago a great American statesman, Elihu Root, confronted with the conflict between democracy and German military autocracy, observed that the two opposing systems could not live side by side. "The world can not be half democratic and half autocratic. It must be all democratic or all Prussian. There can be no compromise." Today the conflict goes even deeper. It is not only a conflict between forms of government but between the ends and objectives of government, between ideologies, between conceptions of the kind of civilization that men are seeking to attain. Is the conflict an irrepressible one? There is no doubt that it is irrepressible in its military aspects. Competitive armaments would be a fatal obstacle to a world of law and order even if the several nations had the same forms of government and the same political ideals. Where they do not, as they do not today, the effect could not be in doubt. The invention of new instruments of destruction has merely given additional urgency to a problem that would in any case have been a pressing one.

But is the conflict equally irrepressible in its political and social aspects? Can democracy and dictatorship coöperate together for the ends proclaimed in the Charter? Can states which respect human rights and fundamental

freedoms come to rely upon the good faith of totalitarian governments and work hand in hand with them in the promotion of common interests? Are the conflicting ideologies actually in as sharp opposition as they appear to be? There is no definitive answer to be given to these questions. But certain conditions are clear if coöperation is to be effective. Dictatorship need not be it itself a direct threat to the peace. If it is in one sense a dangerous situation that millicns, perhaps many millions, should be responsive to the call of a leader and should be ready to accept his judgment of their best interests and his decision as to the policy to be followed in relation to other states, yet the will of the dictator may not necessarily be aggressively nationalistic, it may not threaten the liberties of other peoples even though it denies them to its own people. Much would depend upon the power of the dictator, upon his own personal aims and ambitions, and upon the traditions of his people.

But if dictatorship and totalitarian government need not constitute a direct threat to the peace, it can scarcely be doubted that they constitute a latent or potential threat, a threat which may become actual when their control over the thought of their peoples goes so far as to instill false views and create a perverted conception of the attitudes and policies of other countries. In the present conflict of ideologies the one hope of peace lies in keeping open the channels of communication between one country and another, and in giving to every people access to the sources of information so that they may obtain a reasonably fair knowledge of the ideals and policies of other peoples. Official propaganda, by radio or press, directed against the policies of other states should be regarded as an act of aggression, only less of a menace to the peace than military threats because less imminent.

The conflict between opposing ideologies is therefore irrepressible or not irrepressible according to the extent to which the states holding them are prepared to refrain from hostile propaganda and to respect scrupulously the right of every state to pursue its own domestic ideals and to develop its own national civilization without interference by others. Tolerance is here the one condition of peace, tolerance and the fundamental principle so frequently emphasized by the American States of mutual respect by each for the sovereignty and independence of the others. The threat to the peace comes not from the democracies. Their traditional love of liberty, their tendency to question motives and to discuss policies, makes them reluctant to put pressure upon others and gives assurance that they would not abuse the power to control others if they had it. Fear of the possibility of future aggression is what creates suspicion and doubt; and it would appear that the best assurance that could be given by a state of the sincerity of its pledge not to encroach upon the liberties of other states would be the fact that within its own borders it observes scrupulously the liberties of its own citizens.

The members of the United Nations have pledged themselves to take joint and separate action, in coöperation with the organization, for the promotion of universal respect for and observance of human rights and fundamental freedoms. It is not to be expected that the respective pledges can be carried out by a single proclamation or decree. The fulfillment of the obligation by each state must in many cases be a matter of time. In large part the execution of the pledge must be left to the individual state, acting through its own constitutional procedures. Only where there is a threat to the peace is it to be expected that the Security Council of the United Nations will be called upon to take action. Here the problem will be one of degrees of danger. Apart from cases of fanatical nationalism, where the international community would be justified in taking prompt action, the most urgent situation is that of relieving the tension between states due to suspicion and distrust. To this end the channels of communication must be kept open and access to the sources of information kept free. This is not a counsel of perfection, but an obligation under existing law. The obligation is one which can not be deferred or qualified, for upon it depends the possibility of developing a sufficient degree of mutual confidence to make military disarmament possible. In this connection the American Republics have already led the way with the resolution of the Conference on Problems of War and Peace, held at Mexico City in 1945, which recommends: "That the American Republics recognize their essential obligation to guarantee to their people free and impartial access to the sources of information," and that measures be taken "to promote a free exchange of information among their peoples."

The urgency of the problem of moral disarmament gives to the program of the United Nations Educational Scientific and Cultural Organization a high political as well as a social character. UNESCO can not be expected to meet acute or overt threats to the peace. That problem, if unhappily it should arise, must remain for the Security Council of the United Nations. But the new agency, assuming universal membership in due time, should be able, in collaboration with the Commission on Human Rights of the United Nations, to accelerate greatly the progress of states in removing the barriers to mutual understanding. The constitution of the agency emphasizes significantly that a peace based exclusively upon the political and economic arrangements of governments would not be one that could obtain the sincere support of the peoples of the world and that a lasting peace must be founded "upon the intellectual and moral solidarity of mankind."

CHARLES G. FENWICK

SOVEREIGNTY IN ANTARCTICA

The recent sending of a large United States expedition to Antarctica has revived interest in the complicated legal problems relative to the acquisition

of sovereignty in such areas.¹ British Commonwealth, Norwegian, French, Argentine, and Chilean claims vie with those of the United States. The basic problem of acquisition of sovereignty is complicated by a new claim which was recently made by the Argentine Government.² In a decree issued on October 9, 1946 the Argentine Government claims sovereignty over the Argentine continental shelf and the waters covering it. The decree invoked as precedents the United States and Mexican Governments' orders of a similar character. The United States precedent, evidently refers to the Presidential Proclamations and Executive Orders of September 28, 1945, which have already been analyzed in this JOURNAL by Professor Borchard, who refers also to the comparable Mexican decree.³ The United States claim related to the right to exploit the submarine resources of the continental shelf and the fisheries superjacent thereto. Although the specific claim was not then envisaged, the legality of the exploitation of resources lying under adjacent waters finds support in the writings of two Argentinian jurists.⁴ The Antarctic as a potential source of petroleum for the satisfaction of Argentine needs, seems to have been under consideration for some time.⁵

Obviously, however, such a claim with reference to submarine lands and to waters adjacent to the Antarctic continent must find basic support in the maintenance of a claim to sovereignty over the land itself. Both the Argentine and the Chilean claims seem to rely partly on the sector principle and partly on various assertions of their claims and overt acts of exploration and administration.⁶ The Chilean claim was stated in a decree of November 6, 1940, asserting sovereignty over all the lands, islands, islets, reefs, pack-ice, and the appurtenant territorial sea lying in the area bounded by the meridians of 53° and 90° East longitude.⁷ The Argentine Government, upon being notified of this decree, reserved all its rights. It referred to its claim as being based on effective and continuous occupation since 1904 and to subsidiary bases of title such as geographic propinquity. It concluded by suggesting that the only possible general international solution was to convene a conference of the states interested. The Argentine note also referred to the Falkland Islands, the sovereignty of which has so long been in dispute between that State and Great Britain.⁸ One of the

¹ The problems are well explored in Smedal, *Acquisition of Sovereignty Over Polar Areas*, 1931, and in Hyde, C. C., "Acquisition of Sovereignty Over Polar Areas," in *Iowa Law Review*, Vol. 19 (1934), p. 286.

² See document in Supplement, below, p. 11.

³ This JOURNAL, Vol. 40 (1946), p. 53.

⁴ Ruiz Moreno, *Derecho Internacional Publico*, Vol. 2 (1940), p. 49; A. Podestá Costa, *Manual de Derecho Internacional Publico*, 1943, p. 99.

⁵ Carlos Rodriguez, *La Republica Argentina y las Adquisiciones Territoriales en el Continente Antartico*, 1941, p. 31.

⁶ See Pinochet de la Barra, *La Antártida Chilena*, 1944.

⁷ Same, p. 23.

⁸ Same, p. 157. Compare Goebel, *The Struggle for the Falkland Islands*, 1927.

principal British antarctic claims is that to the Falkland Islands Dependency, based on the sector theory and resting upon the projection of longitudinal lines outward from those islands.⁹

Should it become apparent that the resources of Antarctica or its air-strategical potentialities are of great importance, it will no doubt become necessary to settle the conflicting claims to sovereignty. Any decision in regard to that area would obviously be a powerful precedent for the settlement of comparable claims in the Arctic despite the physical differences between the two areas. It is possible that the matter could be adjusted by a conference such as that which produced the Berlin Act of 1885 concerning Africa. On the other hand it would facilitate the work of such a conference if there were first a decision by the International Court of Justice regarding the applicable law. The decision of the Permanent Court of International Justice in the Eastern Greenland case is evidence that such a question can be handled judicially. The matter might well be referred to the Court for an Advisory Opinion by the General Assembly of the United Nations in the interest of peace and of the progressive development of international law. It might equally be referred to the Court by any two states whose claims in Antarctica conflict. In the latter case one might anticipate that other interested states would ask leave to intervene under Article 62 of the Statute.

PHILIP C. JESSUP

REVOLUTIONARY CREATION OF NORMS OF INTERNATIONAL LAW

(Law is a dynamic system of norms which, in continuous concretization and individualization, develops from the basic norm above to the last act of mere execution below. Law is a normative system which itself regulates the creation of its own norms.) The legal order must, therefore, establish norms which give determined organs the power to create, change, abolish, apply, and execute the norms of a particular legal order. Such power we call competence or jurisdiction. The order of competences of a particular legal community we call its Constitution. The Constitution must define what persons shall act as organs, what their competence is, and by what procedure it is to be exercised. It may, in addition, prescribe, positively or negatively, certain contents. A legal norm is, therefore, valid if it has been created by the Constitutionally prescribed procedure and (or) is in conformity, as to contents, with the Constitution or the immediately higher norm. It remains valid as long as it has not been changed or abolished by a procedure also provided for by the Constitution. The Constitution may also contain norms for its own change, perhaps prescribing particular procedures for such action.

But law can also be changed or created otherwise than by the Constitutionally prescribed procedures, this also "illegally": *ex injuria jus oritur*.

⁹ G. H. Hackworth, *Digest of International Law*, Washington, 1940-, p. 462.

"The principle of legitimacy is qualified by the principle of effectiveness."¹ In a broader sense, any "illegal" creation of a norm, whether general (a Statute) or individual (a judicial decision), which, in spite of its "illegality," asserts itself as law, may be called a "revolutionary" creation of law. But we must distinguish between a truly revolutionary and a merely "unconstitutional" creation of law.

Let us look, first, at municipal law. The "unconstitutional Statute," the "illegal" decision of a Court of last instance,² is, nevertheless, valid law, if the Constitution provides no particular procedure for abolishing it, or, if such procedure is provided, as long as the decision has not been abolished by this procedure. "Illegality of a norm means possibility of abrogating the norm (otherwise than in the normal way) or punishing the norm-creating organ."³ Such "illegal" creation of law must, therefore, be regarded as authorized by the Constitution, although the Constitution may provide a special procedure for abolishing it. The "unconstitutional Statute" is a legal feature which, paradoxically, may, but must not, appear in a legal order. But the revolutionary creation of law is a universal phenomenon under any municipal legal order.

Revolution in the legal sense occurs if a Constitution, particularly its basic norm, is changed contrary to the Constitutionally prescribed procedure. It is legally irrelevant whether such change is peaceful or violent, whether the revolution starts from below or above—the *coup d'etat*—, whether the triumphant new regime entirely changes the legal order or accepts most of the legal order of the previous regime, whether the new legal order which the revolution brings about is better or worse than the old, whether the revolution is of far-reaching historical importance or only a game of politicians. Even the most drastic change in the contents of a Constitution is legally not revolutionary if it is brought about by Constitutionally prescribed procedure.⁴ Even a slight and peaceful change is legally revolutionary if brought about by a procedure not provided by, or in violation of, the Constitution in force.⁵ Revolution means the discontinuity of the

¹ H. Kelsen, *General Theory of Law and State*, Cambridge (Mass.), 1945, p. 119.

² *Erie Railroad v. Tompkins* (304 U. S. 64, 58 S. Ct. 817) (1938) not only overruled *Swift v. Tyson*, but held, repeating the words of Justice Holmes, that "*Swift v. Tyson* was an unconstitutional assumption of power, by courts of the United States." Nevertheless, under the principle of *res judicata* *Swift v. Tyson* (16 Pet. 1, 10. L. Ed. 865) (1842), was valid law for ninety-six years.

³ Kelsen, work cited, p. 371.

⁴ Whether Italy's change from monarchy to Republic was legally a revolutionary creation of law, depends on whether such change was or was not brought about in conformity with a procedure provided by the Constitution of the Kingdom of Italy in force at that time.

⁵ The American Republics held the change from the Vargas regime in Brazil to be Constitutional for diplomatic reasons, so as to avoid the problem of the recognition of a *de facto* government. But the overthrow of President Vargas by a palace revolution was, from a legal point of view, certainly revolutionary, as contrary to the Vargas Constitution of 1937, then in force.

legal order. It cannot be understood from the point of view of the legal order which has been violated. According to that legal order it constitutes an illegality. A "right to revolution" cannot exist as a right in the sense of positive law. In such a case everything depends on effectiveness. If the revolution succeeds it abolishes the old and creates a new legal order; if it fails the revolutionaries are, under the old legal order, traitors.⁶

But, while revolutionary creation of law cannot be legally understood from the point of view of the old municipal law, it is the positive norm of effectiveness of the supra-ordinated international law which guarantees the continuity of the municipal legal order and the identity of the international personality of the State. Revolution, therefore, must be understood as a procedure of creating municipal law provided for by international law. There is also a procedure of international law itself, *dēbellatio*, which constitutes a revolutionary form of creation of municipal law. The revolutionary creation of municipal law, which leads us to international law, has been the subject of many studies. But little attention has been given to the possibility of a revolutionary creation of law on the level of international law itself.

International law also has its constitutional norms; there is the constitution of general international law, there are the constitutions of particular international communities, like the United Nations, based on particular, treaty-created, international law. International law also regulates the creation of its own norms, by custom or by the treaty procedure.⁷ Here, too, norms of international law may be created in contradiction to the constitutionally prescribed procedure, or in violation of certain contents of hierarchically superior norms of international law. Here again there is no revolutionary creation of law, however drastic the change in contents may be, if the new law has been created in conformity with the procedure prescribed by the international law in force.⁸

We need first to consider a possible revolutionary creation of general

⁶ Hence the paradoxical situation of the crime of treason. In positive Common Law it is the highest crime, standing in a category apart. But a successful revolution leads to an original creation of law. "Those who lose are the traitors," says the King in Calderón's *La Vida es Sueño*. An old English verse reads:

"Treason cannot prosper, What's the reason?
For if it does, who would dare to call it treason?"

⁷ See Josef L. Kunz: "The meaning and the range of the norm *pacta sunt servanda*," in this JOURNAL, Vol. 39 (1945), pp. 180-197.

⁸ At the World Health Conference, held in the Summer of 1946 in New York, it was proposed that the World Health Assembly of the new World Health Organization should have jurisdiction of enacting regulations, immediately binding upon member-States without ratification, except if specifically rejected by a member-State. The Belgian representative, rejecting this proposal, spoke of a "revolutionary change of international law." But legally such a norm, created by the treaty procedure, with the consent and ratification of the contracting parties, and binding only upon member-States, would not be revolutionary at all.

international law, by overthrowing the whole present international legal order and its basic norm, so that apparently the new international law could not be legally understood from the point of view of the international law actually (or previously) in force. It is true that general international law, although a primitive legal order, has shown since the Renaissance a high degree of stability, far superior to that of the more advanced municipal legal orders. But such revolutionary change is thinkable. Such an idea was held widely in early Bolshevik Russia. The idea, as expressed by the leading Soviet international lawyer, Eugene Korovin,⁹ was to look at the present international law as something intrinsically bad from a Marxist point of view and theoretically superfluous. The aim was to overthrow by a world-revolution the present system of a plurality of sovereign, capitalistic states, and to replace it by a world-wide Soviet state, of which the Union of Soviet Socialist Republics, an open state under the Constitution of 1923, was to be the nucleus. In such case the present international law would be overthrown and replaced by a Marxist world-law, a wholly intra-Soviet municipal law. Only for the period prior to the victory of the world revolution was Korovin willing to recognize an "international law of the transition period": general international law, he held, had lost its validity between a Soviet state and the capitalistic world; the Soviets would be bound only by treaties. This construction is already theoretically untenable; for the norm *pacta sunt servanda* of general international law is the reason for the validity of all treaty-made law. And as the Soviet world revolution has, up to now, not succeeded, the present international law has remained in force and is binding on the Soviet Union.

Undoubtedly such "revolutionary" change of the present international legal order would again depend on effectiveness for validity. But the question arises whether such creation of new law, even if effective, would legally have the character of revolutionary creation of law. Revolutionary creation of municipal law is revolutionary because it is illegal under municipal law; it is only the positive norm of effectiveness of international law which validates the revolutionary creation of municipal law. The latter is, therefore, a legal form of creation of municipal law provided for by international law. But general international law has no superior positive law above it and contains the positive norm of effectiveness. There is no rule of general international law which makes such "revolutionary" change illegal. In consequence the so-called revolutionary change of general international law must be understood as a legal procedure for the change of its Constitution provided for by the Constitution itself, on condition of effectiveness. It follows that the legal figure of "revolution" has no place in general international law, which is the only legal order in which there can be no revolution in the legal sense.

⁹ E. A. Korovin, *Das Völkerrecht der Übergangszeit* (German translation), 1929. See also T. A. Taracouzio, *The Soviet Union and International Law*, New York, 1935.

But there is the possibility of the creation of particular treaty-made international law, made not in conformity with the supra-ordinated general international law. Examples are not rare to-day.

We may refer to the creation of the norms—both as to procedure and contents—which form the basis of the War Crime Trials in Germany and Japan. A jurist can hardly admit that he is dealing here with normal, or long-established, international law, with a mere routine application of international law, already previously valid. But this problem would demand a whole volume for its investigation.

There are other recent examples, such as Article 2, par. 6, of the Charter of the United Nations, according to which the Organization shall ensure that non-members act in accordance with the principles of Article 2, so far as may be necessary for the maintenance of international peace and security. This paragraph has a predecessor in Article XVII of the Covenant of the League of Nations.¹⁰ Article XVII left it entirely to the discretion of non-member states whether they should accept or not accept the invitation of the Council. In the Eastern Carelian case Tchitcherin sharply rejected the invitation and Soviet Russia declared that any attempt to apply Article XVII against her would be considered as a hostile act. Article XVII does not attempt legally to bind non-member states. True, it provides that, if the third state rejects the invitation and resorts to war against a member State, the provisions of Article XVI shall be applicable against it. But such measures would not have the legal character of sanctions for sanctions in the legal sense presuppose the violation of a legal duty and non-members are not bound by the Covenant. Article XVII was, therefore, not in viola-

¹⁰ Art. XVII.

1. In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

2. Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such actions as may seem best and most effectual in the circumstances.

3. If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article XVI shall be applicable as against the State taking such action.

4. If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

See the well-known Commentaries on the Covenant by Schücking and Wehberg, Ray, and Göppert, as well as the following monographs: E. Morpurgo, "L'articolo 17 del Patto della Società delle Nazioni ed il diritto internazionale consuetudinario," in *Revue de Droit International* (Sottile), 1925, pp. 177-185; A. Bavaj, *L'interpretazione dell' articolo 17 del Patto della Società della Nazioni*, 1931; R. Weinberg, *Völkerbund und Nichtmitgliedstaaten*, 1932.

tion of the general international law then in force. Article 2, paragraph 6, of the Charter takes a different approach. Two completely different interpretations of it have already been given. Goodrich and Hambro¹¹ state emphatically that "the Charter does not of course create any legal obligations for non-member States. They are, therefore, not obligated in a legal sense to act according to the principles of the Charter for any purpose whatever." True, there is, under Article 35, the possibility of the acceptance of the Charter *pro hac vice* by non-members, as under Article XVII of the Covenant. But it is also true that the UN is bound to ensure that non-members act in accordance with the principles of the Charter whether they have accepted or not. In this case the Organization, according to Goodrich and Hambro, "assumes authority not based on the consent of the States affected" and the Charter "provides for the imposition by force, if necessary, of the prescribed conduct without any legal basis in contractual agreement." But that is no solution and no juridical explanation. For the authors can only mean that such action constitutes either old-fashioned intervention and war, not sanctions, or that the Charter imposes upon the Organization the duty to act with no basis in law at all, or a duty to act illegally.

Kelsen,¹² on the other hand, interprets Article 2, paragraph 6, as claiming that the Charter is legally binding upon non-member States. Under Article 2, paragraph 6, only Article 2 would be binding, but Article 2, paragraph 2, covers all the obligations under the Charter. Kelsen considers¹³ that non-members are even legally bound to register their treaties (Article 102). He even goes so far¹⁴ as to say that the Charter claims to constitute general international law and that, if this interpretation is accepted, all the States of the world would be "members" of the UN.

This interpretation seems to go too far in any case. Article 2, paragraph 2, covers all the obligations under the Charter, it is true, but imposes this duty "in order to ensure to all of them the rights and benefits resulting from membership," a purpose which naturally makes no sense in the case of non-members. Such wide interpretation would, under Article 17, bind non-members even to bear the expenses of the Organization. The fact that the Charter distinguishes between members and non-members, the exclusion of Franco-Spain from membership, and the unsuccessful application for membership by a number of States, show that the Charter only constitutes particular international law, although it may have, like the League, a tend-

¹¹ Leland M. Goodrich and Edward Hambro, *Charter of the United Nations: Commentary and Documents*, Boston, 1946, pp. 70-71.

¹² H. Kelsen, "Sanctions in International Law under the Charter of the UN," *Iowa Law Review*, Vol. 31 (1946), pp. 499-543, at p. 502.

¹³ Work quoted, note 12, p. 512.

¹⁴ H. Kelsen, "Membership in the United Nations," *Columbia Law Review*, Vol. XLVI (1946), pp. 391-411, at pp. 394, 411.

ency toward universality. It seems to follow that Article 2, paragraph 6, cannot intend to bind non-members by all the norms of the Charter. But by what norms? Would a non-member State be legally bound to make available armed forces to the Security Council under Article 43? Is Switzerland legally bound to grant rights of passage to UN troops? Finally the restricting phrase "so far as may be necessary for the maintenance of peace and security" must not be forgotten.

We need, first, the "jurisprudence" of the UN to determine the meaning and range of Article 2, paragraph 6. The wording of this clause does not compel the adoption of the construction that non-members are thereby legally bound. But if this interpretation is adopted then Article 2, paragraph 6, as Kelsen fully recognizes, "is not in conformity with general international law as prevailing at the moment the Charter came into force." For under general international law a treaty creates only legal rights and duties among the contracting parties.¹⁵

While Article 2, paragraph 6, of the Charter is not so worded as clearly to claim that non-members are legally bound, this issue is unequivocally raised in the draft treaty for the outlawing of atomic bombs, proposed by the Soviet Union, and read by Mr. Gromyko¹⁶ in the session of the Atomic Energy Commission of the UN. The proposed treaty, it is true, is open to accession by all States, whether members of the UN or not. But under Article 6 the treaty is to come into effect after the approval of the Security Council and after ratification by half of the signatory States, including all States members of the UN, and Article 7 reads: "After the entry into force of the present agreement, it shall be an obligation upon all States, members or not of the UN." This clause is clearly not in conformity with general international law. For treaties do not legally bind non-contracting parties and "save in exceptional cases are binding only in virtue of their ratification."¹⁷

The draft treaties of peace with the minor European Axis states purport to be legally binding after ratification by one party only. A peace treaty is valid even if imposed by force but it is, nevertheless, a treaty and needs, therefore, in order to be a treaty at all, signature and ratification by the vanquished as well as by the victor. But in Article LXXVIII of the Draft Peace Treaty with Italy¹⁸ we read that the treaty "shall be ratified by the

¹⁵ Permanent Court of International Justice, Publications A/22, p. 17, A/B/46, pp. 141, 143.

¹⁶ *The New York Times*, June 20, 1946, p. 4.

¹⁷ Permanent Court of International Justice, Publications A/23, p. 20.

¹⁸ *The New York Times*, July 27, 1946, p. 9. Analogously Article XXXVII of the Hungarian, XXXVIII of the Rumanian, XXXVI of the Bulgarian, and XXXIV of the Finnish Draft Peace Treaties (the same, July 31, 1946, pp. 15, 18, 19 and 21), only with the difference that the first three treaties come into force immediately upon deposit of ratification by the U. K., the U. S. and the U. S. S. R., the last upon deposit of ratification by the U. K. and the U. S. S. R.

Allied Powers. It shall be ratified also by Italy. It will come into force upon the deposit of ratification by France, the United Kingdom, the United States and the Union of Soviet Socialist Republics." What is in this case, by the way, the legal significance of ratification by Italy?

As we have seen, "revolution" has no place in general international law, for the reason that such so-called revolutionary change is not illegal under the international law, at any moment in force, in view of the norm of effectiveness. But the examples of the creation of treaty norms already discussed, not in conformity with general international law, are in a very different category. For here this creation is illegal under general international law. And it cannot be said that here everything depends on effectiveness. As Verdross¹⁹ correctly states, "the principle of effectiveness can create new law only within the framework of international law; for a *boundless* recognition of the principle of effectiveness would legalize *any* illegality and thus abolish international law itself."

Such illegal creation of treaty law will need a healing of the ill in order to become valid international law, as by general recognition. it may be rejected as illegal in a procedure and by an organ of international law. Indeed Article 2, paragraph 6, is, as Kelsen²⁰ asserts, "problematical." Kelsen says that an arbitration tribunal *ad hoc*, established between a member and a non-member State, may possibly not consider the non-member State as bound by the Charter. But there is more to the problem than this. Even the International Court of Justice at The Hague, although, under Article 3 of the Charter, it is a "principal organ" of the UN, may not only possibly, but will be bound to, decide that a non-member is not legally bound by the Charter, or that Italy is not legally bound by an Italian Peace Treaty not ratified by her. For this Court, under Article 38 of its Statute, is bound to apply general customary international law, under which these treaty norms are not legally binding, and can apply international conventions only if they "establish rules expressly recognized by the contesting parties."

The problems of "revolutionary" and illegal creation of norms of international law have hardly been considered as yet by the writers on that subject. These problems call for further investigation. They are highly interesting theoretically and, therefore, highly important practically. For there is no practice without theory and in the relation between them it is theory which holds the commanding position; as the great Leonardo Da Vinci has put it: *La teoria è il capitano, e la pratica sono i soldati.*

JOSEF L. KUNZ

¹⁹ A. Verdross, *Völkerrecht*, Berlin, 1937, p. 126.

²⁰ Kelsen, work quoted, note 12, pp. 512-513.

TOWARD A WORLD CONFERENCE ON TRADE AND EMPLOYMENT

Within the framework of the United Nations system there have recently been significant developments looking to the provision of broad economic bases of peace and the acceptance of international rules designed to undergird an effective international trade organization. In the initiation of effort toward these ends the United States has taken a leading part. The organization of the effort in its preliminary stages, the general nature of what has been proposed, and the relation of this effort to other undertakings for international cooperation seem to merit special attention.

In December, 1945, the Secretary of State of the United States made public certain American *Proposals for Consideration by an International Conference on Trade and Employment*,¹ with the announcement that the proposals had the support of the Executive branch of the Government and had been submitted to other Governments as a basis for discussion. At the same time it was announced that the Government of the United Kingdom was in full agreement on all important points in the proposals, had accepted them as a basis for international discussion and, in common with the United States Government and in the light of views expressed by other countries, would use its best endeavors to bring such discussions to a successful conclusion.² Negotiations for the purpose of developing concrete arrangements, it was explained, were to relate to tariffs and preferences, quantitative restrictions, subsidies, state trading, cartels and other types of trade barriers. At a press conference held on December 6, 1945, Mr. Clayton, then Assistant Secretary of State, indicated that the financial credit which was to be extended to Great Britain would enable that country to undertake, with the United States, a "full partnership in the enterprise of restoring the world to a multilateral trading basis and getting it off the bilateral barter and quota system that developed to such a great degree between the two world wars. . . ."³

The enterprise soon came under the direction of the United Nations. On February 18, 1946, the Economic and Social Council of that organization approved a resolution calling for an International Conference on Trade and Employment, and constituted a Preparatory Committee of nineteen countries which was to elaborate an agenda, including a draft convention for consideration by the Conference.⁴ The first meeting of the Preparatory

¹ United States Department of State, *Publication No. 2411 (Commercial Policy Series, No. 79)*. A text of the proposals is found in the issue of the Department of State *Bulletin* referred to in note 2, below, at pp. 918-929, and a brief analysis of them in the same issue at pp. 914-918. Objectives of the proposals are explained in *New Horizons for World Trade*, Department of State *Publication No. 2591 (Commercial Policy Series No. 90)*.

² Department of State *Bulletin*, Dec. 9, 1945, p. 912.

³ Same.

⁴ The nineteen countries included, in addition to those which were represented at the meeting of the Preparatory Committee in London, the Soviet Union.

Committee was arranged for the Autumn of 1946, and it was understood that the meeting would be exploratory in nature. Before it took place, the United States published, on September 20, 1946, the *Suggested Charter for an International Trade Organization*,⁵ which was an elaboration of the previously published *Proposals*⁶ and had been prepared by a technical staff within the United States Government. Separate chapters of the *Suggested Charter* (as to which it was made clear that the provisions were designed to provide a basis for discussion and not a document expressing the fixed or final views of the Government issuing it) related to Purposes, Membership, Employment Provisions, General Commercial Policy, Restrictive Business Practices, Intergovernmental Commodity Arrangements, and Organization.

Pursuant to the resolution of the Economic and Social Council, representatives of eighteen of the countries which composed the Preparatory Committee for the International Conference on Trade and Employment met in London on October 15, 1946, and continued their sessions until late in November. The Soviet Union did not participate, but the eighteen countries which did take part represented three-fourths of the international trade of the world.⁷ The meeting was to be a preliminary one, and in the discussions the Governments taking part were not formally committed. In welcoming the delegates, Sir Stafford Cripps, President of the Board of Trade of Great Britain, told them that his country was, following the lead given by the Atlantic Charter and the mutual-aid agreement between the United Kingdom and the United States, "putting forward to the world through this meeting a new conception of national responsibility in economic matters."⁸ At the outset of the discussions the chairman of the American delegation, after explaining that the draft charter was not the product of pure altruism (the principles which it embodied being conceived to be in the interest of the United States), went on to observe that

If the trade of the world were to be governed by rules the opposite of those contained in the *Suggested Charter*, the United States would deeply regret it, but it could adapt itself to the resulting situation; its economy would survive the strain. But other nations, in this respect,

⁵ Department of State Publication No. 2598 (*Commercial Policy Series* No. 93).

⁶ Note 1, above.

⁷ *The New York Times*, Dec. 1, 1946, Sec. E, p. 4. The countries represented were Australia, Belgium, Brazil, Czechoslovakia, Luxemburg, Canada, Chile, China, Cuba, France, India, Lebanon, The Netherlands, New Zealand, Norway, Union of South Africa, the United Kingdom, and the United States.

⁸ *The New York Times*, Oct. 16, 1946, p. 12. The speaker also included in his remarks the following comments: "Hitherto it has been considered sufficient if each nation regulated its conduct in these matters in accordance with the bilateral treaties it has entered into. It was no one else's concern as to what those treaties contained or how they would affect others, and beyond that it was accepted that each country could do as it liked with its own market."

"It was that accepted attitude to international trade which led us into the disastrous chaos of the interwar years."

are less fortunately endowed than are we. For us, the strangulation of trade would necessitate a difficult readjustment. For others, it would spell catastrophe.⁹

The meeting provided opportunity for criticisms of what the United States had proposed. These criticisms are reported to have stressed, *inter alia*, that trade restrictions had received great emphasis as compared with expansion of employment and full development of home resources,¹⁰ and that little attention had been given to the problems of industrially backward or war-weakened countries.¹¹ At the final plenary session a spokesman for the World Federation of Trade Unions, attending as an observer, criticized countries which he did not name because of their supposed deficient and negative economic policies.¹² In the main, however, there appears to have been remarkable harmony and a spirit of coöperation. At the conclusion of the conference complete agreement was reported to have been reached on clauses of the charter relating to admission of states to the proposed organization, the prevention of unemployment and its consequences, the economic development of backward areas, most-favored-nation treatment, tariffs and preferences, quantitative restrictions and exchange controls, subsidies, state trading, emergency provisions, restrictive business practices, and commodity agreements. Important parts of the United States proposals still to be agreed upon were reported to be those relating to the treatment of countries with complete state trade monopolies, and relations with non-members (these matters, in the absence of representatives of the Soviet Union, having apparently been left out of the discussion). The statement of purposes, part of the provisions concerning organization, and some technical matters such as those relating to countervailing duties, customs procedure, and valuation practices, were referred by the full conference to an interim drafting committee for further work.¹³ The chairman of the American delegation could say that, "We have come, almost all of us, to an identity of views,"¹⁴ and the President of the Board of Trade in Great

⁹ Remarks of Clair Wilcox, as reproduced in Department of State *Bulletin*, Oct. 27, 1946, pp. 759-760.

¹⁰ *The New York Times*, Oct. 17, 1946, p. 4. In an address before the American Chamber of Commerce in London while the conference was going on, the British Parliamentary Secretary of the Ministry of Fuel and Power drew attention to the fact that, in the original proposals of the United States thirteen pages were given to trade policy and two paragraphs to employment (same, Oct. 24, 1946, p. 6). It was later reported that there had been agreement on the subject of employment (same, Oct. 31, p. 9, Nov. 12, p. 8).

¹¹ *The New York Times*, Oct. 18, 1946, p. 34; Nov. 27, 1946, p. 31.

¹² Same, Nov. 27, 1946, p. 8 (remarks of M. Duret). The same speaker is reported to have advocated that weaker countries be allowed to discriminate and apply trade restrictions until they could compete.

¹³ Same, Nov. 24, 1946, pp. 1, 5. It was estimated that there was agreement on ninety per cent of the text of the charter (Michael L. Hoffman, in same, Dec. 1, 1946, p. 4E).

¹⁴ Same, Nov. 27, 1946, p. 8.

Britain characterized the meeting of the preparatory committee as "most successful."¹⁵ April 8, 1947, was agreed upon as the date for the next meeting, which is to be held in Geneva.

While the experts were still in session at London the Acting Secretary of State of the United States issued, on November 9, formal notice of intention to conduct trade-agreement negotiations with eighteen foreign states (the Soviet Union being included, in addition to all of those states which had been represented at the London meeting of the Preparatory Committee), and made public a list of products that will be considered for the possible granting of tariff concessions by the United States in these negotiations.¹⁶ President Truman in a statement to the press referred to the projected negotiations as "central to the structure of international economic coöperation under the United Nations" and said that their success or failure would "largely determine whether the world will move towards a system of liberal international trade, free from arbitrary barriers, excessive tariffs, and discriminations" or would "pay the heavy costs of narrow economic nationalism."¹⁷ The outcome of the trade-agreement negotiations will have an important bearing upon plans for the holding of the World Conference on Trade and Employment in the latter part of 1947.

The limitations of a brief comment preclude consideration of many technical provisions of the *Suggested Charter* which invite attention, and until an authentic record is available of the London discussions an attempt at a comparative study of the views expressed by representatives of the participating states would be premature. For specialists in international law any comprehensive effort looking to the acceptance of international rules on a basis of multilateral agreement necessarily assumes significance in view of the notable absence of rules of customary international law which would prevent states from following policies of narrow economic nationalism.¹⁸ One of the more specific legal questions which arises is that of the effect of the proposed new multilateral undertaking upon existing bi-lateral commitments of the states which become members of the projected International Trade Organization. On this point provisions of the *Suggested Charter* envisage the review, by such states, of any prior commitments which they may have and which would prevent them from giving full effect to specified paragraphs in the basic plan; if necessary, the members would agree to ter-

¹⁵ Same, Nov. 29, 1946, p. 5.

¹⁶ Department of State *Bulletin*, Nov. 17, 1946, p. 907. For public notice of the Department of State pursuant to legislation concerning trade agreements, see 11 *Federal Register* 13447. The list of products, to be considered for the possible granting of tariff concessions by the United States under the broadened authority given in the Act approved July 5, 1945 (59 *Statutes* 411), is printed in Department of State *Publication* No. 2672 (*Commercial Policy Series* No. 96).

¹⁷ Department of State *Bulletin*, Nov. 17, 1946, p. 909.

¹⁸ See the statement of the Permanent Court of International Justice in its *Publications*, Series A/B, No. 46, p. 162.

minate such obligations either by agreement of the parties or in accordance with the terms of the instruments.¹⁹ The article relating to the interpretation and settlement of legal questions includes a plan for referring to the International Court of Justice (at the request of a party to the dispute) any "justiciable issue" arising out of a ruling of the Conference (to consist of representatives of the members of the organization) on certain parts of the Charter.²⁰ A "justiciable issue" arising out of any other ruling of the Conference may (under the draft Charter), if the Conference consents, be submitted to the Court by any party to the dispute. It is proposed that the Organization be permitted, with the authorization of the General Assembly of the United Nations, to refer any dispute concerning the interpretation of the trade Charter to the International Court of Justice, with a request for an advisory opinion thereon.

Of interest from the point of view of general international organization are many features of the basic plan which the United States presented, such as those concerning voting, denial of benefits to non-member states, and the integration of the work of the proposed machinery with that of various other international agencies (such as the International Monetary Fund, the Food and Agriculture Organization, and the International Labor Organization) which have functions relating in some way to those which the international trade organization would undertake. For the great body of the citizenry of the participating countries the realization of higher living standards and of a resultant climate conducive to the preservation of peace in the world will doubtless be the ultimate ends in terms of which the current movement will be judged. Of the foreign economic policy of the United States in which the plan for an international trade organization now holds a very central place, the Under Secretary for Economic Affairs has recently said that "... abandonment of the program is unthinkable because it would be a step backward with serious consequences for the peace of the world."²¹

ROBERT R. WILSON

¹⁹ Art. 31. By the final paragraph of this article the members would accept this rule as to any international obligations they may have which would prevent them from giving full effect to the following paragraphs of the charter:

1. No Member shall seek exclusive or preferential advantages for its trade in the territory of any non-Member which would result, directly or indirectly, in discrimination in that territory against the trade of any other Member.

2. No Member shall be a party to any agreement or other arrangement with any non-Member under which such non-Member shall be contractually entitled to any of the benefits under this Charter.

²⁰ Art. 76. The parts of the Charter referred to in this connection are subparagraphs (c), (d), (e) and (k) of Article 32 (the general exceptions article in Chapter IV) and paragraph 2 of Article 49 (on exceptions to provisions relating to intergovernmental commodity agreements).

²¹ Address of Mr. Clayton before the National Foreign Trade Convention, Nov. 13, 1946: Department of State *Bulletin*, November 24, 1946, p. 953.

DEATH OF DR. LEO S. ROWE

Dr. Leo S. Rowe, Director General of the Pan-American Union, was instantly killed by an automobile on the evening of December 5, 1946, while crossing the street on his way to a reception at the Bolivian Embassy. Dr. Rowe was a founder of the American Society of International Law in 1906 and of its Journal in 1907. Both had been initiated at the 11th annual meeting of the Lake Mohonk Conference on International Arbitration held in the Spring of 1905, and as a member of the organizing committee appointed by the Conference Dr. Rowe participated in drafting the original Constitution of the Society which, with some amendments, remained in force until redrafted in 1940. Dr. Rowe was a member of the first Executive Council, which held its first meeting in January 1906; from this time onward he was an active and enthusiastic member of the Society, having been elected a Vice President in 1930.

Dr. Rowe was Chief of the Latin American Division of the Department of State when he was elected Director General of the Pan-American Union in 1920, the position which he held from that time to the time of his death. He occupied numerous governmental posts in connection with Latin American affairs and attended every Pan-American conference for the last quarter of a century as a delegate of the United States or as Director General of the Pan-American Union. Many of the American Republics conferred upon him the highest awards and decorations at their disposal.

At his request his body was cremated and the ashes placed in the Pan-American Union over which he presided for so many years. An appropriate meeting in his memory was held immediately after his death by the Governing Board of the Pan-American Union.

On February 5 a commemorative program in homage to Dr. Rowe was held in the Hall of the Americas in the presence of the Diplomatic Corps and high ranking officials of the United States. The principal address on behalf of the Governing Board was delivered by the Chairman, Dr. Antonio Rocha, Special Ambassador of Colombia to the Pan-American Union. The Rev. Edmund A. Walsh, S.J., Vice President of Georgetown University, a friend and associate of many years, also spoke, at the special request of Dr. Rowe. Brief remarks by other members of the Governing Board concluded the program.

L. H. WOOLSEY

CURRENT NOTES

ANNUAL MEETING OF THE SOCIETY

The Annual Meeting of the American Society of International Law for 1947 will be held in Washington on April 24, 25, and 26. The general theme of the discussions will be the possible contributions of the United States to the development of international law and organization in the post-war world. For the convenience of members attending from a distance, it has been decided to hold the banquet on Thursday evening, April 24, instead of, as heretofore, on the Saturday following.

It is confidently hoped that competent persons representative of the Government of the United States, as well as of the United Nations, will be among the speakers. On Saturday evening, April 26, it is probable that a War Department film of the evidence at the Nuremberg trial will be shown at the National Archives, for members and their friends who desire to attend.

EDWARD DUMBAULD

Chairman, Committee on Annual Meeting

REGIONAL MEETINGS OF SOCIETY MEMBERS

As a result of a proposal made by the President of the Society, Professor Charles Cheney Hyde, and a unanimous vote of the Executive Council taken on May 25, 1946,* a postal questionnaire was submitted to all members in July carrying the following questions:

- (1) How can the Government of the United States best uphold the cause of international law?
- (2) How can the American Society of International Law best arouse public interest in, and respect for, international law?
- (3) Do you feel that regional meetings of Members (e.g., in Boston, New York, Chicago, San Francisco) could profitably be held in October or November to discuss these and other questions in preparation for the next Annual Meeting?

A report on the results of this consultation follows.

Summary and Analysis of Replies to Questionnaire

About one hundred and fifty replies were received to the questionnaire; according to those acquainted with such surveys this is an unusually high percentage return; it certainly provides an adequate sample for the purposes of the inquiry. The original replies are being preserved for further examination if desirable.

* *Proceedings*, 1946, p. 165.

I

The recommendations most frequently made in reply to Question 1, concerning possible action by the United States to advance the cause of international law, related to (1) the International Court of Justice, and (2) the United Nations, the number of recommendations under the former heading being the most numerous of all. It was urged that the United States support the ICJ in various ways, and most of the recommendations included acceptance of the obligatory jurisdiction of the Court (Article 36), in two or three cases "without reservations." Under the second heading the United States was urged to support the United Nations and take a leading part in all its activities. About one-half as many members urged either (3) codification of international law, (4) obedience to international law by the United States, or (5) development of arrangements for sanctions and enforcement. The suggestions for codification were often tied up with the work of the UN as was the advocacy of enforcement. Finally a number of other items appeared in the following order of frequency:

- (6) public education concerning international law,
- (7) similar education of the Department of State and Foreign Service,
- (8) maintenance of armed strength [sometimes tied up with Item (5)],
- (9) elimination of the veto in the UN [connected with Item (2)], and
- (10) publicity concerning international relations.

Only one or two members argued in favor of world government.

There was of course a good deal of overlapping on these points and a number of members argued in favor of both Items (1) and (2).

Certain curiosities appeared, as in the case of the member who said that the United States was doing all right at present and merely had to carry on its present policy. Another argued that perfecting the procedure for the settlement of claims would do more than anything else to convince the individual of the value of international law. Punishment of individuals for wrongs against the international community appeared among the recommendations and also advocacy of refusal on the part of the United States to deal with any country which did not give international law preference over national law in cases of conflict.

II

The outstanding suggestions made in reply to Question 2 were less numerous than those made in reply to Question 1. By far the most numerous recommendation, and one which appeared again and again and in all sorts of combinations, was that for (1) public education (both youth and adults) concerning international law, its nature and potential services, but also its shortcomings and the need for improvement. All forms of education were

mentioned, with particular reference to the establishment of a popular magazine or the publication of pamphlets, press releases, radio broadcasts, lectures, and so on. It was clear that a very great proportion of the members of the Society who replied were convinced of the importance of this point.

After this the suggestions were so varied and sometimes vague that they can hardly be summarized. There was some advocacy of (2) regional meetings and regional chapters of the Society as there was some mention of (3) increase of membership. Finally there was considerable advocacy [although nowhere nearly as extensive as under Item (1)] of

(4) increasing the graduate study of international law,

(5) "educating the practicing lawyer" concerning international law (!).

One member was kind enough to say that "the Society and its officers and members are doing about all that can practically be done."

III

A very large majority replied in the affirmative to the question of whether regional meetings of members of the Society should be held to discuss these problems.

Three Regional Meetings Held

Following the consultation related above, regional meetings of members of the Society were held in New York on November 9, in Chicago on November 30, and in San Francisco on December 14, organized by Professor Philip C. Jessup, Professor Quincy Wright, and Professor Joseph Walter Bingham, respectively.

Some eighty members and guests attended a meeting held at the Men's Faculty Club at Columbia University, New York, consisting of a luncheon and discussion. Professor Eagleton presided in the absence of Professor Jessup, who was ill. President Hyde spoke on the need for developing the membership and activity of the Society. Vice President Finch spoke of the need for spreading an understanding of international law among the general public, in order to enable citizens of the United States to support their government in formulating and carrying out sound public policies. The Secretary and Managing Editor provided detailed information concerning current developments in the membership of the Society, which was growing, and the JOURNAL, also growing in circulation and interest. Short statements on the relations between the Society and certain special groups were made by John P. Humphrey, Chief of the Division of Human Rights in the Secretariat of the United Nations, John Maktos, of the Department of State, Willard C. Cowles, Chairman of the Section of Comparative and International Law of the American Bar Association, Professor John B. Whit-

ton of Princeton, and Vice President Arthur K. Kuhn. Mr. Thomas W. Huntington spoke on the activities of the Committee on Public Relations of the Society, of which he is Chairman. There was extended and active discussion from the floor concerning coöperation with the United Nations, the United States Government, the Bar, and educational institutions, and a motion presented by Judge William H. Wadhams, and seconded by Louis B. Wehle, was adopted recommending the creation of a committee to assist the United Nations in any useful manner. The meeting adjourned shortly after 5 P.M. although active discussion still continued.

Some fifty members attended the meeting at the University of Chicago, which was held both morning and afternoon of November 30. Professor Wright presided and a vigorous discussion of the questions propounded by President Hyde ensued. A Committee on Resolutions presented a report and the following resolutions were adopted after some modifications:

1. The Conference recommends that the Society emphasize in its annual programs and in its JOURNAL the progressive development of international law, its relation to problems of organization and politics, and its adaptation to changing conditions.

2. The Conference recommends that the Society study the circumstances under which the individual can be assured of access to international tribunals for the protection of his person and property and for the remedying of injuries caused by violation of international law and treaties.

3. The Conference recommends that the Society undertake the study of the development and clarification of international criminal law and the formulation of an international criminal code.

4. The Conference recommends that the Society study the extent to which international questions should be treated by national courts in this and other countries as judicial rather than as political questions.

5. The Conference recommends that the Society study methods for stimulating the writing and syndicating of articles for newspapers and other periodicals, written in popular language, with a view to promoting knowledge of and respect for international law and understanding of its application to current problems.

6. The Conference urges the Society to recommend that law schools give more consideration to the study of international law with the expectation of the ultimate inclusion of international law in bar examinations.

7. The Conference commends the American Society of International Law for its support of the publication program of the U. S. Department of State and urges the Society to continue its support and recommendation for expansion of this program.

8. The Conference recommends that members of the Society coöperate with local bar associations in the establishment of committees to study the principles of international law, as involved in current problems.

9. The Conference recommends that the Society should continue and extend regional conferences as a means of popularizing the study of international law.

A tenth resolution, offered by Professor Pfankuchen, was adopted by a vote of 9 to 6 as follows:

The Conference urges the Society occasionally to hold its annual meeting outside Washington in conjunction with one of the regional meetings.

Professor Pfankuchen thought this might stimulate interest and membership in various sections of the country. Others pointed out the importance of retaining the active interest of State Department officials and members of the diplomatic corps in Washington. The influence which the Society has had upon the departments in Washington would be less if meetings were not held there annually. Furthermore, the membership in Washington and New York is much the largest. Consequently, East Coast meetings would be better attended. On the other hand, it was pointed out, this condition might change if meetings were occasionally held elsewhere.

Some thirty persons attended the meeting at San Francisco, at which Dean Edwin D. Dickinson of the University of California presided. A lively discussion occurred at both morning and afternoon sessions, on all of the problems raised in the questionnaire, the development of international organization, possible improvements in the JOURNAL, relations with other organizations interested in the social sciences, coöperation with the Department of State (with particular reference to its publications, in which the Society has taken such an interest in the past).^{*} At the afternoon session Professor Charles Fairman of Stanford presented additional questions for consideration involving relations with the United Nations and with foreign scholars in international law.

In conclusion, the following resolutions, presented by Professor Malbone W. Graham of Los Angeles, were adopted without opposition:

Resolutions:

I. Resolution affirming the value of regional meetings.

Resolved that, in keeping with the general object of the American Society of International Law "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice,"

The first Pacific Coast Regional Conferences of Members of the Society, believing that its sessions have furthered that objective,

- 1) Welcomes the initiative of President Hyde in convoking regional meetings of the Society;
- 2) Expresses the hope that the holding of annual or more frequent regional meetings will become a permanent policy; and to that end

^{*} Attention should be called to arrangements recently made for distribution of Department of State documents from six Area Distribution Centers in Boston, New York, Chicago, New Orleans, Denver, and San Francisco; further information may be had on this service from the Director of the Office of Public Affairs, Department of State.—Ed.

- 1) Proposes that regional meetings be given a recognized position in the Constitution of the Society; and
- 2) Invites the Executive Council, in accordance with Article IX, par. 1, of the Constitution, to propose an appropriate enabling amendment to Article VII, par. 1, of the Constitution, at the next regular Annual Meeting of the Society.

II. Resolution concerning acts of regional meetings.

Resolved that, (1) with a view to maintaining the organic unity of the Society while allowing maximum leeway for local deliberations, acts of regional meetings, including resolutions, be regarded, pending such Constitutional amendments as are envisaged by the preceding resolution, as having a recommendatory character only.

III. Resolution regarding local Committees.

Resolved that, pending the Constitutional changes envisaged in Resolutions I and II, this conference approve the designation of a Continuation Committee and the definition of the area it is to serve.

PITMAN B. POTTER

Secretary of the Society

LIMA CONFERENCE OF INTER-AMERICAN BAR ASSOCIATION

A large number of lawyers are making arrangements to attend the Fifth Conference of the Inter-American Bar Association which will be held at Lima, Peru, on Nov. 25-Dec. 8, 1947. The lawyers will represent associations from nearly all of the countries of this hemisphere.

Important problems will be considered by the score or more of Committees or Sections which will hold meetings during the Conference. An examination of the fields assigned to the various Committees will indicate the importance of the meeting. These are included below.

Committee I: Immigration, Nationality and Naturalization; Committee II: Taxation; Committee III: Administrative Law and Procedure; Committee IV (A): Commercial Treaties; Committee IV (B): Customs Laws; Committee V: National Centers of Legal Documentation and Bibliographical Indices of Law Materials; Committee VI: Comparative Constitutional Law; Committee VII: Communications, etc.; Committee VIII: Industrial, Economic, and Social Legislation; Committee IX: Penal Law and Procedure; Committee X: Territorial Waters and Ocean Fisheries; Committee XI: Maritime Law (Admiralty); Committee XII: Activities of Lawyers' Associations; Committee XIII: Intellectual and Industrial Property; Committee XIV: Legal Education; Committee XV (A): Law of Trusts and Trustees; Committee XV (B): Uniformity or Coördination of Legislation Relative to Civil Status of Persons; Committee XV (C): Uniformity of Law of Civil and Commercial Obligations and Contracts; Committee XV (D): International Cartels; Committee XVI: Municipal Law; Committee XVII: Postwar Juridical Problems.

The American Society of International Law will be represented by a number of delegates and papers will be presented by several of its members.

WILLIAM ROY VALLANCE

Chairman, Committee on Coöperation with other Societies

CAMBRIDGE CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION

The 41st Conference of the International Law Association met at Cambridge, England, from August 19 to 24, 1946. In the ancient university town, untouched by bombs, about 300 delegates from 12 countries met to discuss the following agenda:

- I. The United Nations Charter:
 - (a) The present structure and the direction of desirable changes.
 - (b) The effect of the Charter on the development of international law, with special reference to the status of neutrality and the Hague and Geneva Conventions.
 - (c) Methods of curbing the aggressive spirit.
- II. Divorce jurisdiction and the mutual recognition of decrees.
- III. (a) Uniform international legislation in the field of commerce.
(b) Conflict of laws concerning the formation of contracts.
- IV. Trade marks.
- V. Constitution and administration of the Association.

Resolutions dealt with curbing the aggressive spirit, with the preservation of permanent peace, with international trusteeships and with coöperation with UNESCO. To the United Nations the Conference sent a resolution reading:

That the International Law Association expresses its satisfaction that the Charter of the United Nations envisages 'the progressive development of international law and its codification,' and voices its firm hope that prompt attention will be given to the means and methods by which such development and codification may be undertaken and pursued. To this end, the International Law Association stands in readiness to be of every possible assistance, and it hereby directs its Council to maintain close contact with the Secretary-General of the United Nations.

The Conference urged the full restoration of trade mark rights effected by World War II. It added a second resolution on trade marks reading:

That a sub-committee of the Trade Marks Committee be appointed to consider and report on the proposals of the Dutch Group for a 'Uniform International Regulation of Trade Marks Law,' and that the sub-committee consist of Robert Burrell, K. C. (Chairman), Professor Bodenhausen (Secretary), and Messrs. Braun, Culbertson, de Haan, Judge Hakulinen, Ehrenreich-Hansen, Rordam, and Plaisant, with power to coöpt additional members.

The Conference authorized the preparation of a draft International Convention on the Conflict of Laws concerning the formation of contracts and

also advanced the discussion of a draft convention for the mutual recognition of decrees of divorce and nullity.

H. E. Mr. Trygve Lie, Secretary General of the United Nations, was elected and accepted the position of Honorary Vice President of the Association. The Czechoslovak Branch invited the 1947 Conference to meet at Prague. The Executive Council later accepted this invitation.

From the first day of the Conference the delegates revealed an affirmative desire for a revision of the Association's Constitution and for an enlarged program of activity. This movement resulted in the appointment of the following committee on general policy, including the Constitution, which has already held two meetings and which will report at the Prague Conference:

Lord PORTER	} 3 Paper Buildings (Basement South), Temple, London, E. C. 4,
Mr. Arthur JAFFE	
Mr. W. Harvey MOORE	
Mr. Judge BAGGE, Floragatan 2, Stockholm,	
Mr. N. V. BOEG, Niels Brocksg 4, Copenhagen,	
Hon. William S. CULBERTSON, Colorado Bldg., Washington 5, D. C.	
M. Leopold DOR, 39 rue Scheffer, Paris 16 ^e ,	
Hon. A. L. GOODHART, University College, Oxford,	
Mr. J. P. GOVARE, 5 rue de Lasteyrie, Paris 16 ^e ,	
Dr. Max GUTZWILLER, Praz des Riaux 7, Zürich,	
Dr. A. E. JANSSEN, rue de la Loi 85, Bruxelles,	
Dr. JANSMA, Weteringschans, Amsterdam,	
Mr. Henri LE CLERCQ, 1 Place de l'Industrie, Bruxelles,	
Hon. J. A. VAN HAMEL, Baarn.	

WILLIAM S. CULBERTSON,

*Member, Executive Council, International Law Association,
President, American Branch.*

DOCUMENTS OF THE UNITED NATIONS

The documents issued by the United Nations can be divided in two ways, according to form and according to content; in each case they fall into two general categories. There are those that are mimeographed and those that are printed. There are also those which report the proceedings of meetings and those which were submitted for consideration by those meetings.

The large bulk of UN documents at the present time are mimeographed. These are not, in general, available to the public, though persons needing them in limited numbers and for special purposes may sometimes secure them by writing to the Documents Division of the UN. They are also available for use in the United Nations Reference Centre at Lake Success and in a certain number of other libraries throughout the country to which they

have been distributed either through the courtesy of the United States delegation to the United Nations or by the UN itself. The libraries in the first group were selected by the American Library Association with two considerations in mind, geographic distribution and density of population.

Some of the material which appears first in mimeographed form is later printed and made available to the general public. For these printed documents the sales agent is the International Documents Service, Columbia University Press. All final documents are printed in the five official languages; French, English, Russian, Chinese, and Spanish. For each of the main organs of the United Nations a basic symbol has been adopted, and also a distinctive color of paper on which all of its documentation appears. These are indicated in the following list.

A/	General Assembly	white
S/	Security Council	yellow
E/	Economic and Social Council	blue
T/	Trusteeship Council	green
AEC/	Atomic Energy Commission	red

Documents of the International Court of Justice will be issued directly from The Hague and will have their own separate system.

The verbatim report of each meeting of the main bodies of the UN appears first in unedited form as a mimeographed *procès-verbal*. It bears the basic symbol of the organ in question, plus the document symbol ..P.V./.., denoting *procès-verbal*; plus the series number of the meeting. Thus A/P.V./58 is the verbatim record of the 58th plenary session of the Assembly. P.V.'s are issued to the press within a few hours of the end of a meeting. Delegates are given 48 hours in which to edit their remarks in the P.V.'s. If their suggested changes seem to the Secretariat to be purely editorial in nature they are accepted automatically. If, however, the changes seem to involve matters of substance they are referred back to the organ before which the remarks were made. This organ then decides whether or not the changes will be allowed.

It is planned that the edited verbatim speeches will all subsequently be printed as part of the *Official Record* of the organ in question. In the case of speeches originally given in another language the mimeographed P.V. contains only the record of the oral interpretation made at the meeting. The *Official Record*, on the other hand, contains a careful translation of the original speech. The *Official Record*, however, is still rather slow in appearing. The *Official Record* accounts of certain of the meetings of the Security Council, the Economic and Social Council, and the Atomic Energy Commission have been published, but as late as January 1, 1947, the *Official Record* account of the Assembly session held in London in January, 1946, had not yet appeared.

The proceedings of subordinate bodies are usually not issued verbatim but in the form of brief summaries. They are also to be published later in

the *Official Record*. As of January 1, 1947, the UN had issued the *Official Record* of only one committee, the General Assembly Committee on the League of Nations. This held two meetings a year ago.

Since October 8, 1946, the UN has published a daily *Journal of the United Nations* which contains the program for the day, the agenda of the meetings scheduled, and a list of documents issued on that day. During the Autumn session of the first Assembly it contained the unedited P.V.'s of plenary sessions held previously, and also unedited summary records of committee meetings. Each of these was printed as a supplement with a separate system of page-numbering. Thus the summary records of the successive meetings of Committee Six, the Legal Committee, are paged successively, and without regard to the paging of the rest of the contents of the *Journal*.

Before the *Journal of the United Nations* was inaugurated three separate Journals were issued, one for the General Assembly, one for the Security Council, and one for the Economic and Social Council. These appeared daily whenever the organ in question was in session. The separate Journals have been discontinued.

As distinguished from the proceedings of meetings, UN documentation also includes the material submitted for the consideration of the meetings, proposed resolutions, amendments thereto, memoranda from the Secretariat, draft reports, and so on. All of these appear originally in mimeographed form, in only two languages for the time being, namely English and French. It is the intention of the UN to print the more important of these documents as part of the *Official Record* of the organ which considers them. At the present time only a few have been printed.

Any documents presented directly to one of the main organs of the UN bears merely the basic symbol followed by a number denoting its place in the general series of that organ. For example, A/127 is the one hundred and twenty-seventh document presented to the General Assembly as a whole.

All documents considered by a commission or a committee are mimeographed or printed on paper of the color assigned to the parent organ. They bear, first of all, the basic symbol of the main organ under which the group in question works. This is followed by an additional symbol or "component" indicating the commission or committee to which the document in question was presented.

Around 200 different document series are already in existence. Aside from the general series of the five main organs, the more important series to date are those on the following list. Certain other important series have been issued under the Security Council and the Atomic Energy Commission, but those are restricted and are made available only to the delegates themselves.

Documents of Groups Subordinate to the General Assembly

A/EUR/-	General Committee
A/C.1/-	Political and Security Committee
A/C.2/-	Economic and Finance Committee
A/C.3/-	Social, Humanitarian and Cultural Committee
A/C.4/-	Trusteeship Committee
A/C.4/Sub.1/-	Sub-Committee on Trusteeship Agreements of the Fourth Committee
A/C.4/Sub.2/-	Sub-Committee dealing with Non-Self-Governing Territories
A/C.5/-	Administrative and Budgetary Committee
A/C.6/-	Legal Committee
A/C.1 and 6/-	Joint First and Sixth Committee
A/C.2 and 3/-	Joint Second and Third Committee
A/LN/-	Committee on the League of Nations
A/Site/-	Permanent Headquarters Committee
A/HQC/-	Headquarters Commission

Documents of Groups Subordinate to the Economic and Social Council

E/EMP/-	Economic and Employment Commission
E/TRC/-	Transport and Communications Commission
E/STAT/-	Statistical Commission
E/HR/-	Commission on Human Rights
E/HR/ST/-	Commission on the Status of Women, formerly a Sub-Commission under the Human Rights Commission
E/TSC/-	Social Commission
E/CS.7/-	Commission on Narcotic Drugs
E/REF/-	Special Committee on Refugees and Displaced Persons
E/NGO/- and E/CT.2/-	Committee on Arrangements for Consultation with Non-Governmental Organizations
E/AC.14/-	Committee of the Whole on the Report of the Temporary Sub-Committee on the Economic Reconstruction of Devastated Areas
E/H/-	International Health Conference

As can be seen from the above list, the system of committee and commission symbols in use during 1946 was far from uniform. Groups operating under the Economic and Social Council were designated mostly by their initials or by other letter abbreviations. Some of the groups operating under the Assembly were designated by committee numbers and some by letter symbols.

At the present time a more consistent system of document symbols is being planned. Certain standard "components" will be adopted which will have the same meaning wherever used. For example, standing committees of all main organs will be numbered, and will be designated,—

as are the six standing committees of the Assembly—by the component .../C.1/..., .../C.2/..., etc. Commissions will likewise be numbered,—in the order of their establishment,—and designated by the component .../CN.1/..., .../CN.2/..., and so on. *Ad hoc* committees will likewise be numbered in the order of their establishment and designated by .../AC .../...; Sub-Committees will be designated by the component .../SC.../..., placed after the symbol of the committee to which they are subordinate. Similarly sub-commissions will be designated by the component .../SUB .../... placed after the symbol of the commission to which they are subordinate. Documents of international conferences convened by the UN will be denoted by .../CONF/.. followed by a letter abbreviation of the subject matter.

Other standard components include the following :

.../P.V./..	Verbatim Record
.../S.R./..	Summary Record
.../PC/...	Preparatory Commission
.../INF/..	Information Series
.../Rev./..	Revision
.../Add./..	Addendum
.../Corr./..	Corrigendum

In translating into words the symbols which a given document bears one should begin from the end and work backward. Thus A/C.1/SUB.3/4/Rev.2/Corr./1 would be the first correction to the second revision of the fourth document of the series issued by the third sub-committee of the first committee of the Assembly.

Though the UN has for its own use an elaborate and complete system of indexing documents, there is as yet no plan by which this will be made available to the public or to libraries. In order to study a particular subject it is necessary first to know before what organs the subject was successively brought for discussion. Such information is contained in the various articles published in the printed *United Nations Weekly Bulletin*, the first issue of which appeared on August 3, 1946. An unofficial, but more compact, source of such information is the monthly *United Nations News* published by the Woodrow Wilson Foundation, New York City.

In the case of matters dealt with by the General Assembly the committee or *rapporteur's* report, on which the Assembly acts, usually contains a fairly complete history of UN treatment of the subject. Document A/283 contains the document numbers of all the *rapporteurs'* reports which formed the basis of action taken by the 1946 Autumn session of the General Assembly, together with references to the *Journal P.V.'s* which record the discussions and votes in the plenary sessions. Similar information, together with a summary of the contents of resolutions, is also contained in the January, 1947, issue of the unofficial *United Nations News*.

As of January 1, 1947, the documents dealing with the codification and development of international law were the following:

A/19	A/C.6/54
A/19/Corr.1	A/C.6/69
A/98	A/C.6/72
A/122	A/C.6/81
A/122/Add.1	A/C.6/83
A/181	A/C.6/86
A/222	A/C.6/94
A/228	A/C.6/95
A/231	A/C.6/108
A/236	A/C.6/114
A/C.1/120	A/C.6/120
A/BUR./50	

Discussion of the subject can be found in *Supplement 6* of the following numbers of the *Journal of the United Nations*: 39, 41, 46, 47, 56, and 58.

BEATRICE PITNEY LAMB

Woodrow Wilson Foundation

ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT REAPPEARS

It is gratifying to welcome the new series of the Austrian magazine for public law (*Österreichische Zeitschrift für öffentliches Recht*), under the editorship of L. Adamovich, R. Köstler, and Professor Verdross (Springer Verlag, Vienna), and to find so many old friends among the contributors to the first issue. Although many of these scholars have scattered to other countries they nevertheless find a unifying allegiance in their old periodical. So far as one can judge, the highest standards of scholarship are maintained. We wish the infant an outstanding success, particularly as a mark of revival of their mother country.

E. B.

THE MIDDLE EAST JOURNAL

The appearance, in Washington, of a new Middle East Journal will be of interest to all students of international law and relations. The new quarterly will be edited by Harvey P. Hall and Harold W. Glidden, and be published at the address of the School of Advanced International Studies. It will contain articles, records of factual developments, reviews of books, and documentation, relating to a region in which the United States has become almost as much interested recently as in Europe itself.

P. B. P.

GENOCIDE AS A CRIME UNDER INTERNATIONAL LAW

The practices of the National Socialist Government in Germany resulting in destruction of entire human groups gave impetus to a reconsideration of certain principles of international law. The question arose whether sovereignty goes so far that a government can destroy with impunity its own

citizens and whether such acts of destruction are domestic affairs or matters of international concern. Practically speaking, should the moral right of humanitarian intervention be converted into a right under international law? ¹ If the destruction of human groups is a problem of international concern, then such acts should be treated as crimes under the law of nations, like piracy, and every state should be able to take jurisdiction over such acts irrespective of the nationality of the offender and of the place where the crime was committed.

In line with this thought the present writer submitted a proposal to the International Conference for Unification of Criminal Law held in Madrid in 1933 to declare the destruction of racial, religious or social collectivities a crime under the law of nations (*delictum iuris gentium*).²

There was envisaged the creation of two new international crimes: the crime of barbarity, consisting in the extermination of racial, religious or social collectivities, and the crime of vandalism, consisting in the destruction of cultural and artistic works of these groups. The intention was to declare these crimes punishable by any country in which the culprit might be caught, regardless of the criminal's nationality or the place where the crime was committed.³ This proposal was not accepted. Much later, on November 22, 1946, during the discussion on genocide in the United Nations General Assembly, Sir Hartley Shawcross, United Kingdom Attorney Gen-

¹ Although some humanitarian intervention stigmatized religious persecutions by the use of not-quite-legal terms, it has always been felt that such interventions are based essentially on considerations of international morality. Compare in this respect communication from Secretary of State Hay to Mr. Wilson, United States Minister to Roumania, on July 17, 1902, in connection with the persecution of the Roumanian Jews: "This government cannot be a tacit party to such an international wrong" (Moore, *Digest*, Vol. VI, p. 364), but also instructions from Mr. Lansing to Ambassador Morgenthau to use his good offices for the "amelioration of conditions of the Armenians, informing Turkish Government that this persecution is destroying the feeling of good will which the people of the United States have always held toward Turkey" (*Foreign Relations*, 1915, Supplement, p. 988).

² See Raphael Lemkin, *Le terrorisme*, in *Actes de la V^e Conférence Internationale pour l'Unification du Droit pénal*, Paris, Pedone, 1935, and in particular by the same author the supplement to the above report entitled *Les Actes Créant un danger Général (inter-étatique) considérés comme délits de droit des gens*: Paris, Pedone, 1933.

³ The formulation ran as follows:

Whosoever, out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable, for the crime of barbarity, to a penalty of . . . unless his deed falls within a more severe provision of the given code.

Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism, to a penalty of . . . unless his deed falls within a more severe provision of the given code.

The above crimes will be prosecuted and punished irrespective of the place where the crime was committed and of the nationality of the offender, according to the law of the country where the offender was apprehended.

eral and delegate declared that the failure of this proposal made it impossible to punish some of the serious Nazi crimes.⁴

It was only in 1945 that the German war criminals were indicted, among other things, on the charge of genocide, meaning the extermination of racial, national or religious groups, especially the Jews, Poles, Gypsies, and others. The term and concept of genocide had been developed by this writer in his work *Axis Rule in Occupied Europe*.⁵ The word genocide is a hybrid consisting of the Greek *genos* meaning race, nation or tribe; and the Latin suffix *cide* meaning killing. The realities of European life in the years 1933-45 called for the creation of such a term and for the formulation of a legal concept of destruction of human groups. The Nazis had embarked upon a gigantic plan to change permanently the population balance in occupied Europe in their favor. They intended to wipe out entirely the national-biological power of the neighbors of Germany so that Germany might win a permanent victory, whether directly through military subjugation or indirectly through such a biological destruction that even in the case of Germany's defeat the neighbors would be so weakened that Germany would be able to recover her strength in later years.

The crime of genocide involves a wide range of actions, including not only the deprivation of life but also the prevention of life (abortions, sterilizations) and also devices considerably endangering life and health (artificial infections, working to death in special camps, deliberate separation of families for depopulation purposes and so forth). All these actions are subordinated to the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups. In view of such a phenomenon the terms previously used to describe an attack upon nationhood were not adequate. Mass murder or extermination wouldn't apply in the case of sterilization because the victims of sterilizations were not murdered, rather a people was killed through delayed action by stopping propagation. Moreover mass murder does not convey the specific losses to civilization in the form of the cultural contributions which can be made only by groups of people united through national, racial or cultural characteristics.

The evidence produced at the Nuremberg trial gave full support to the concept of genocide.⁶ However, the International Military Tribunal gave

⁴ *Journal of the United Nations*, No. 41, 1946, page 52.

⁵ Washington: Carnegie Endowment for International Peace; 1944.

⁶ See especially statements by Sir Hartley Shawcross and Sir David Maxwell Fyfe for the British prosecution, and Champetier de Ribes and Dubost for the French prosecution, who elaborated at length and with great eloquence on the crime of genocide in the course of the Nuremberg proceedings. The concept of genocide was also used recently by the Chief of Counsel in subsequent Nuremberg proceedings, Brigadier General Telford Taylor, in the case against the Nazi doctors who experimented on human beings in concentration camps. In this classical genocide case the defendants practiced

a narrow interpretation to its Charter and decided that acts committed before the outbreak of the war were not punishable offenses. This decision of the Tribunal was to a great extent based on the rectification of an alleged error in the Charter. On October 6, 1945, the four prosecutors signed in Berlin a protocol amending the Charter to the effect that the semi-colon in Art. 6, paragraph (c), of the Charter between the words "war" and "or" has been erroneously substituted for a comma. The signatories wished to remove a discrepancy between the Russian text (which had a comma) on one hand and the French and English texts on the other hand, which had a semi-colon between the above words.⁷ Ultimately the Charter was interpreted so that inhuman acts and persecutions of the civilian population were punishable only when committed during or in connection with the war. From the point of view of international law, however, acts committed before the war by Germany on its citizens were more significant. Had the Tribunal punished such acts a precedent would have been established to the effect that a Government is precluded from destroying groups of its own citizens.

Such was the legal status of the problem when the General Assembly met at Lake Success in October of 1946. The present writer was conscious of the great necessity of establishing a rule of international law which would make sure that "revolting and horrible acts" committed by a government on its own citizens, to use the words of the Nuremberg Tribunal, should in the future not go unpunished. It was then necessary to return to the postulates submitted to the International Conference for Unification of Criminal Law held in Madrid in 1933. The writer discussed the situation with several delegates at Lake Success. Encouraged by their sympathetic understanding, he drafted a resolution which was signed by the representatives

experiments in order to develop techniques for outright killings and abortions, on one hand, and sterilizations and castrations on the other hand. The writer calls the first "ktonotechnics" (from the Greek ktonos meaning murder) and the second "stero-technics" (from the Greek steiros meaning infertile or steirosis meaning infertility). Both "ktonotechnics" and "sterotechnics" were considered by the Nazis as very essential and served the purposes of genocide in its physical and biological aspects. As to various aspects and techniques of genocide see the writer's volume cited in note 5, above, Chapter, IX, Genocide. If and when "sterotechnics" achieves scientific character and is free of its genocidal purposes it could then qualify as sterology (the science of sterilization).

⁷ The provision of the Charter as signed by the Representatives of the United States, France, Great Britain and the Soviet Union on August 8, 1945, reads as follows: "Art. 6 (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated." See United States Department of State, *Executive Agreement Series*, No. 17, p. 46.

of Cuba, India, and Panama as sponsors.⁸ With the strong support of the United States delegation, the resolution was placed on the agenda of the Assembly. Later the matter was referred to the Legal Committee for discussion. The draft of the resolution consisted of two parts: the preamble referred to the destruction of racial, religious or national, groups in the past and stressed the losses to humanity in the form of cultural and other contributions. It further stated that genocide is a denial of the right of existence to entire human groups in the same sense as homicide is a denial to an individual of his right to live, and that such a denial is contrary to the aims and purposes of the UN. In its second part the resolution of the Assembly called upon the Social and Economic Council to prepare a report on three matters; first, to declare genocide an international crime; second, to insure international coöperation in its prevention and punishment; and third, to recommend that genocide be dealt with by national legislation in the same way as other international crimes such as piracy, traffic in women and children, and others.

The resolution met with the sympathy of the Legal Committee,⁹ as well as with considerable support from public opinion.¹⁰ Sir Hartley Shawcross proposed that the Legal Committee should declare genocide an international crime without awaiting further study by the Social and Economic Council. The Council was finishing its work and did not intend to reconvene during 1946. Because of additional amendments the Legal Committee appointed a sub-committee (Señor Gajardo from Chile served as chairman and Mr. Charles Fahy, Legal Advisor to the United States Department of State served as Reporter of the Sub-Committee) which submitted to the Legal

⁸ The writer wishes to express his deep gratitude to H. E. Guillermo Belt, Ambassador of Cuba, to the Hon. Mrs. Vijaya Lakshmi Pandit, Chairman of the Delegation of India, and to H. E. Dr. Ricardo J. Alfaro, Minister of Foreign Affairs of the Republic of Panama, for sponsoring the Resolution.

⁹ The discussions in the Legal Committee were highlighted by the very learned comments of the following: H. E. Dr. Robert Jimenez, former Minister of Foreign Affairs of Panama, Chairman of the Legal Committee of the United Nations Assembly; Mr. Charles Fahy, U. S. A.; Professor Ernesto Dihigo, Representative of Cuba; Justice Chagla, Representative of India; Dr. Jesus Maria Yepes, Legal Advisor of the Ministry of Foreign Affairs of Colombia; The Honorable Abdul Monim Bey Riad, Representative of Saudi-Arabia; Professor Charles Chaumont, Advisor of the French Delegation; Mr. P. N. Saptu, Alternate Representative of India; Dr. Manfred Lachs, Advisor to the delegation of Poland; Dr. Kerno, Assistant to the Secretary General of the U. N.

¹⁰ An important factor in the comparatively quick reception of the concept of genocide in international law was the understanding and support of this idea by the press of the United States and other countries. Especially remarkable contributions were made by *The Washington Post* (since 1944), *The New York Times* (since 1945), *New York Herald Tribune*, *Dagens Nyheter* in Stockholm, *Sunday Times* of London. *The Nineteenth Century and After*, London, *Le Monde* of Paris, *Tribune des Nations* in Paris, and other organs of public opinion in Switzerland, Holland, Norway, and India. Also numerous organizations working in the field of international affairs were interested and supported this concept such as The Scandinavian Institute for International Coöperation and the International Womens Alliance, both of Stockholm.

Committee the final draft. This draft carried two additional points as compared with the original, a reference to moral law and a specification of the responsibility of public officials.¹¹ This was approved by the Legal Committee and finally, on December 11, 1946, unanimously adopted by the Assembly. The text of the resolution in its essential parts reads as follows:

The General Assembly

Affirms that genocide is a crime under international law which the civilized world condemns—and for the commission of which principals and accomplices, whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable;

Invites the Member States to enact the necessary legislation for the prevention and punishment of this crime;

Recommends that international coöperation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,

Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.

By declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established. This principle is already accepted by the UN and does not need any specific confirmation by treaty. Thus the resolution of December 11, 1946, changes fundamentally the international responsibilities of a government toward its citizens. The importance of the concept of genocide from the point of view of international law and the new responsibilities of states was stressed in the letter of President Truman transmitting his report on United Nations to the Congress of the United States on February 5, 1947.¹² Genocide is now established as a crime under international law on a plane with piracy although no treaties were signed to this effect. The usefulness of a future international treaty on genocide lies in facilitating the prevention and punishment of the crime and apprehension of criminals.¹³ According to the second paragraph of the resolution, member states are to enact suitable legislation. No great difficulties are involved in this field since genocide is a composite crime and consists of acts which are themselves punishable by most existing legislation. The main task will be to redraft existing provisions into criminal law formulae based upon the specific criminal intent to

¹¹ On responsibility of persons acting on behalf of states in the crime of genocide see article by present writer in *The American Scholar*, Vol. XV, No. 2 (April, 1946).

¹² Text of letter in *The New York Times*, February 6, 1947.

¹³ The outline of such a treaty was offered by the writer in his article "Genocide" published in *The American Scholar*, as cited; it was republished in *La Revue Belge de Droit Penal et de Criminologie*, Brussels, November, 1946, also in *Samtiden*, Oslo, October, 1946, and in a special pamphlet issued by the *Secrétariat D'Etat à la Présidence du Conseil et à L'Information* in Paris, on September 24, 1946 (*Notes Documentaires et Etudes*, No. 417) under the title of *Le Crime de Génocide*.

destroy entire human groups. Such redrafted provisions will have to be adjusted to the principle that the offenders are punishable in a given country even if the crime is committed abroad. This last principle is the symbol and practical application of the higher doctrine of moral and legal solidarity in protecting the basic values of our civilization.

The concept of genocide can and must be used also in treaties between states for the settlement of conflicts and disputes with underlying ethnical, racial, and religious tensions, especially in cases where such tensions result in large scale criminality. Peace treaties afford an appropriate occasion for such use of this concept. Since some of the Axis satellite countries practiced genocide in the recent war according to the German pattern the writer proposed in a special memorandum that the Paris Conference with the satellite countries should include in the Peace Treaties anti-genocide clauses. This would amount to an obligation by the enemy countries involved to include immediately the crime of genocide in their criminal codes and to punish the numerous perpetrators of this crime.¹⁴ Unfortunately the proposal of the author could not be discussed because it was introduced after the deadline of 16 August 1946, the time fixed for new amendments to the drafts of the treaties with the satellite countries.

However, in the case of the peace settlement relating to Germany the inclusion of anti-genocide clauses in the peace treaty or peace statute would be both timely and appropriate. Germany, the classical country of genocide practices, must not profit by the situation that the United Nations genocide resolution does not bind her as a state because she is not a member of the United Nations. Since Germany's practices actually provided the basis for developing the concept of genocide she should be the first country to include the crime of genocide in her criminal code. Such an obligation should be imposed upon Germany either through the forthcoming peace instrument or even earlier, by order of the occupation authorities and (or) by a specific obligation to be included in the German state constitutions. Anti-genocide provisions in German domestic law are especially necessary because of the great number of persons of alien origin who are still residing in Germany as displaced persons.

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¹⁴ See *Memorandum sur la nécessité d'inclure les clauses contre le génocide dans les traités de paix* published in the Annex of the French pamphlet *Le Crime de Génocide*, cited above, note 12, wherein two alternative formulae of the crime of genocide proposed for peace treaties are introduced as follows: (1) "Whoever, while participating in a conspiracy to destroy a national, racial, or religious group, undertakes an attack against the life, liberty, or property of members of such groups is guilty of the crime of genocide"; (2) "Whoever, while participating in a conspiracy to destroy a national, racial, or religious group undertakes an attack against the life or bodily integrity or practices biological devices on members of such groups, is guilty of the crime of genocide."

* The views expressed in this note are the personal views of the author and not necessarily those of any government department with which he has been or is connected.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1946

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations:—*C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *G. M. B. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *N. Y. T.*, New York Times; *P. A. U.*, Pan American Union Bulletin; *S. C. O. E.*, United Nations Security Council Official Records; *T. I. A. S.*, U. S. Treaties and other International Acts Series.

May, 1946

- 4/August 15 EGYPT—UNITED STATES. Replying to U. S. note of May 4, Egyptian note stated that special trade privileges, extended to the Philippine Republic by the United States, shall not be required by Egypt. Text: *D. S. B.*, Sept. 1, 1946, p. 431.
- 4/August 26 PORTUGAL—UNITED STATES. Replying to the U. S. note of May 4, Portuguese note of Aug. 26 stated that special concessions, granted the Republic of the Philippines by the United States, shall not require the extension to Portugal of such privileges. Text: *D. S. B.*, Sept. 8, 1946, p. 463.
- 4/September 10 DENMARK—UNITED STATES. In reply to U. S. note of May 4, the Danish note of Sept. 10 stated that most-favored-nation provisions accorded to the Philippine Islands need not be extended to Denmark. Text of Danish note: *D. S. B.*, Sept. 29, 1946, p. 596.
- 4/October 3 UNITED STATES—YUGOSLAVIA. Replying to U. S. note of May 4, a Yugoslav note stated its understanding that special consideration, granted to the Philippine Republic by the United States, shall not be extended to Yugoslavia. Text: *D. S. B.*, Oct. 20, 1946, p. 726.
- 4/October 7 DOMINICAN REPUBLIC—UNITED STATES. Replying to U. S. note of May 4, Dominican note stated that special concessions granted to the Philippine Republic by the United States shall not require the extension to The Dominican Republic of such privileges. Text: *D. S. B.*, Oct. 13, 1946, p. 691.
- 10–July 15 GREAT BRITAIN—UNITED STATES. U. S. Senate approved S. J. Res. 138, authorizing the 3¾ billion dollar credit to Great Britain. *N. Y. T.*, May 11, 1946, p. 1; *Cong. Rec.* (daily) May 10, 1946, pp. 4882–4902. The loan was approved July 13 by the House of Representatives. *N. Y. T.*, July 14, 1946, p. 1; *Cong. Rec.* (daily) July 13, 1946, pp. 9039–9081. The bill was signed July 15 by President Truman. *N. Y. T.*, July 16, 1946, p. 1.
- 20–September 20 GREAT BRITAIN—YUGOSLAVIA. British Foreign Office published on August 19 two notes of May 20 and Aug. 16, concerning patrol incidents in the Venezia Giulia area. Texts: *London Times*, Aug. 20, 1946, p. 4. Partial text of recent British note, released Sept. 20: *London Times*, Sept. 21, 1946, p. 3.

August, 1946

- 1 AGRICULTURE, INTERNATIONAL INSTITUTE OF. Property and functions were transferred to the Food and Agriculture Organization. All members of the I.I.A. have now signed the protocol of transfer except Ethiopia, Mexico and Venezuela, but the latter two no longer consider themselves members. *London Times*, Sept. 7, 1946, p. 3.
- 2 GREAT BRITAIN—IRAQ. Exchanged notes at Bagdad, respecting the status of the Iraqi diplomatic mission in London, and the precedence of H. M. Ambassador at Bagdad. Text: *Iraq* No. 3 (1946), *Cmd.* 6918.
- 13 GREAT BRITAIN—NETHERLANDS. Signed agreement at London for certain air services. Text with annex and exchange of notes: *G. B. T. S.* No. 23 (1946), *Cmd.* 6893.
- 15-30 SOVIET RUSSIA—SWEDEN—UNITED STATES. U. S. note of August 15 expressed concern over the projected Soviet-Swedish trade agreement. Text, together with Swedish reply of the 29th: *D. S. B.*, Sept. 15, 1946, pp. 506-507. Excerpts from Swedish note: *N. Y. T.*, Sept. 5, 1946, p. 4. Russia denied any breach of its lend-lease agreement. *N. Y. T.*, Aug. 31, 1946, p. 5. Text of U. S. State Department's statement of Aug. 30: *D. S. B.*, Sept. 8, 1946, p. 464.
- 16-October 15 PEACE CONFERENCE. Iran, in a second note, requested admission as a member. [The first was delivered Aug. 10.] *N. Y. T.*, Aug. 17, 1946, p. 3. Voted to invite Austria to be heard on the South Tyrol question. *N. Y. T.*, Aug. 18, 1946, p. 1; *London Times*, Aug. 19, 1946, p. 3. Australian delegate proposed that a "court of human rights" be provided in all five peace treaties under discussion. Text: *N. Y. T.*, Aug. 19, 1946, p. 1. The United States suggested an additional clause. Text: p. 1. Decided to invite Iran to make known its views on all five treaties. *London Times*, Aug. 19, 1946, p. 3. Text of Italian Document No. 8 to be submitted Aug. 20, asking participation in the drafting of treaties for Germany, Austria and Japan: *N. Y. T.*, Aug. 20, 1946, p. 8. U. S. representative told the Italian Economic Commission at the Conference that his Government did not intend to have economic aid, given to Italy, redistributed to other nations. The United States will not claim reparations. *N. Y. T.*, Sept. 12, 1946, pp. 1, 16. On Sept. 18 Russia invoked the $\frac{2}{3}$ rule in a commission for the first time, and renewed its contention that France was not a voting member of any Danubian treaty commission. *N. Y. T.*, Sept. 19, 1946, pp. 1, 3. Approved the peace treaty for Italy on Oct. 9. *N. Y. T.*, Oct. 10, 1946, pp. 1, 2. The peace treaties for Rumania, Bulgaria, Hungary and Finland were approved on Oct. 10, 11, 13 and 14, respectively. *N. Y. T.*, Oct. 11, 1946, pp. 1, 8; Oct. 12, pp. 1, 3; Oct. 13, pp. 1, 26; and Oct. 15, pp. 1, 20. With the Yugoslav delegation absent, the Conference gave final approval to the five draft treaties and adjourned Oct. 15. *London Times*, Oct. 16, 1946, p. 4; *N. Y. T.*, Oct. 16, 1946, pp. 1, 15. Text of Yugoslav delegation's note expressing dissatisfaction with the work of the Conference, especially provisions of the Italian peace treaty: p. 15. Mr. Byrnes broadcast his report on Oct. 18. *N. Y. T.*, Oct. 19, 1946, p. 1. Text: p. 5; *D. S. B.*, Oct. 27, 1946, pp. 739-743; Dept. of State. *Conference Ser.* No. 90.
- 17-30 EDUCATION CONFERENCE. Delegates from 30 nations to the International Education Conference met at Endicott, N. Y. *N. Y. T.*, Aug. 18, 1946, p. 27. Voted Aug. 27 to establish the World Organization of the Teaching Profession. Text of draft constitution: *N. Y. T.*, Aug. 28, 1946, p. 14. The conference ended Aug. 30 with the signature of the constitution. *N. Y. T.*, Aug. 31, 1946, p. 13.

- 17/November 7 DENMARK—SOVIET RUSSIA. Signed 5-year trade and shipping agreement in Moscow. *N. Y. T.*, Aug. 18, 1946, p. 7; *C. I. E. D.*, Aug. 12/25, 1946, p. 506. The agreement was ratified Nov. 7. *C. I. E. D.*, Oct. 21/Nov. 10, 1946, p. 653.
- 19 GREEK ELECTIONS. Summary was issued of conclusions reached by the U. S. section of the Allied Mission to Observe the Revision of Greek Electoral Lists. Text of summary: *D. S. B.*, Sept. 1, 1946, pp. 424-425.
- 19 PRISONERS OF WAR. Joint statement by the State, War and Navy Departments was released, regarding claims of American nationals against enemy countries arising out of mistreatment of prisoners of war. Text: *D. S. B.*, Sept. 1, 1946, p. 427.
- 19/27 POLAND (Nat'l. Unity Govt.). United States sent note Aug. 19 protesting "oppressive acts which have prevented normal democratic political activity" and listing political parties which should be recognized as democratic. Great Britain sent similar note. *N. Y. T.*, Aug. 21, 1946, p. 1. Text: p. 6; *D. S. B.*, Sept. 1, 1946, pp. 422-423. British Ambassador at Warsaw presented note Aug. 19, reminding Poland of its undertakings to hold elections and to grant freedom of activity to all political parties. Text: *London Times*, Aug. 21, 1946, p. 3. The Polish Embassy in Washington issued statement Aug. 27 protesting U. S. note. Text: *N. Y. T.*, Aug. 28, 1946, pp. 1, 3.
- 19-November 13 DARDANELLES. U. S. note to Russia stated opposition to latter's demands for a share in military control of the Straits. *N. Y. T.*, Aug. 20, 1946, p. 1. Text: p. 3; *D. S. B.*, Sept. 1, 1946, pp. 421-422. Partial text of British note of Aug. 21 to Russia: *N. Y. T.*, Nov. 22, 1946, p. 14. Turkey released its note rejecting Russian demands, but expressing willingness to have an international conference bring the 1936 convention up-to-date. *N. Y. T.*, Aug. 24, 1946, p. 3. Text: Aug. 25, p. 12; *London Times*, Aug. 26, 1946, p. 3. Russian note, received Sept. 24, in reply to Turkish note of Sept. 22, indicated that if Turkey rejected Soviet proposals for defense of the Dardanelles and organized "military measures in the Straits together with any non-Black Sea power," it would be considered against the security interests of Black Sea powers. *N. Y. T.*, Sept. 29, 1946, pp. 1, 39; *London Times*, Sept. 30, 1946, p. 3. Announcement was made Oct. 4 of memorandum to Turkey stating British views. *N. Y. T.*, Oct. 6, 1946, p. 33; *London Times*, Oct. 7, 1946, p. 3. U. S. note to Russia of Oct. 9, in reply to Soviet note to Turkey of Sept. 24, rejected idea of exclusive Russo-Turkish responsibility for defense, and stated U. S. interest in the future of the Straits, and stated that any attack would be a matter for U. N. Security Council action. *N. Y. T.*, Oct. 12, 1946, p. 1. Text: p. 3; *D. S. B.*, Oct. 20, 1946, p. 722. Great Britain also sent note Oct. 9. Text: *N. Y. T.*, Nov. 22, 1946, p. 14. Turkish reply to Soviet note of Sept. 24 was handed to Russian Chargé at Ankara on Oct. 18. [No text published.] *N. Y. T.*, Oct. 19, 1946, p. 1; *London Times*, Oct. 19, 1946, p. 4. The British Foreign Office announced Nov. 13 receipt of third Russian note. *N. Y. T.*, Nov. 14, 1946, p. 23.
- 20 NORWAY—SOVIET RUSSIA. Announcement was made at Oslo of agreement on their common frontier. The boundary, established in 1826, was reaffirmed (former Finnish-Norwegian boundary). *N. Y. T.*, Aug. 21, 1946, p. 8.
- 20-October 8 UNITED STATES—YUGOSLAVIA. Yugoslavia protested to United States against flights of aircraft over its territory. *London Times*, Aug. 21, 1946, p. 4. United States sent note on the same date protesting the recent forcing down of

two transport planes flying between Italy and Austria. *N. Y. T.*, Aug. 21, 1946, p. 1. Text: p. 2. Marshal Tito's broadcast contradicted U. S. account of the incident of Aug. 9 and demanded respect of Yugoslavia's air sovereignty. pp. 1, 2. U. S. note of August 21 gave Yugoslavia 48 hours to release imprisoned U. S. airmen, to insure their safe passage beyond Yugoslav borders and to allow American Embassy officials to communicate with them. *N. Y. T.*, Aug. 22, 1946, p. 1. Text: p. 3, *D. S. B.*, Sept. 1, 1946, pp. 417-418. On Aug. 22 Marshal Tito ordered flyers to be released and his troops not to fire on foreign aircraft. *N. Y. T.*, Aug. 23, 1946, p. 1. Text of Marshal Tito's note of Aug. 23: *D. S. B.*, Sept. 1, 1946, p. 419. U. S. Department of State announced that Yugoslavia had apparently complied with the ultimatum dealing with attacks on U. S. aircraft. *N. Y. T.*, Aug. 25, 1946, p. 1. Text of announcement: p. 4. On Aug. 25 the Yugoslav Ministry of Information cited 110 "violations" of its territory by Anglo-American military planes from Aug. 10 to 20. *N. Y. T.*, Aug. 26, 1946, p. 1. U. S. note, delivered Sept. 17, replied to Yugoslav notes of July 26 and Aug. 14, and rejected Yugoslav charges of abuse of army personnel. Text: *N. Y. T.*, Sept. 21, 1946, p. 4; *D. S. B.*, Sept. 29, 1946, pp. 578-581. Text of Yugoslav note of Sept. 20 agreeing to pay indemnity for American fliers killed Aug. 19: *N. Y. T.*, Oct. 10, 1946, p. 10. U. S. note of Sept. 27 accused Yugoslavia of spreading malicious propaganda, and renewed appeal for coöperation in Trieste. *N. Y. T.*, Oct. 1, 1946, pp. 1, 13. Text: *D. S. B.*, Oct. 13, 1946, pp. 676-677. U. S. note of Oct. 3 acknowledged receipt of \$150,000 to be distributed among the families of crew members of U. S. plane shot down on Aug. 19. It also declined to accept Yugoslav claim of non-responsibility for loss of two planes forced down Aug. 9 and 19. *D. S. B.*, Oct. 20, 1946, p. 725; *N. Y. T.*, Oct. 10, 1946, p. 1.

20-November 10 EGYPT—GREAT BRITAIN. Egyptian delegation rejected British formula Aug. 20 for a new treaty. *London Times*, Aug. 21, 1946, p. 4. Text of Egyptian statement: Aug. 22, p. 4. Treaty negotiations were resumed Sept. 15. *N. Y. T.*, Sept. 16, 1946, p. 2; *London Times*, Sept. 16, 1946, p. 4. The Egyptian group again rejected British proposals. *N. Y. T.*, Sept. 24, 1946, p. 22. Joint communiqué of Oct. 25 announced that a "decisive result" would be forthcoming in a few days regarding the negotiations. *N. Y. T.*, Oct. 26, 1946, p. 4. Prime Minister Attlee denied Oct. 28 that Great Britain had agreed to recognize Egyptian rule over the Sudan. *London Times*, Oct. 29, 1946, p. 4. On Nov. 10 the Egyptian Premier reiterated existence of draft treaty providing for British withdrawal, etc. *N. Y. T.*, Nov. 11, 1946, p. 8.

21 JAPANESE OCCUPATION. Russian member of the Allied Council for Japan turned down American proposal to enlarge membership of the Council to include all eleven Allies who fought in the Pacific war. *N. Y. T.*, Aug. 21, 1946, p. 1.

22 SPANISH RECOGNITION (Republican Govt. in Exile). Announcement was made of recognition by Czechoslovakia. *News Flashes from Czechoslovakia* (Chicago), Sept. 15, 1946, p. 1.

24-October 25 INDIA. Appointment was announced Aug. 24 of the new Executive Council consisting of 12 members. *N. Y. T.*, Aug. 25, 1946, p. 1. List: p. 25; *London Times*, Aug. 26, 1946, p. 4. Biographical sketches: Govt. of India *Information Services*, Aug. 26, 1946, No. 3219. The Council took office Sept. 2. *London Times*, Sept. 3, 1946, p. 4; *N. Y. T.*, Sept. 3, 1946, p. 6. The Cabinet held its first meeting Sept. 4. *London Times*, Sept. 5, 1946, p. 4. Terence A. Shone was appointed High Commissioner for the United Kingdom in India on Sept. 18. *N. Y. T.*, Sept. 19, 1946, p. 12. Biographical sketches of members

of the Cabinet: Govt. of India *Information Services*, Sept. 18, 1946, No. 3240. Viceroy Lord Wavell announced Oct. 15 that the Moslem League had decided to participate in the interim government and five members were named to sit in the interim Cabinet. Members: London *Times*, Oct. 16, 1946, p. 4; *N. Y. T.*, Oct. 26, 1946, p. 6.

- 26-September 3 AVIATION CONFERENCE. Caribbean Regional Aviation Conference, the third of ten meetings sponsored by PICAQ, met in Washington. U. S. delegation: *D. S. B.*, Sept. 1, 1946, p. 407. List of countries and international organizations invited: *D. S. B.*, Sept. 8, 1946, p. 457. Informal report on the meeting: *D. S. B.*, Nov. 17, 1946, pp. 897-900.
- 27 ITALY—SYRIA. Announcement that Syria had agreed to the exchange of diplomatic representatives. *N. Y. T.*, Aug. 28, 1946, p. 3.
- 29 COUNCIL OF FOREIGN MINISTERS. Opened meetings Aug. 29 in Paris to discuss work of the Peace Conference. Issued joint statement on treaty amendments. Text: London *Times*, Aug. 30, 1946, p. 4.
- 29 JAPANESE OCCUPATION. Text of U. S. War Department's report on the first year of occupation: *N. Y. T.*, Aug. 30, 1946, p. 6; *D. S. B.*, Sept. 8, 1946, pp. 460-461.
- 29/October 4 REPARATIONS (Italian). Claims totaling \$5,700,000,000 have been registered with the Secretariat of the Peace Conference at Paris. *N. Y. T.*, Aug. 30, 1946, p. 7. At a meeting of the Italian Economic Commission at the Peace Conference, Greece and Yugoslavia were voted 100 million dollars each and Ethiopia, 25 millions. Reparations to Albania failed of adoption. *N. Y. T.*, Oct. 5, 1946, p. 1.
- 29-November 4 UNITED NATIONS. Security Council. Approved Aug. 29 applications of Afghanistan, Iceland and Sweden for membership, and rejected those of Albania, Outer Mongolia, Trans-Jordan, Ireland and Portugal. *N. Y. T.*, Aug. 30, 1946, pp. 1, 2. Russia demanded Aug. 29 that every country with troops in non-enemy states report on their number and location within two weeks. Action was put off because the matter was not presented according to accepted rules of order. *N. Y. T.*, Aug. 30, 1946, p. 1. Text of Mr. Gromyko's statement: p. 3; U. N. Doc. S/144; *S. C. O. R.*, 1st yr., 2d ser., pp. 141-142. On Sept. 3 the Soviet Ukrainian delegate presented formal charges of aggression against the Greek Government and the British forces in Greece. *N. Y. T.*, Sept. 4, 1946, pp. 1, 2. British and Greek members replied. *N. Y. T.*, Sept. 6, 1946, p. 1. Mr. Manuilsky gave a summation of his charges of aggression on Sept. 10. *N. Y. T.*, Sept. 11, 1946, pp. 1, 16. The United States suggested on Sept. 18 a Council inquiry into the situation along the whole of Greece's northern frontier. *N. Y. T.*, Sept. 19, 1946, p. 1. Text of statement by U. S. delegate: p. 4. Dropped charges against Greece Sept. 20. *N. Y. T.*, Sept. 21, 1946, p. 1. Mr. Gromyko urged the Council to request the United States and Great Britain to report the number and location of their troops in non-enemy countries and charged their presence caused uneasiness therein. *N. Y. T.*, Sept. 24, 1946, p. 1. The Council refused to request the information on Sept. 24. *N. Y. T.*, Sept. 25, 1946, p. 1; London *Times*, Sept. 25, 1946, p. 4. Defeated Oct. 15 a Polish resolution which would have barred Franco Spain from accession to the International Court of Justice. *N. Y. T.*, Oct. 16, 1946, p. 13. Voted Nov. 4 to drop from its inactive agenda the problem of Franco Spain to enable the question to be taken up by the General Assembly. *N. Y. T.*, Nov. 5, 1946, pp. 1, 5; London *Times*, Nov. 5, 1946, p. 4.

30/31 CHINA—UNITED STATES. Signed an over-all agreement for the sale to China of U. S. civilian-type surplus property in the western Pacific and China. Text of joint statement, released Aug. 31; *D. S. B.*, Sept. 22, 1946, pp. 548-549.

30-September 13 POLISH FORCES IN EXILE. The British Government, according to an announcement of Aug. 30, has decided to enroll General Anders' forces in a Polish Resettlement Corps, despite Polish Government's protest of Aug. 8. *N. Y. T.*, Aug. 31, 1946, p. 7. Poland announced a new note of protest Sept. 7 against "military character" of the proposed Corps. *N. Y. T.*, Sept. 8, 1946, p. 31. A British reply was announced on Sept. 13. *N. Y. T.*, Sept. 14, 1946, p. 3.

30-November 8 KOREAN OCCUPATION. Text of statements of U. S. policy, dated Aug. 30 and Oct. 1: *D. S. B.*, Sept. 8, 1946, p. 462; and Oct. 13, 1946, p. 670. Announcement was made Nov. 8 that Russia had advised the United States of its willingness to resume discussions on a united Korea. *N. Y. T.*, Nov. 8, 1946, p. 11.

30-November 9 INTERNATIONAL MILITARY TRIBUNAL (Germany). The Prosecution's case was concluded on Aug. 30. *N. Y. T.*, Aug. 31, 1946, p. 3. Defendants made their final pleas, Aug. 31, all claiming innocence. *N. Y. T.*, Sept. 1, 1946, p. 1. Summary of the judgment delivered on Sept. 30: *N. Y. T.*, Oct. 1, 1946, pp. 1, 13. Excerpts: *London Times*, Oct. 1, 1946, p. 3. French text and German translation: *Journal Officiel*, Gouvernement Militaire de la Zone Française d'Occupation, Oct. 18, 1946. Full English text: below, Supplement, p. 1. Twelve defendants were sentenced to be hanged, 7 to varying prison terms, and 3 were acquitted. *N. Y. T.*, Oct. 2, 1946, p. 1. Verdicts: pp. 22, 23, 24; *London Times*, Oct. 2, 1946, p. 4. On Oct. 10 the Allied Control Council denied appeals. *N. Y. T.*, Oct. 11, 1946, p. 1. Text of decision: p. 2. Ten defendants were hanged Oct. 16. Hermann Goering committed suicide by poison. *London Times*, Oct. 17, 1946, p. 6; *N. Y. T.*, Oct. 16, 1946, pp. 1, 19. Text of U. S. Prosecutor's report to President Truman: p. 23; *D. S. B.*, Oct. 27, 1946, pp. 771-776. Text of Mr. Biddle's Report of Nov. 9 on the trial: *N. Y. T.*, Nov. 13, 1946, p. 14; *D. S. B.*, Nov. 24, 1946, pp. 954-957.

31 GREAT BRITAIN—NOEWAY. Signed agreement at London concerning air communications. Text with annex: *G. B. T. S. No. 31* (1946), *Cmd.* 6913.

September, 1946

2-13 FOOD AND AGRICULTURE ORGANIZATION. Conference opened Sept. 2 at Copenhagen. *N. Y. T.*, Sept. 3, 1946, p. 2; *London Times*, Sept. 3, 1946, p. 4. Summary of world food survey: *London Times*, Sept. 2, 1946, p. 5. U. S. delegation: *D. S. B.*, Aug. 25, 1946, pp. 362-363. Admitted Italy, Switzerland, Portugal and Ireland on Sept. 3. *London Times*, Sept. 4, 1946, p. 4. Soviet Russia and Argentina to be invited to serve with 15 members of the F. A. O. on a commission to prepare plans for a world food board and an international price stabilization program. *London Times*, Sept. 10, 1946, p. 3; *N. Y. T.*, Sept. 10, 1946, p. 2. Sessions recessed Sept. 13 with delegates from 47 nations approving objectives of a proposed world food board. Admitted Hungary to membership. *London Times*, Sept. 14, 1946, p. 3; *N. Y. T.*, Sept. 14, 1946, p. 3.

2-25 POSTAL UNION OF THE AMERICAS AND SPAIN. Fifth congress met at Rio de Janeiro with delegates present from 23 countries. U. S. delegates and summary of the meeting: *D. S. B.*, Nov. 3, 1946, pp. 815-816.

3 GREAT BRITAIN—SOUTHERN RHODESIA. Signed agreement for avoidance of double taxation. *London Times*, Sept. 12, 1946, p. 3.

- 4 INDIA—SIAM. Signed 20-year agreement at New Delhi, whereby India grants a \$15,000,000 credit to Siam. *London Times*, Sept. 5, 1943, p. 4.
- 6 BRAZIL—UNITED STATES. Signed air transport agreement at Rio de Janeiro. *D. S. B.*, Sept. 22, 1946, p. 556.
- 6 BYRNES, JAMES F. Text of the Secretary of State's address at Stuttgart, calling for a return of self-government to Germany and removal of "alien dictatorship": *N. Y. T.*, Sept. 7, 1946, p. 5; *D. S. B.*, Sept. 15, 1946, pp. 496-501. Excerpts: *London Times*, Sept. 7, 1946, p. 4.
- 7-15 MEDICAL CONGRESS. First Inter-American Congress of Medicine met at Rio de Janeiro with delegates from 19 countries. The next meeting will be in 1948 at Mexico City. *D. S. B.*, Nov. 3, 1946, pp. 814-815. U. S. delegates: *D. S. B.*, Sept. 22, 1946, p. 535.
- 7/October 24 NETHERLANDS EAST INDIES. British Government announced decision to withdraw occupation forces by Nov. 30. *N. Y. T.*, Sept. 8, 1946, p. 34. The final phase of withdrawal began Oct. 24. *London Times*, Oct. 25, 1946, p. 3.
- 10/15 FRANCE—FRENCH-INDO CHINA. Working arrangement between France and the new Indo-China Republic of Viet Nam was announced in Paris, granting mutual recognition for nationals, recognition of French property and business interests in Viet Nam, etc. *N. Y. T.*, Sept. 11, 1946, p. 8. Signed an agreement Sept. 15 in Paris. *N. Y. T.*, Sept. 16, 1946, p. 3; *London Times*, Sept. 18, 1946, p. 3.
- 10-November 5 PALESTINE. In opening the London conference on Palestine Prime Minister Attlee said that Palestine is a world problem. *N. Y. T.*, Sept. 11, 1946, p. 8. Text of address and personnel of delegations: *London Times*, Sept. 11, 1946, p. 4. Leaders of 7 Arab nations rejected Anglo-American Cabinet Committee's plan for federalization of Palestine. *N. Y. T.*, Sept. 13, 1946, p. 16. Arab delegation's counterplan offered minority standing and guaranteed political and cultural rights for the Jews. *N. Y. T.*, Sept. 21, 1946, p. 4; *London Times*, Sept. 21, 1946, p. 3. Summary of main points of Arab plan: *N. Y. T.*, Sept. 26, 1946, p. 11. The Conference adjourned Oct. 2 until Dec. 16. *London Times*, Oct. 3, 1946, p. 4. President Truman pledged United States to further "substantial immigration" into Palestine. Text of statement: *N. Y. T.*, Oct. 5, 1946, p. 2; *D. S. B.*, Oct. 13, 1946, pp. 669-670. Text of exchange of messages between King of Saudi Arabia and President Truman [Oct. 15 and Oct. 28]: *N. Y. T.*, Oct. 18, 1946, pp. 1, 3; and Oct. 29, 1946, p. 14; *D. S. B.*, Nov. 10, 1946, pp. 848-851. Decision to release from detention Jewish leaders in Palestine and Palestinian Arabs, detained in the Seychelles, was announced in the House of Commons on Nov. 5. *London Times*, Nov. 6, 1946, p. 4.
- 11-28 GREECE. King George's proclamation, issued in London, called for national unity and pledged him to work for social progress through democracy. Excerpts: *N. Y. T.*, Sept. 12, 1946, p. 8; *London Times*, Sept. 12, 1946, p. 3. The King landed in Greece Sept. 27. *N. Y. T.*, Sept. 28, 1946, p. 1. He returned to Athens on the 28th. *N. Y. T.*, Sept. 29, 1946, p. 1; *London Times*, Sept. 30, 1946, p. 4.
- 11-December 10 UNITED NATIONS. Economic and Social Council. Third session opened at Lake Success, Long Island on Sept. 11. *N. Y. T.*, Sept. 12, 1946, p. 12. Russia rejected Sept. 25 all proposals to rebuild European economy on a unified continent-wide basis. *N. Y. T.*, Sept. 26, 1946, p. 1. Soviet delegation contended that Germany should pay the resettlement and maintenance costs of Eu-

- ropean refugees from countries which suffered from Nazi aggression: p. 5. Voted not to permit Spanish participation in the international control of drugs. *N. Y. T.*, Sept. 27, 1946, p. 8. Approved Sept. 30 draft constitution for an international refugee organization. *N. Y. T.*, Oct. 1, 1946, p. 10. Text: U. N. Doc. E/161/Rev. 2. Personnel of eight of the nine permanent commissions: *N. Y. T.*, Oct. 3, 1946, p. 22. Closed 3d session Oct. 3. *N. Y. T.*, Oct. 4, 1946, p. 7. Summary of the session: *D. S. B.*, Oct. 20, 1946, pp. 715-717. Member countries of the Council's commissions and terms of office: p. 718. Held *ad hoc* meeting Dec. 10 at which nominees to the commissions were confirmed. List of commissions and members: U. N. Doc. E/252.
- 12 PANAMA—UNITED STATES. Issued joint statement concerning defense sites in Panama. Text: *D. S. B.*, Sept. 22, 1946, p. 551.
- 12 PARAGUAY—UNITED STATES. Signed trade agreement at Asunción. Summary of provisions: *D. S. B.*, Sept. 22, 1946, pp. 550-551.
- 12/14 CENTRAL AMERICAN REPUBLICS. Representatives of Costa Rica, Guatemala, Nicaragua, El Salvador and Honduras met at Santa Ana, El Salvador, to discuss, among other subjects, a Central American union. *N. Y. T.*, Sept. 13, 1946, p. 1. The Presidents of El Salvador and Guatemala agreed Sept. 14 to establish a commission to set up a union with the other three countries. *C. S. Monitor*, Sept. 17, 1946, p. 9.
- 12-18 INTERNATIONAL MONETARY FUND. Managing Director Gutt announced that the 39 member governments were being called upon to set par values on their currencies within 30 days. *D. S. B.*, Sept. 29, 1946, p. 575. Great Britain stated Sept. 16 that the sterling-dollar exchange rate remained. The United States notified the Bank on Sept. 18 that the par value of the dollar remains at \$35 per ounce of gold. Text of Secretary of the Treasury's letter: *N. Y. T.*, Sept. 19, 1946, pp. 1, 9; *D. S. B.*, Sept. 29, 1946, p. 576.
- 15 BULGARIA. Bulgarian People's Republic was proclaimed. *N. Y. T.*, Sept. 16, 1946, p. 3.
- 15 COSTA RICA—EL SALVADOR. Chancellors of the two countries signed a document eliminating the use of passports for travel between them. *N. Y. T.*, Sept. 16, 1946, p. 2.
- 15/18 BRAZIL. Constituent Assembly voted Sept. 15 to ratify the new constitution. *N. Y. T.*, Sept. 16, 1946, p. 2. The constitution was formally promulgated the 18th, restoring representative government and freedom of speech, religion, press, etc. *N. Y. T.*, Sept. 19, 1946, p. 12; *London Times*, Sept. 19, 1946, p. 3.
- 16-November 13 TRIESTE. Text of Senator Connally's remarks before the Italian Political and Territorial Commission at the Paris Peace Conference: *D. S. B.*, Sept. 29, 1946, pp. 570-571. The Commission voted Sept. 28 in favor of the French line of demarcation between the Italo-Yugoslav and Free Territory frontiers, and the Yugoslav Government announced its refusal to accept such solution, or to sign a treaty containing such provisions. *N. Y. T.*, Sept. 29, 1946, p. 1; *London Times*, Sept. 30, 1946, p. 3. The Conference voted for the French plan by which the governor would be responsible to the United Nations Security Council. *N. Y. T.*, Oct. 10, 1946, pp. 1, 2. Map showing prewar boundary and "French" line: *N. Y. T.*, Oct. 6, 1946, IV, p. 1. Texts of French compromise proposal for the Statute for the free territory and the Provisional régime and Free Port régime (adopted at the Peace Conference) and the Soviet views (not approved): *N. Y. T.*, Nov. 13, 1946, p. 4.

- 17 ARGENTINA—GREAT BRITAIN. Signed trade agreement. *N. Y. T.*, Sept. 18, 1946, p. 13; *London Times*, Sept. 18, 1946, p. 3. Text: *G. B. T. S.*, No. 46 (1946), *Cmd.* 6953.
- 17 FRANCE—GREAT BRITAIN. Signed revised Anglo-French debt settlement and accord on payments between sterling and franc areas. *N. Y. T.*, Sept. 18, 1946, p. 5; *London Times*, Sept. 18, 1946, p. 4.
- 17-26 WEATHER STATION VESSELS CONFERENCE. Met in London, with delegates from 12 countries. It was sponsored by P. I. C. A. O. Nine nations signed on the 26th an agreement providing for the establishment of 13 stations in the Atlantic. U. S. Delegates: *D. S. B.*, Oct. 13, 1946, pp. 678-679. Report on the meeting: *D. S. B.*, Nov. 17, 1946, pp. 901-904.
- 18 ALLIED COUNCIL FOR JAPAN. At meeting in Tokyo the British Commonwealth member advocated eventual nationalization of Zaibatsu-owned coal mines, and government management in the interim period of 3 years. Chinese delegate favored partial nationalization. U. S. delegate reported all Japanese forces in home island demobilized and arms rendered inoperative or destroyed. Soviet delegates suggested that the United States was reconstructing Japanese naval bases. *C. I. E. D.*, Sept. 9/22, 1946, p. 561.
- 19 AIR TRANSPORT. Joint British-American statement announced that Great Britain had agreed to follow the principle of freedom of competition in international air transport. Text: *D. S. B.*, Sept. 19, 1946, pp. 577-578.
- 19 CHURCHILL, WINSTON. In an address at the University of Zürich Mr. Churchill urged a Franco-German partnership as a first step in a United States of Europe. *N. Y. T.*, Sept. 20, 1946, p. 1. Text: p. 2; *London Times*, Sept. 20, 1946, p. 4.
- 19 TRADE ORGANIZATION. United States Department of State proposed a formal organization of nations pledged to work for expanded world commerce. *N. Y. T.*, Sept. 20, 1946, pp. 1, 4. Text of suggested charter: Dept. of State. *Commercial Policy Ser.* No. 93; *D. S. B.*, Sept. 29, 1946, pp. 585-589; *International Conciliation*, Nov. 1946, pp. 487-543.
- 19-October 9 INTERNATIONAL LABOR CONFERENCE. Twenty-ninth session met at Montreal with more than 40 governments represented. *N. Y. T.*, Sept. 20, 1946, p. 6. U. S. delegation: *D. S. B.*, Sept. 29, 1946, p. 573. Re-admitted the Argentine labor delegate. *N. Y. T.*, Sept. 21, 1946, p. 4. Mr. Lie, Secretary General of the United Nations, addressed the meeting of the 25th. Summary of remarks: *N. Y. T.*, Sept. 26, 1946, p. 2. Ratified on Oct. 2 the agreement making the I. L. O. an agency of the United Nations. *N. Y. T.*, Oct. 3, 1946, p. 20. Closed Oct. 9 after approving conventions covering children and young workers, and standards of social and labor conditions in independent territories. Also approved an instrument for amending the I. L. O. constitution. *N. Y. T.*, Oct. 10, 1946, p. 2; *London Times*, Oct. 11, 1946, p. 3. Report on the Conference: *D. S. B.*, Dec. 8, 1946, pp. 1034-1039.
- 19-October 25 ICELAND—UNITED STATES. U. S. sent note Sept. 19 suggesting terms for an agreement to terminate the Defense of Iceland Agreement of July 1, 1941, and to provide for the return of the Keflavik airport to Iceland. *N. Y. T.*, Sept. 21, 1946, p. 1. Text: p. 4; *D. S. B.*, Sept. 29, 1946, pp. 583-584. The agreement was concluded Oct. 7. *D. S. B.*, Nov. 3, 1946, p. 826. Transfer of the airport was made Oct. 25. *N. Y. T.*, Oct. 26, 1946, p. 7.
- 21 BRAZIL—GREAT BRITAIN. Signed trade agreement at London. *N. Y. T.*, Sept. 22, 1946, p. 31; *C. I. E. D.*, Sept. 9/22, 1946, p. 560. Text: *Brazil* No. 1 (1946), *Cmd.* 6952.

- 23-26 U. N. E. S. C. O. U. S. National Commission of U. N. E. S. C. O. met in Washington, to discuss the proposed program of activities for the Organization, and to draw up recommendations for the consideration and guidance of the American delegation at the Paris meeting. *D. S. B.*, Oct. 6, 1946, p. 633. List of 50 national organizations asked to name representatives: *D. S. B.*, Aug. 25, 1946, p. 356. Members of the Commission: *D. S. B.*, Sept. 27, 1946, pp. 599-600. Text of report of the meeting: *D. S. B.*, Oct. 13, 1946, pp. 684-687.
- 24 BELGIUM—UNITED STATES. Signed final lend-lease agreement in Washington whereby Belgium agreed to pay \$18,000,000 for surplus American Army property. *N. Y. T.*, Sept. 25, 1946, p. 17; *D. S. B.*, Oct. 6, 1946, pp. 644-645.
- 24 HUNGARIAN OCCUPATION. U. S. note to Russia charged Russia with obstruction in reaching a 3-power agreement for the economic reconstruction of Hungary. *N. Y. T.*, Sept. 25, 1946, p. 1. Text: p. 6; *D. S. B.*, Oct. 6, 1946, pp. 638-639. Summary: *London Times*, Sept. 25, 1946, p. 4.
- 24/October 3 ATOMIC ENERGY. Texts of Bernard Baruch's memorandum to President Truman on statements regarding atomic energy made by former Secretary of Commerce Wallace and other documents: *N. Y. T.*, Oct. 3, 1946, p. 23. Mr. Wallace's reply of Oct. 3: *N. Y. T.*, Oct. 4, 1946, p. 6.
- 24-October 27 BULGARIAN ELECTIONS. U. S. Dept. of State made public Oct. 21 an exchange of notes of Sept. 24 and Oct. 1, regarding a proposal to have the Control Commission consider steps to ensure free elections. *N. Y. T.*, Oct. 22, 1946, p. 1. Text: p. 4; *D. S. B.*, Nov. 4, 1946, pp. 818-820. In the elections of Oct. 27 the Communist-dominated Fatherland Front won. *N. Y. T.*, Oct. 29, 1946, p. 13.
- 26-November 15 INDONESIA. Indonesian demands were presented in a note to the Dutch authorities and the talks ended temporarily for consultation. *London Times*, Sept. 27, 1946, p. 4. Conversations were resumed Oct. 1 in the Bangka Islands with Dutch, Eurasian, Chinese and Arab communities and the Commissioner-General represented. *C. I. E. D.*, Sept. 23/Oct. 6, 1946, p. 589. On Oct. 7 Dutch and Indonesian representatives met at Batavia under British chairmanship. *N. Y. T.*, Oct. 8, 1946, p. 3; *London Times*, Oct. 8, 1946, p. 4. Dutch and Indonesians agreed Oct. 14 on a truce ending 14 months of warfare. *C. I. E. D.*, Oct. 7/20, 1946, p. 622. The negotiators reached a compromise plan Nov. 12 for the *de facto* recognition of Indonesian Republic. *N. Y. T.*, Nov. 14, 1946, pp. 1, 6. It was initialed Nov. 15. *N. Y. T.*, Nov. 16, 1946, p. 8. Text of draft agreement: *N. Y. T.*, Nov. 19, 1946, p. 16. Summary: *London Times*, Nov. 19, 1946, p. 3.
- 27 GOLD. U. S. Department of State announced formation of a Tripartite Commission for the Restitution of Monetary Gold to implement Part III of the agreement between the Allied Powers, Paris, last Jan. 14. Headquarters will be at Brussels. The group will operate independently of the Inter-Allied Reparations Agency. *N. Y. T.*, Sept. 28, 1946, p. 11. Text of Terms of Reference: *D. S. B.*, Sept. 29, 1946, p. 563.
- 27-October 3 INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, and INTERNATIONAL MONETARY FUND. Opened first annual meeting on Sept. 27 in Washington with 38 Governors for the Bank present, and 39 Governors of the Fund. *N. Y. T.*, Sept. 28, 1946, p. 1. Elected Hugh Dalton as Chairman of the Boards at the closing session on Oct. 3. *N. Y. T.*, Oct. 4, 1946, p. 12. The next annual meeting will take place in London, September, 1947. *D. S. B.*, Oct. 20, 1946, p. 707.

- 28 ATOMIC ENERGY. Scientific and Technical Committee of the U. N. Atomic Energy Commission submitted its report. *London Times*, Sept. 30, 1946, p. 3. Text: *N. Y. T.*, Sept. 29, 1946, p. 46; *U. N. Doc. AEC/C.2/6, AEC/C.3/3*.
- 28-October 21 TELECOMMUNICATIONS CONFERENCE. Representatives of Great Britain, China, France, United States and Russia attended a conference at Moscow. *N. Y. T.*, Aug. 31, 1946, p. 4. Agenda: *D. S. B.*, Sept. 8, 1946, p. 459. U. S. delegation: *D. S. B.*, Sept. 29, 1946, p. 575. Adopted Oct. 21 a recommendation for a world conference on radio communications in May 1947, to be followed by another in 1948 on telephone and telegraph regulations. Adopted a preliminary draft of a new convention on telecommunications. *London Times*, Oct. 22, 1946, p. 3. Report of chief U. S. delegate was contained in a radio address. Text: *D. S. B.*, Nov. 24, 1946, pp. 943-946.
- 28-November 22 DANUBE RIVER. Traffic on the Danube was discussed Sept. 28 by the U. N. Economic and Social Council. *N. Y. T.*, Sept. 29, 1946, p. 44. Text of draft resolution submitted by the United States to the Council: *D. S. B.*, Oct. 13, 1946, p. 658. On Sept. 30 the United States and Great Britain withdrew demand for incorporation into Rumanian peace treaty of clauses to ensure non-discriminatory administration of the Danube. *N. Y. T.*, Oct. 1, 1946, pp. 1, 14; *London Times*, Oct. 1, 1946, p. 4. Peace Conference at Paris approved Oct. 10 the provision of the Rumanian peace treaty calling for free navigation on the River. *N. Y. T.*, Oct. 11, 1946, pp. 1, 8. Bulgarian treaty, containing provisions to internationalize the Danube was adopted by the Peace Conference Oct. 11. *N. Y. T.*, Oct. 12, 1946, p. 1. Secretary General Lie of the United Nations asked 7 nations on Oct. 8 if they would participate in a Danube conference. *N. Y. T.*, Oct. 9, 1946, p. 21. On Oct. 31, Russia, Czechoslovakia and Yugoslavia declined, while Great Britain, Greece, and U. S. accepted, and France agreed conditionally. *N. Y. T.*, Nov. 1, 1946, p. 13; *D. S. B.*, Dec. 1, 1946, p. 986. Plan to transfer 600 Danube River ships to their owners was announced Nov. 11 by Secretary Byrnes. *N. Y. T.*, Nov. 12, 1946, pp. 1, 2; *London Times*, Nov. 13, 1946, p. 4. The United States began the return Nov. 22. *N. Y. T.*, Nov. 23, 1946, p. 8.
- 29-November 13 FRANCE. Draft constitution was adopted Sept. 29 by the Assembly. *London Times*, Sept. 30, 1946, p. 4; *N. Y. T.*, Sept. 29, 1946, p. 43. English translation of text of draft constitution: *N. Y. T.*, Oct. 1, 1946, p. 16. The Constitution was approved Oct. 13 by the electorate. *N. Y. T.*, Oct. 14, 1946, p. 1; *London Times*, Oct. 15, 1946, p. 4. The Constitution was promulgated and came into force Oct. 28. *C. I. E. D.*, Oct. 21/Nov. 10, 1946, p. 654. The Cabinet voted Nov. 13 to resign. *N. Y. T.*, Nov. 14, 1946, p. 20.
- 30 NAVICERT. Announcement was made that Great Britain and the United States would end the navicert system [which was set up by an exchange of notes on Nov. 21, 1939 and which came into force Dec. 1st following]. *D. S. B.*, Sept. 29, 1946, p. 578.
- October, 1946
- 1-15 MINING ENGINEERING AND GEOLOGY CONGRESS. Second Pan American Congress of Mining Engineering and Geology met at Petropolis, Brazil. *D. S. B.*, Nov. 10, 1946, p. 846. U. S. delegation: *D. S. B.*, Oct. 6, 1946, p. 630.
- 2 INTERNATIONAL MONETARY FUND. The Board of Governors elected Turkey, Syria, Lebanon and Italy to membership [total—43 nations]. Increased quotas of contribution assigned to France and Paraguay. Voted to study the monetary use of silver. *N. Y. T.*, Oct. 3, 1946, pp. 1, 10.

- 3 ARGENTINA—BRAZIL. Effectuated trade agreement by exchange of notes at Rio de Janeiro. *N. Y. T.*, Oct. 4, 1946, p. 3.
- 3 BYRNES, JAMES F. Text of address in Paris on U. S. foreign policy; *N. Y. T.*, Oct. 4, 1946, p. 4; *D. S. B.*, Oct. 13, 1946, pp. 665-668.
- 4 BULGARIA. Announcement was made of the publication of a new draft constitution. *N. Y. T.*, Oct. 5, 1946, p. 5; *C. I. E. D.*, Sept. 23/Oct. 6, 1946, p. 577.
- 4 GREECE—UNITED STATES. Signed agreement at Washington, granting a \$25,000,000 credit to Greece for the purchase of surplus war property. *London Times*, Oct. 11, 1946, p. 3; *N. Y. T.*, Oct. 11, 1946, p. 20.
- 7/November 13 SOVIET RUSSIA—SWEDEN. Signed 15-year trade treaty at Moscow. Summary of provisions: *N. Y. T.*, Oct. 8, 1946, p. 10; *London Times*, Oct. 8, 1946, p. 3. The treaty was ratified by Sweden on Nov. 13. *N. Y. T.*, Nov. 14, 1946, p. 19 *London Times*, Nov. 14, 1946, p. 4.
- 8 ATOMIC BOMB. In an address accepting fifth annual award of Freedom House Bernard M. Baruch opposed scrapping atomic bombs prior to an effective international control plan. *N. Y. T.*, Oct. 9, 1946, p. 1. Text: p. 23.
- 8 REPARATIONS (German). At closing meeting of its 5th session in Brussels the Council of the Inter-Allied Reparations Agency voted to refer to the Council of Foreign Ministers the matter of reparations payments which have fallen behind schedule. *N. Y. T.*, Oct. 10, 1946, p. 5.
- 8-November 7 TRUSTEESHIP. Secretary General Lie of the United Nations announced Oct. 8 that France had submitted the text of proposed trusteeship agreements for the French Cameroons and Togoland. *N. Y. T.*, Oct. 9, 1946, p. 21. Announcement was made Oct. 22 that France had submitted data on a long list of French possessions. *N. Y. T.*, Oct. 23, 1946, p. 5. On Oct. 28 Mr. Lie announced that in submitting a trusteeship draft for Western Samoa, New Zealand became the 5th country to submit drafts. *N. Y. T.*, Oct. 29, 1946, p. 4. Text of U. S. draft agreement on trusteeship in the Pacific: *N. Y. T.*, Nov. 7, 1946, p. 24; *D. S. B.*, Nov. 17, 1946, pp. 889-891. The United States proposed Nov. 7 to waive its right as a "state directly concerned" to veto proposed United Nations trusteeship agreements on condition that other countries would take like action. Failing U. N. approval of its draft agreement the U. S. would continue *de facto* control. *N. Y. T.*, Nov. 8, 1946, pp. 1, 4.
- 8-November 13 ATOMIC ENERGY. U. N. Commission voted to study and define precautionary measures against illegal production and diversion of atomic energy. *N. Y. T.*, Oct. 9, 1946, p. 1. Summary of Prime Minister Attlee's remarks in the House of Commons: *London Times*, Oct. 9, 1946, p. 8. Russian member of the Commission offered plan for atomic control requiring supervision of mineral resources and disclosure of methods of mining atomic raw materials. *N. Y. T.*, Oct. 22, 1946, pp. 1, 6. The Commission approved Nov. 13 a stewardship report by a vote of 10-0, Poland and Russia abstaining. Suggestions made in the report: *N. Y. T.*, Nov. 14, 1946, p. 8.
- 9 ANTARCTIC REGIONS. Decree issued by Argentine Government asserting sovereignty over the Argentine submarine platform and water covering it. *London Times*, Oct. 11, 1946, p. 4. Text below, Supplement, p. 11.
- 10 CHINA. Kuomintang Central Executive Committee re-elected Generalissimo Chiang Kai-shek as President. *London Times*, Oct. 11, 1946, p. 4.

- 11 GREAT BRITAIN—GUATEMALA. Foreign Minister of Guatemala announced that Great Britain had rejected a Guatemalan proposal to submit Guatemala's claims to British Honduras to the International Court of Justice, an issue which grew out of Spanish treaties dating back to 1670. *N. Y. T.*, Oct. 12, 1946, p. 5.
- 12 ITALY—UNITED STATES. Secretary of State Byrnes announced that the United States would transfer \$50,000,000 to the Italian Government immediately to reimburse that Government for lire lent to the United States for purchase of supplies in Italy. Text of Mr. Byrnes' letter: *N. Y. T.*, Oct. 13, 1946, pp. 1, 27.
- 14 LEND-LEASE. Details of mutual aid given by Great Britain to U. S. A., Russia, China and the Allied European countries from March 1941 to Sept. 1, 1945 were published as *Cmd. 6931. C. I. E. D.*, Oct. 7/20, 1946, p. 616.
- 14/24 GERMAN OCCUPATION. Allied Control Council's coördinating committee adopted Oct. 14 a penal code under which many thousands of German war criminals, militarists and Nazis can be arrested and punished under a common set of principles. *N. Y. T.*, Oct. 15, 1946, p. 14. Ordinance No. 7 of the American Military Government was promulgated for establishing the organization and procedure for further war trials in Germany. *N. Y. T.*, Oct. 25, 1946, p. 11.
- 15 PASSPORTS. At a meeting of the Intergovernmental Committee on Refugees in London, representatives of 15 nations of the 25 attending, signed an agreement providing for a "travel document" for displaced persons. The document will enable the holder to return, for the life of the document, without a visa, to the country issuing it, in this way differing from the Nansen passport. *London Times*, Oct. 16 and 18, 1946, pp. 4 and 4. Displaced persons will be eligible for a "travel document" on Jan. 15, 1947. *N. Y. T.*, Oct. 19, 1946, p. 9.
- 15-November 26 TRADE AND EMPLOYMENT CONFERENCE. Preparatory Committee opened meetings Oct. 15 in London with 17 governments represented. *London Times*, Oct. 16, 1946, p. 4. U. S. delegation: *D. S. B.*, Oct. 13, 1946, p. 664. Decided Oct. 16 to hold remaining meetings in private. *London Times*, Oct. 17, 1946, p. 6. Adopted rough draft providing for an international trade organization, at the final session of Nov. 26. Second session of the Preparatory Commission will be held at Geneva in April, 1947. *N. Y. T.*, Nov. 27, 1946, p. 8.
- 17 BRAZIL—CZECHOSLOVAKIA. Signed trade and navigation treaty at Rio de Janeiro granting a \$20,000,000 credit to Czechoslovakia. *N. Y. T.*, Oct. 18, 1946, p. 6.
- 18/25 CZECHOSLOVAKIA. Foreign Minister stated that his country had decided to pay in full the claims of foreign investors in Czechoslovakia which arose following the nationalization of Czech industry. *N. Y. T.*, Oct. 19, 1946, p. 2. Nationalization decrees were signed Oct. 25. They provide for compensation to individuals and corporations except those engaged in activities against the sovereignty, independence, etc., of the Czechoslovak Republic. *D. S. B.*, Dec. 1, 1946, p. 1003.
- 18 FRANCE—UNITED STATES. Signed convention at Paris for prevention of double taxation on incomes. *N. Y. T.*, Oct. 19, 1946, p. 8; *D. S. B.*, Nov. 3, 1946, p. 827.
- 18 GERMAN PROPERTY. Spanish Cabinet announced an accord with the British, French and American governments on the disposition of German properties in Spain. *N. Y. T.*, Oct. 19, 1946, p. 5.
- 18 UNITED STATES—YUGOSLAVIA. U. S. note charged that some of its citizens had been subjected to forced labor and had died as a result. Yugoslav Embassy

- made a denial of the charges. *N. Y. T.*, Oct. 19, 1946, p. 1. Text of U. S. note: p. 7; *D. S. B.*, Oct. 27, 1946, pp. 761-762. Texts of other U. S. and Yugoslav notes: pp. 762-764.
- 19/22 ITALY—UNITED STATES. Text of telegrams expressing mutual peace aims: *D. S. B.*, Nov. 3, 1946, p. 821.
- 20 UNITED NATIONS. Fifty events in its history: *N. Y. T.*, Oct. 20, 1946, IV, p. 5.
- 21 CHINA—INDIA. India announced future exchange of ambassadors. *N. Y. T.*, Oct. 22, 1946, p. 15.
- 21 MOLOTOV, V. M. Text of Soviet Foreign Minister's declaration pledging Russian coöperation in the cause of peace: *N. Y. T.*, Oct. 22, 1946, p. 1.
- 22 BEVIN, ERNEST. Excerpts from speech in the House of Commons on British foreign policy: *N. Y. T.*, Oct. 23, 1946, p. 5. Text: *London Times*, Oct. 23, 1946, pp. 4, 8.
- 22 PHILIPPINE REPUBLIC—UNITED STATES. Treaty of General Relations and protocol, signed at Manila, July 4, 1946, came into force with the exchange of ratifications. Text of treaty and protocol: *D. S. B.*, Nov. 3, 1946, pp. 824-826.
- 22/30 ALBANIA—GREAT BRITAIN. Two British warships were sunk with loss of life on Oct. 22 in Corfu Channel. Albania sent protest Oct. 30 to the United Nations on the presence of these ships in her territorial waters. *London Times*, Oct. 31, 1946, p. 3.
- 23-November 19 UNITED NATIONS. General Assembly. Opened 2d part of the first session on Long Island. *N. Y. T.*, Oct. 24, 1946, p. 1. Text of President Truman's address: p. 2; *D. S. B.*, Nov. 3, 1946, pp. 808-812. Member nations and chief delegates: *N. Y. T.*, Oct. 23, 1946, p. 5. Mr. Vishinsky of Russia withdrew objection Oct. 25 to the consideration of the veto question. *N. Y. T.*, Oct. 26, 1946, p. 1. The British policy on atomic energy was outlined by Mr. Noel-Baker. *London Times*, Oct. 26, 1946, p. 4; U. N. *Doc. A/P.V./37*, pp. 74-75. Text of oral report of the Secretary General: *N. Y. T.*, Oct. 25, 1946, p. 4; U. N. *Doc. A/65/Add.1*. On Oct. 29 Mr. Molotov called for a general reduction of armaments and outlawry of the atomic bomb as well as a report on armed forces in former enemy countries. *N. Y. T.*, Oct. 30, 1946, p. 1. Translation of the plan: p. 12; U. N. *Doc. A/P.V./42*, pp. 165-181. Mr. Austin, the chief delegate of the United States, agreed in principle to disarmament, but stated it must not be a unilateral U. S. action. *N. Y. T.*, Oct. 31, 1946, p. 1. Text of address: p. 12; U. N. *Doc. A/P.V./44*, pp. 231-246. On Oct. 31 limitation of armaments and the Franco régime were added to the agenda. List of topic assignments to Committees: *N. Y. T.*, Nov. 1, 1946, p. 14. Iceland, Sweden and Afghanistan were welcomed Nov. 9 as new members. *N. Y. T.*, Nov. 10, 1946, p. 33; *London Times*, Nov. 11, 1946, p. 3. Representatives of the new member countries signed the Charter on Nov. 19. *N. Y. T.*, Nov. 20, 1946, pp. 1, 3.
- 24-26 INTERNATIONAL JURIDICAL CONGRESS. Held sessions in Paris. The creation of an international code for war crimes and punishment for financial backers of the nazi regime were discussed. *N. Y. T.*, Oct. 26, 1946, p. 5. Formation of an International Association of Jurists was approved in a resolution adopted Oct. 26. The next meeting will be at Brussels in July, 1947. *N. Y. T.*, Oct. 27, 1946, p. 34.
- 24-30 UNITED MARITIME CONSULTATIVE COUNCIL. Second meeting was held in Washington. Subjects listed for discussion: *D. S. B.*, Oct. 6, 1946, p. 631. Text of

- Mr. Clayton's address: *D. S. B.*, Nov. 3, 1946, pp. 816-817, 822. Council became non-existent as of Oct. 31, 1946, and will be succeeded by the Provisional Maritime Consultative Council set up at this meeting. *D. S. B.*, Dec. 1, 1946, p. 1002.
- 25/30 AUSTRIAN OCCUPATION. Allied Council issued a statement Oct. 25 registering disapproval of Austrian economic conditions and calling upon the Government to remedy the situation. *London Times*, Oct. 28, 1946, p. 4. The Austrian Parliament instructed Chancellor Figl on Oct. 30 to work for the restoration of Austria's sovereignty, including the end of the occupation by the Allies. *N. Y. T.*, Oct. 31, 1946, pp. 1, 5.
- 27 SOVIET RUSSIA—SWEDEN. Signed aviation agreement at Moscow. *N. Y. T.*, Oct. 28, 1946, p. 4.
- 28 AUSTRIA—UNITED STATES. Policy on the status of Austria was defined in a statement issued by the Department of State. Text: *D. S. B.*, Nov. 10, 1946, pp. 864-865.
- 28/November 1 ATOMIC ENERGY. President Truman named five civilians to the new atomic energy commission. Members: *N. Y. T.*, Oct. 29, 1946, p. 1. Text of the President's statement: p. 3. David Lilienthal was sworn in as chairman on Nov. 1. *N. Y. T.*, Nov. 2, 1946, p. 7.
- 28/November 2 RUMANIAN ELECTIONS. British and U. S. notes were delivered to the Rumanian Government on Oct. 28, concerning the lack of freedom for political parties in the forthcoming elections, in contravention of assurances received in Jan. 1946 from the Council of Ministers and its President. Text of U. S. note: *D. S. B.*, Nov. 10, 1946, p. 851; *N. Y. T.*, Oct. 31, 1946, pp. 1, 7. Reply of Nov. 2 stated the notes were an intervention in internal affairs and an infringement of sovereignty. *N. Y. T.*, Nov. 4, 1946, p. 5. Partial text of unofficial translation: *N. Y. T.*, Nov. 5, 1946, p. 6.
- 29-31 DISARMAMENT. In the U. N. General Assembly Mr. Molotov called for a general reduction of armaments. *N. Y. T.*, Oct. 30, 1946, p. 1. English translation of speech: p. 12; *U. N. Doc. A/P.V./42*, pp. 165-191. Mr. Austin of the U. S. agreed in principle, and stated it must not be a U. S. unilateral action. *N. Y. T.*, Oct. 31, 1946, p. 1. Text: p. 12; *U. N. Doc. A/P.V./44*, pp. 231-246.
- 30 ARGENTINA—SPAIN. Signed trade agreement at Buenos Aires. *N. Y. T.*, Oct. 31, 1946, p. 2.
- 30 CARIBBEAN COMMISSION. United States, Great Britain, France and Netherlands signed an agreement in Washington, formally establishing the Commission and its auxiliary bodies—a Research Council and a West Indian Conference. The Commission aims to promote the scientific, technological and economic development of the Caribbean. *D. S. B.*, Nov. 17, 1946, p. 920; *C. S. Monitor*, Oct. 30, 1946, p. 6; *London Times*, Oct. 31, 1946, p. 3. Text: *G. B. M. S. No. 13* (1946), *Cmd. 6972*. Permanent headquarters have been acquired for the permanent secretariat at Port-of-Spain, Trinidad. Lawrence W. Cramer is secretary general. *N. Y. T.*, Oct. 31, 1946, p. 10.
- 30/November 3 JAPAN. The new Constitution was approved Oct. 30 by the Privy Council, which then voted itself out of existence. *N. Y. T.*, Oct. 31, 1946, p. 2. The Emperor promulgated the Constitution on Nov. 3. *N. Y. T.*, Nov. 3, 1946, p. 1. Text of rescript: pp. 1, 49.

- 31 BRAZIL—GREAT BRITAIN. Signed an air transport agreement in London. *N. Y. T.*, Nov. 1, 1946, p. 11; *London Times*, Nov. 1, 1946, p. 3. Text: *Brazil* No. 2 (1946), *Cmd.* 6962.
- 31 GOLD. Announcement was made in Bucharest that the Dutch and Belgian Governments had filed claim to 60 tons of gold, paid by Germany to Rumania for oil exports during the war, claiming it had originally been looted from Belgium and the Netherlands. *N. Y. T.*, Nov. 1, 1946, p. 15.

November, 1946

- 1/14 PEACE TREATY (German). In identical notes to the United States, Russia, Great Britain and France, the right to be heard in the drafting of a peace treaty for Germany was demanded by Belgium, Luxembourg and the Netherlands. *N. Y. T.*, Nov. 2, 1946, pp. 1, 5; *C. I. E. D.*, Oct. 21/Nov. 10, 1946, pp. 650-669. A Polish note was also handed to the Council of Foreign Ministers on Nov. 14 in which Poland made the same request. *London Times*, Nov. 18, 1946, p. 6.
- 2 AIR TRANSPORT. Conference of the International Air Transport Association, with delegates from 70 countries, ended at Cairo, Egypt. Adopted resolutions for standardization of all dimensional units in international air transport, establishment of an airline clearinghouse, international accounts on a dollar or sterling basis and the retention of the Warsaw convention. Next annual meeting to be at Rio de Janeiro. *N. Y. T.*, Nov. 3, 1946, p. 12.
- 2 AUSTRIA—BELGIUM. Signed trade agreement in Vienna. *N. Y. T.*, Nov. 4, 1946, p. 6.
- 4 CHINA—UNITED STATES. Signed 10,000-word treaty of friendship, commerce and navigation at Nanking. *D. S. B.*, Nov. 10, 1946, p. 366. Brief summary: *N. Y. T.*, Nov. 4, 1946, p. 10.
- 4 GREECE. Reconstituted Cabinet was sworn in. Members: *N. Y. T.*, Nov. 5, 1946, p. 8; *London Times*, Nov. 5, 1946, p. 3.
- 4-10 HEALTH ORGANIZATION. Interim Commission of the World Health Organization opened meetings in Geneva on Nov. 4. *London Times*, Nov. 5, 1946, p. 3. Dr. Thomas Parran was U. S. delegate. Summary of meeting: *U. N. Weekly Bulletin*, Nov. 25, 1946, pp. 38-40.
- 4-15 COUNCIL OF FOREIGN MINISTERS. Opened sessions in New York Nov. 4 to continue consideration of the peace treaties. *N. Y. T.*, Nov. 5, 1946, pp. 1, 3; *London Times*, Nov. 5, 1946, p. 4. Eight major issues before the Council and position thereon: *N. Y. T.*, Nov. 4, 1946, p. 5. Summary of proceedings to Nov. 7: *N. Y. T.*, Nov. 8, 1946, p. 3. Summary through Nov. 10: *N. Y. T.*, Nov. 11, 1946, p. 3. Czechoslovak and Polish Foreign Ministers announced Nov. 15 that they had sent notes to the Council asking that their countries be permitted to help draft the peace treaty with Germany. *N. Y. T.*, Nov. 16, 1946, p. 5.
- 5/14 ALBANIA—UNITED STATES. U. S. note of Nov. 5 stated that the U. S. informal mission was being recalled because of Albanian unwillingness to recognize the validity of existing treaties and obligations. *N. Y. T.*, Nov. 9, 1946, pp. 1, 7. Text: *D. S. B.*, Nov. 17, 1946, pp. 913-914. Text of Albanian note, broadcast by Moscow radio on Nov. 14: *N. Y. T.*, Nov. 15, 1946, p. 6.
- 6 PAN AMERICAN UNION. In conformity with Resolution IX of the Inter-American Conference on Problems of War and Peace (1945), providing for the annual election of the Chairman and Vice Chairman of the Governing Board, Dr. An-

tonio Rocha of Colombia was elected Chairman. *D. S. B.*, Nov. 17, 1946, pp. 920-921.

- 6-7 TRIESTE. Texts of Yugoslav and Italian statements which were heard by the Council of Foreign Ministers: *N. Y. T.*, Nov. 7, 1946, p. 36. Announcement was made Nov. 7 of Marshal Tito's offer to bargain on Trieste, which might be kept by Italy, if Yugoslavia could have Gorizia. The offer was declined by Italy. *N. Y. T.*, Nov. 8, 1946, pp. 1, 3; *London Times*, Nov. 8, 1946, p. 4.
- 11-15 WOOL. International Wool Meeting opened Nov. 11 in London. *London Times*, Nov. 12, 1946, p. 4. U. S. delegation: *D. S. B.*, Nov. 3, 1946, p. 789. List of countries represented and text of statement of Nov. 15, released by heads of delegations at the meeting: *D. S. B.*, Nov. 24, 1946, p. 942.
- 14 CZECHOSLOVAKIA—UNITED STATES. Exchanged identical notes, embodying agreement concerning commercial property, compensation for nationalized property and related matters. Text of U. S. note: *D. S. B.*, Dec. 1, 1946, pp. 1004-1006.
- 14 INDIA—UNITED STATES. Signed air transport agreement at New Delhi. *N. Y. T.*, Nov. 15, 1946, p. 12. Summary: *D. S. B.*, Nov. 24, 1946, pp. 966-967.
- 15 CHINA. Constitutional Assembly convened, with more than 1300 delegates present. *N. Y. T.*, Nov. 16, 1946, p. 8.

MULTIPARTITE CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919.

Denunciation announced:

Spain. Oct. 18, 1946. *N. Y. T.*, Oct. 19, 1946, p. 5.

AIR TRANSPORT AGREEMENT. Chicago, Dec. 7, 1944.

Adherence:

Argentina. June 4, 1946.

Denunciations:

Dominican Republic (effective Oct. 14, 1947).

Nicaragua (effective Oct. 7, 1947).

Signature:

Iran. Aug. 13, 1946. *D. S. B.*, Nov. 24, 1946, p. 970.

AVIATION CONVENTION. Chicago, Dec. 7, 1944.

Ratifications (announced):

India. Nov. 13, 1946. *N. Y. T.*, Nov. 14, 1946, p. 13.

Spain. Oct. 18, 1946. *N. Y. T.*, Oct. 19, 1946, p. 5.

Ratifications deposited:

Ireland. Oct. 31, 1946.

Sweden. Nov. 7, 1946. *D. S. B.*, Nov. 24, 1946, p. 970.

INDUSTRIAL PROPERTY. London, June 2, 1934.

Adherence:

New Zealand (effective July 14, 1946). *D. S. B.*, Sept. 22, 1946, p. 552.

INTER-AMERICAN AUTOMOTIVE TRAFFIC. Washington, Dec. 15, 1943.

Ratifications:

Costa Rica. Aug. 12, 1946.

Panama. Sept. 3, 1946. *P. A. U.* (Spanish), Nov. 1946, p. 650.

United States. Aug. 3, 1946. *D. S. B.*, Sept. 1, 1946, p. 426.

Ratification deposited:

United States. Oct. 29, 1946. *D. S. B.*, Dec. 1, 1946, p. 1021.

Promulgation:

United States. Nov. 1, 1946. *D. S. B.*, Dec. 1, 1946, p. 1021.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29, 1940.

Adherence deposited:

Venezuela. Aug. 8, 1946. *D. S. B.*, Nov. 10, 1946, p. 866.

INTERNATIONAL COURT OF JUSTICE. Statute. Optional Clause. San Francisco, June 26, 1945.

Declarations signed:

Great Britain. Feb. 13, 1946. *G. B. M. S.* No. 11 (1946), *Cmd.* 6934.

United States. Aug. 14, 1946.

Declaration deposited:

United States. Aug. 26, 1946. *N. Y. T.*, Aug. 27, 1946, p. 6; *D. S. B.*, Sept. 8, 1946, pp. 452-453.

LETTERS, Etc., OF DECLARED VALUE. Buenos Aires, May 23, 1939.

Adherences:

Lebanon. Nov. 27, 1945.

Syria. April 10, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

MONEY ORDERS. Buenos Aires, May 23, 1939.

Adherences:

Lebanon. Nov. 27, 1945.

Syria. April 10, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

NARCOTICS. Geneva, July 13, 1931.

Ratification deposited:

Argentina. April 18, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

OPIUM CONVENTION. Geneva, Feb. 19, 1925.

Ratification deposited:

Argentina. April 18, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

OPIUM CONVENTION. The Hague, Jan. 23, 1912.

Ratification deposited:

Argentina. Apr. 23, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

OPIUM CONVENTION. Final Protocol. The Hague, July 9, 1913.

Ratification deposited:

Argentina. Apr. 23, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

PARCEL POST. Buenos Aires, May 23, 1939.

Adherences:

Lebanon. Nov. 27, 1945.

Syria. April 10, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

PASSPORTS. London, Oct. 15, 1946.

Signed by 15 nations (no names). *London Times*, Oct. 16, 1946, p. 4; *N. Y. T.*, Oct. 19, 1946, p. 9.

PRIVILEGES AND IMMUNITIES, UNITED NATIONS. London, Feb. 13, 1946.

Ratification:

Great Britain. *N. Y. T.*, Oct. 5, 1946, p. 5.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision. Cairo, April 8, 1938.

Adherence:

Lebanon. *D. S. B.*, Sept. 22, 1946, p. 552.

RADIO COMMUNICATIONS REGULATIONS. Additional Protocol. Revision. Cairo, April 8, 1938.

Adherence:

Lebanon. *D. S. B.*, Sept. 22, 1946, p. 552.

RED CROSS. Geneva, July 27, 1929.

Adherences:

Lebanon.

Syria. *D. S. B.*, Sept. 22, 1946, p. 553.

SANITARY CONVENTION. Paris, June 21, 1926. Amendment, Washington, Jan. 5, 1945.

Accessions:

Denmark, with reservation (effective Aug. 23, 1946).

Syria (effective Oct. 31, 1946). *D. S. B.*, Dec. 1, 1946, p. 1022.

SANITARY CONVENTION. Paris, June 21, 1926. Amendment, Washington, Jan. 5, 1945.

Protocol, Washington, April 23, 1946.

Accessions:

Denmark, with reservation (effective Aug. 23, 1946).

Syria (effective Oct. 31, 1946). *D. S. B.*, Dec. 1, 1946, p. 1022.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933.

Adherence:

Dominican Republic. June 12, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933. Amendment, Washington, Jan. 5, 1945.

Accession:

Syria (effective Oct. 31, 1946). *D. S. B.*, Dec. 1, 1946, p. 1022.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933. Amendment, Washington, Jan. 5, 1945. Protocol. Washington, April 23, 1946.

Accession:

Syria (effective Oct. 31, 1946). *D. S. B.*, Dec. 1, 1946, p. 1022.

SUGAR MARKETING AND PRODUCTION. Protocol, London, August 30, 1946.

Signatures and Text: *G. B. T. S.*, No. 45 (1946), *Cmd.* 5946, pp. 6-8.

Contains also texts of Protocols of August 31, 1944 and August 31, 1945.

TELECOMMUNICATIONS CONVENTION. Madrid, Dec. 9, 1932.

Adherence:

Lebanon. *D. S. B.*, Sept. 22, 1946, p. 552.

TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Adherence:

Lebanon. *D. S. B.*, Sept. 22, 1946, p. 552.

TELEPHONE REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Adherence:

Lebanon. *D. S. B.*, Sept. 22, 1946, p. 552.

U. N. E. S. C. O. London, Nov. 16, 1945.

Signatures and Text: *G. B. T. S.* No. 50 (1946), *Cmd.* 6963.

Acceptances deposited as of Nov. 4, 1946: p. 17.

UNITED NATIONS CHARTER. San Francisco, June 26, 1945.

Ratification:

Argentina. August 30, 1946. *N. Y. T.*, Aug. 31, 1946, p. 7.

Signatures of adherence:

Sweden, Iceland and Afghanistan. Nov. 19, 1946. *N. Y. T.*, Nov. 20, 1946, pp. 1, 3.

Text of instrument of adherence: p. 3.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Adherences:

Lebanon. Nov. 27, 1945.

Syria. April 10, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

WEATHER STATIONS. London, Sept. 26, 1946.

Signatures:

Belgium, Canada, France, Ireland, Netherlands, Norway, Sweden, Great Britain and United States. *N. Y. T.*, Oct. 4, 1946, p. 15; *D. S. B.*, Oct. 13, 1946, p. 678.

WHALING. London, June 8, 1937.

Ratification deposited:

Argentina. June 18, 1946. *D. S. B.*, Sept. 22, 1946, p. 553.

WHALING. London, June 8, 1937. Protocol of Amendment, June 24, 1938.

Ratification deposited:

Argentina. June 18, 1946. *D. S. B.*, Sept. 22, 1946, p. 553.

WHALING. Protocol. London, Feb. 7, 1944.

Ratification deposited:

Argentina. June 18, 1946. *D. S. B.*, Sept. 22, 1946, p. 553.

WHALING. Supplementary Protocol, London, Nov. 26, 1945.

Ratification deposited:

United States. Aug. 30, 1946. *D. S. B.*, Sept. 22, 1946, p. 553.

Text: *Cong. Rec.* (daily), July 30, 1946, pp. 10599-10602.

WHEAT AGREEMENT MEMORANDUM. Amendment. Washington, Feb. 27, 1946.

Acceptances:

Argentina. April 9, 1946.

Australia. March 20, 1946.

Canada. March 25, 1946.

Great Britain. May 3, 1946.

United States.

Texts of notes of acceptance: *T. I. A. S.* 1540.

WILD LIFE PRESERVATION IN THE WESTERN HEMISPHERE. Washington, Oct. 12, 1940.

Ratification:

Argentina. May 8, 1946.

Ratifications deposited:

Argentina. June 27, 1946.

Nicaragua. May 22, 1946. *D. S. B.*, Sept. 22, 1946, p. 552.

WORLD HEALTH ORGANIZATION. Constitution. New York, July 22, 1946.

Ratifications signified:

Canada.

China.

Great Britain. *N. Y. T.*, Sept. 13, 1946, p. 8.

DOROTHY R. DART

JUDICIAL DECISIONS

INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG), JUDGMENT AND SENTENCES*

October 1, 1946

Judgment

On 8 August 1945, the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics entered into an Agreement establishing this Tribunal for the Trial of War Criminals whose offenses have no particular geographical location. In accordance with Article 5, the following Governments of the United Nations have expressed their adherence to the Agreement:

Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.

By the Charter annexed to the Agreement, the constitution, jurisdiction, and functions of the Tribunal were defined.

The Tribunal was invested with power to try and punish persons who had committed Crimes against Peace, War Crimes, and Crimes against Humanity as defined in the Charter.

The Charter also provided that at the Trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

In Berlin, on 18 October 1945, in accordance with Article 14 of the Charter, an Indictment was lodged against the defendants named in the caption above, who had been designated by the Committee of the Chief Prosecutors of the signatory Powers as major war criminals.

A copy of the Indictment in the German language was served upon each defendant in custody, at least 30 days before the Trial opened.

This Indictment charges the defendants with Crimes against Peace by the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements, and assurances; with War Crimes; and with Crimes against Humanity. The defendants are also charged with participating in the formulation or execution of a common plan or conspiracy to commit all these crimes. The

* Text provided by Col. Lawrence D. Egbert, Editor of The Record of the Tribunal.

Tribunal was further asked by the Prosecution to declare all the named groups or organizations to be criminal within the meaning of the Charter.

The Defendant Robert Ley committed suicide in prison on 25 October 1945. On 15 November 1945 the Tribunal decided that the Defendant Gustav Krupp von Bohlen und Halbach could not then be tried because of his physical and mental condition, but that the charges against him in the Indictment should be retained for trial thereafter, if the physical and mental condition of the defendant should permit. On 17 November 1945 the Tribunal decided to try the Defendant Bormann in his absence under the provisions of Article 12 of the Charter. After argument, and consideration of full medical reports, and a statement from the defendant himself, the Tribunal decided on 1 December 1945 that no grounds existed for a postponement of the Trial against the Defendant Hess because of his mental condition. A similar decision was made in the case of the Defendant Streicher.

In accordance with Articles 16 and 23 of the Charter, Counsel were either chosen by the defendants in custody themselves, or at their request were appointed by the Tribunal. In his absence the Tribunal appointed Counsel for the Defendant Bormann, and also assigned Counsel to represent the named groups or organizations.

The Trial, which was conducted in four languages—English, Russian, French, and German—began on 20 November 1945, and pleas of "Not Guilty" were made by all the defendants except Bormann.

The hearing of evidence and the speeches of Counsel concluded on 31 August 1946.

Four hundred and three open sessions of the Tribunal have been held. Thirty-three witnesses gave evidence orally for the Prosecution against the individual defendants and 61 witnesses, in addition to 19 of the defendants, gave evidence for the Defense.

A further 143 witnesses gave evidence for the Defense by means of written answers to interrogatories.

The Tribunal appointed Commissioners to hear evidence relating to the organizations, and 101 witnesses were heard for the Defense before the Commissioners, and 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits.

Thirty-eight thousand affidavits, signed by 155,000 people, were submitted on behalf of the Political Leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General Staff and OKW, and 2,000 on behalf of the Gestapo.

The Tribunal itself heard 22 witnesses for the organizations. The documents tendered in evidence for the Prosecution of the individual defendants and the organizations numbered several thousands. A complete steno-

graphic record of everything said in Court has been made, as well as an electrical recording of all the proceedings.

Copies of all the documents put in evidence by the Prosecution have been supplied to the Defense in the German language. The applications made by the defendants for the production of witnesses and documents raised serious problems in some instances, on account of the unsettled state of the Country. It was also necessary to limit the number of witnesses to be called, in order to have an expeditious hearing, in accordance with Article 18 (c) of the Charter. The Tribunal, after examination, granted all those applications which in its opinion were relevant to the defense of any defendant or named group or organization, and were not cumulative. Facilities were provided for obtaining those witnesses and documents granted through the office of the General Secretary established by the Tribunal.

Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied armies in German army headquarters, Government buildings, and elsewhere. Some of the documents were found in salt mines, buried in the ground, hidden behind false walls and in other places thought to be secure from discovery. The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.

The Charter Provisions

The individual defendants are indicted under Article 6 of the Charter, which is as follows:

“Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

“The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

“(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:

“(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity:

"(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

These provisions are binding upon the Tribunal as the law to be applied to the case. The Tribunal will later discuss them in more detail; but, before doing so, it is necessary to review the facts. For the purpose of showing the background of the aggressive war and war crimes charged in the Indictment, the Tribunal will begin by reviewing some of the events that followed the first World War, and in particular, by tracing the growth of the Nazi Party under Hitler's leadership to a position of supreme power from which it controlled the destiny of the whole German People, and paved the way for the alleged commission of all the crimes charged against the defendants.

*The Nazi Regime in Germany
the Origin and Aims of the Nazi Party*

On 5 January 1919, not two months after the conclusion of the Armistice which ended the first World War, and six months before the signing of the peace treaties at Versailles, there came into being in Germany a small political party called the German Labor Party. On 12 September 1919 Adolf Hitler became a member of this Party, and at the first public meeting held in Munich, on 24 February 1920, he announced the Party's program. That program, which remained unaltered until the Party was dissolved in 1945, consisted of 25 points, of which the following five are of particular interest on account of the light they throw on the matters with which the Tribunal is concerned:

"Point 1. We demand the unification of all Germans in the Greater Germany, on the basis of the right of self-determination of peoples.

Point 2. We demand equality of rights for the German People in respect to the other nations; abrogation of the peace treaties of Versailles and Saint Germain.

Point 3. We demand land and territory for the sustenance of our people, and the colonization of our surplus population.

Point 4. Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race. . . .

Point 22. We demand abolition of the mercenary troops and formation of a national army."

Of these aims, the one which seems to have been regarded as the most important, and which figured in almost every public speech, was the removal of the "disgrace" of the Armistice, and the restrictions of the peace treaties of Versailles and Saint Germain. In a typical speech at Munich on 13 April 1923, for example, Hitler said with regard to the Treaty of Versailles:

"The Treaty was made in order to bring 20 million Germans to their deaths, and to ruin the German Nation.... At its foundation our movement formulated three demands:

1. Setting aside of the Peace Treaty.
2. Unification of all Germans.
3. Land and soil to feed our Nation."

The demand for the unification of all Germans in the Greater Germany was to play a large part in the events preceding the seizure of Austria and Czechoslovakia; the abrogation of the Treaty of Versailles was to become a decisive motive in attempting to justify the policy of the German Government; the demand for land was to be the justification for the acquisition of "living space" at the expense of other nations; the expulsion of the Jews from membership of the race of German blood was to lead to the atrocities against the Jewish people; and the demand for a national army was to result in measures of rearmament on the largest possible scale, and ultimately to war.

On 29 July 1921, the Party which had changed its name to National Sozialistische Deutsche Arbeiter Partei (NSDAP) was reorganized, Hitler becoming the first "Chairman." It was in this year that the Sturmabteilung or SA was founded, with Hitler at its head, as a private para-military force, which allegedly was to be used for the purpose of protecting NSDAP leaders from attack by rival political parties, and preserving order at NSDAP meetings, but in reality was used for fighting political opponents on the streets. In March 1923 the Defendant Göring was appointed head of the SA.

The procedure within the Party was governed in the most absolute way by the "Leadership Principle" (Führerprinzip).

According to the principle, each Führer has the right to govern, administer, or decree, subject to no control of any kind and at his complete discretion, subject only to the orders he received from above.

This principle applied in the first instance to Hitler himself as the leader of the Party, and in a lesser degree to all other Party officials. All members of the Party swore an oath of "eternal allegiance" to the leader.

There were only two ways in which Germany could achieve the three main aims above-mentioned, by negotiation, or by force. The 25 points of the NSDAP program do not specifically mention the methods on which the leaders of the Party proposed to rely, but the history of the Nazi regime

shows that Hitler and his followers were only prepared to negotiate on the terms that their demands were conceded, and that force would be used if they were not.

On the night of 8 November 1923, an abortive putsch took place in Munich. Hitler and some of his followers burst into a meeting in the Bürgerbräu Cellar, which was being addressed by the Bavarian Prime Minister Kahr, with the intention of obtaining from him a decision to march forthwith on Berlin. On the morning of 9 November, however, no Bavarian support was forthcoming, and Hitler's demonstration was met by the armed forces of the Reichswehr and the police. Only a few volleys were fired; and after a dozen of his followers had been killed, Hitler fled for his life, and the demonstration was over. The Defendants Streicher, Frick, and Hess all took part in the attempted rising. Hitler was later tried for high treason, and was convicted and sentenced to imprisonment. The SA was outlawed. Hitler was released from prison in 1924 and in 1925 the Schutzstaffeln, or SS, was created, nominally to act as his personal bodyguard, but in reality to terrorize political opponents. This was also the year of the publication of *Mein Kampf*, containing the political views and aims of Hitler, which came to be regarded as the authentic source of Nazi doctrine.

The Seizure of Power

In the eight years that followed the publication of *Mein Kampf*, the NSDAP greatly extended its activities throughout Germany, paying particular attention to the training of youth in the ideas of National Socialism. The first Nazi youth organization had come into existence in 1922, but it was in 1925 that the Hitler Jugend was officially recognized by the NSDAP. In 1931 Baldur von Schirach, who had joined the NSDAP in 1925, became Reich Youth Leader of the NSDAP.

The Party exerted every effort to win political support from the German People. Elections were contested both for the Reichstag and the Landtage. The NSDAP leaders did not make any serious attempt to hide the fact that their only purpose in entering German political life was in order to destroy the democratic structure of the Weimar Republic, and to substitute for it a National Socialist totalitarian regime which would enable them to carry out their avowed policies without opposition. In preparation for the day when he would obtain power in Germany, Hitler in January 1929, appointed Heinrich Himmler as Reichsführer SS with the special task of building the SS into a strong but elite group which would be dependable in all circumstances.

On 30 January 1933 Hitler succeeded in being appointed Chancellor of the Reich by President Von Hindenburg. The Defendants Göring, Schacht, and Von Papen were active in enlisting support to bring this about. Von

Papen had been appointed Reich Chancellor on 1 June 1932. On 14 June he rescinded the decree of the Brüning Cabinet of 13 April 1932, which had dissolved the Nazi para-military organizations, including the SA and the SS. This was done by agreement between Hitler and Von Papen, although Von Papen denies that it was agreed as early as 28 May, as Dr. Hans Volz asserts in "Dates from the History of the NSDAP"; but that it was the result of an agreement was admitted in evidence by Von Papen.

The Reichstag elections of 31 July 1932 resulted in a great accession of strength to the NSDAP, and Von Papen offered Hitler the post of Vice Chancellor, which he refused, insisting upon the Chancellorship itself. In November 1932 a petition signed by leading industrialists and financiers was presented to President Hindenburg, calling upon him to entrust the Chancellorship to Hitler; and in the collection of signatures to the petition Schacht took a prominent part.

The election of 6 November, which followed the defeat of the Government, reduced the number of NSDAP members, but Von Papen made further efforts to gain Hitler's participation, without success. On 12 November Schacht wrote to Hitler:

"I have no doubt that the present development of things can only lead to your becoming Chancellor. It seems as if our attempt to collect a number of signatures from business circles for this purpose was not altogether in vain. . . ."

After Hitler's refusal of 16 November, Von Papen resigned, and was succeeded by General Von Schleicher; but Von Papen still continued his activities. He met Hitler at the house of the Cologne banker Von Schröder on 4 January 1933, and attended a meeting at the Defendant Von Ribbentrop's house on 22 January, with the Defendant Göring and others. He also had an interview with President Hindenburg on 9 January, and from 22 January onwards he discussed officially with Hindenburg the formation of a Hitler Cabinet.

Hitler held his first Cabinet meeting on the day of his appointment as Chancellor, at which the Defendants Göring, Frick, Funk, Von Neurath, and Von Papen were present in their official capacities. On 28 February 1933 the Reichstag building in Berlin was set on fire. This fire was used by Hitler and his Cabinet as a pretext for passing on the same day a decree suspending the constitutional guarantees of freedom. The decree was signed by President Hindenburg and countersigned by Hitler and the Defendant Frick, who then occupied the post of Reich Minister of the Interior. On 5 March elections were held, in which the NSDAP obtained 288 seats of the total of 647. The Hitler Cabinet was anxious to pass an "Enabling Act" that would give them full legislative powers, including the power to deviate from the Constitution. They were without the necessary majority in the Reichstag to be able to do this constitutionally. They therefore made

use of the decree suspending the guarantees of freedom and took into so-called "protective custody" a large number of Communist deputies and Party officials. Having done this, Hitler introduced the "Enabling Act" into the Reichstag, and after he had made it clear that if it was not passed, further forceful measures would be taken, the act was passed on 24 March, 1933.

The Consolidation of Power

The NSDAP, having achieved power in this way, now proceeded to extend its hold on every phase of German life. Other political parties were persecuted, their property and assets confiscated, and many of their members placed in concentration camps. On 26 April 1933 the Defendant Göring founded in Prussia the Geheime Staatspolizei, or Gestapo, as a secret police, and confided to the deputy leader of the Gestapo that its main task was to eliminate political opponents of National Socialism and Hitler. On 14 July 1933 a law was passed declaring the NSDAP to be the only political party, and making it criminal to maintain or form any other political party.

In order to place the complete control of the machinery of Government in the hands of the Nazi leaders, a series of laws and decrees were passed which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Government of the Reich. Representative assemblies in the *Laender* were abolished, and with them all local elections. The Government then proceeded to secure control of the Civil Service. This was achieved by a process of centralization, and by a careful sifting of the whole Civil Service administration. By a law of 7 April it was provided that officials "who were of non-Aryan descent" should be retired; and it was also decreed that "officials who because of their previous political activity do not offer security that they will exert themselves for the national state without reservation shall be discharged." The law of 11 April 1933 provided for the discharge of "all civil servants who belong to the Communist Party." Similarly, the judiciary was subjected to control. Judges were removed from the bench for political or racial reasons. They were spied upon and made subject to the strongest pressure to join the Nazi Party as an alternative to being dismissed. When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken away and given to a newly established "People's Court" consisting of two judges and five officials of the Party. Special courts were set up to try political crimes and only party members were appointed as judges. Persons were arrested by the SS for political reasons, and detained in prisons and concentration camps; and the judges were without power to intervene in any way. Pardons were granted to members of the Party, who had been sentenced by the judges for proved offenses. In 1935 several officials of the Hohenstein concentration camp were convicted

of inflicting brutal treatment upon the inmates. High Nazi officials tried to influence the Court, and after the officials had been convicted, Hitler pardoned them all. In 1942 "judges' letters" were sent to all German judges by the Government, instructing them as to the "general lines" that they must follow.

In their determination to remove all sources of opposition, the NSDAP leaders turned their attention to the trade unions, the churches, and the Jews. In April 1933 Hitler ordered the late Defendant Ley, who was then staff director of the political organization of the NSDAP, "to take over the trade unions." Most of the trade unions of Germany were joined together in two large federations, the "Free Trade Unions" and the "Christian Trade Unions." Unions outside these two large federations contained only 15 percent of the total union membership. On 21 April 1933 Ley issued an NSDAP directive announcing a "coordination action" to be carried out on 2 May against the Free Trade Unions. The directive ordered that SA and SS men were to be employed in the planned "occupation of trade union properties and for the taking into protective custody of personalities who come into question." At the conclusion of the action the official NSDAP press service reported that the National Socialist Factory Cells Organization had "eliminated the old leadership of Free Trade Unions" and taken over the leadership themselves. Similarly, on 3 May 1933 the NSDAP press service announced that the Christian trade unions "have unconditionally subordinated themselves to the leadership of Adolf Hitler." In place of the trade unions the Nazi Government set up a Deutsche Arbeits Front (DAF), controlled by the NSDAP, and which, in practice, all workers in Germany were compelled to join. The chairmen of the unions were taken into custody and were subjected to ill-treatment, ranging from assault and battery to murder.

In their efforts to combat the influence of the Christian churches, whose doctrines were fundamentally at variance with National Socialist philosophy and practice, the Nazi Government proceeded more slowly. The extreme step of banning the practice of the Christian religion was not taken, but year by year efforts were made to limit the influence of Christianity on the German people, since, in the words used by the Defendant Bormann to the Defendant Rosenberg in an official letter, "the Christian religion and National Socialist doctrines are not compatible." In the month of June 1941 the Defendant Bormann issued a secret decree on the relation of Christianity and National Socialism. The decree stated that:

"For the first time in German history the Führer consciously and completely has the leadership in his own hand. With the Party, its components and attached units, the Führer has created for himself and thereby the German Reich Leadership, an instrument which makes him independent of the Treaty. . . . More and more the people must be separated from the churches and their organs, the pastor. . . .

Never again must an influence on leadership of the people be yielded to the churches. This influence must be broken completely and finally. Only the Reich Government and by its direction the Party, its components and attached units, have a right to leadership of the people."

From the earliest days of the NSDAP, anti-Semitism had occupied a prominent place in National Socialist thought and propaganda. The Jews, who were considered to have no right to German citizenship, were held to have been largely responsible for the troubles with which the Nation was afflicted following on the war of 1914-18. Furthermore, the antipathy to the Jews was intensified by the insistence which was laid upon the superiority of the Germanic race and blood. The second chapter of Book 1 of *Mein Kampf* is dedicated to what may be called the "Master Race" theory, the doctrine of Aryan superiority over all other races, and the right of Germans in virtue of this superiority to dominate and use other peoples for their own ends. With the coming of the Nazis into power in 1933, persecution of the Jews became official state policy. On 1 April 1933, a boycott of Jewish enterprises was approved by the Nazi Reich Cabinet, and during the following years a series of anti-Semitic laws was passed, restricting the activities of Jews in the civil service, in the legal profession, in journalism and in the armed forces. In September 1935, the so-called Nuremberg Laws were passed, the most important effect of which was to deprive Jews of German citizenship. In this way the influence of Jewish elements on the affairs of Germany was extinguished, and one more potential source of opposition to Nazi policy was rendered powerless.

In any consideration of the crushing of opposition, the massacre of 30 June 1934 must not be forgotten. It has become known as the "Röhm Purge" or "the blood bath," and revealed the methods which Hitler and his immediate associates, including the Defendant Göring, were ready to employ to strike down all opposition and consolidate their power. On that day Röhm, the Chief of Staff of the SA since 1931, was murdered by Hitler's orders, and the "Old Guard" of the SA was massacred without trial and without warning. The opportunity was taken to murder a large number of people who at once time or another had opposed Hitler.

The ostensible ground for the murder of Röhm was that he was plotting to overthrow Hitler, and the Defendant Göring gave evidence that knowledge of such a plot had come to his ears. Whether this was so or not it is not necessary to determine.

On 3 July the Cabinet approved Hitler's action and described it as "legitimate self-defense by the State."

Shortly afterwards Hindenburg died, and Hitler became both Reich President and Chancellor. At the Nazi-dominated plebiscite, which followed, 38 million Germans expressed their approval, and with the Reichswehr taking the oath of allegiance to the Führer, full power was now in Hitler's hands.

Germany had accepted the dictatorship with all its methods of terror, and its cynical and open denial of the rule of law.

Apart from the policy of crushing the potential opponents of their regime, the Nazi Government took active steps to increase its power over the German population. In the field of education, everything was done to ensure that the youth of Germany was brought up in the atmosphere of National Socialism and accepted National Socialist teachings. As early as 7 April 1933 the law reorganizing the civil service had made it possible for the Nazi Government to remove all "subversive and unreliable teachers"; and this was followed by numerous other measures to make sure that the schools were staffed by teachers who could be trusted to teach their pupils the full meaning of the National Socialist creed. Apart from the influence of National Socialist teaching in the schools, the Hitler Youth Organization was also relied upon by the Nazi Leaders for obtaining fanatical support from the younger generation. The Defendant von Schirach, who had been Reich Youth Leader of the NSDAP since 1931, was appointed Youth Leader of the German Reich in June 1933. Soon all the youth organizations had been either dissolved or absorbed by the Hitler Youth, with the exception of the "Catholic Youth." The Hitler Youth was organized on strict military lines, and as early as 1933 the Wehrmacht was coöperating in providing pre-military training for the Reich Youth.

The Nazi Government endeavored to unite the Nation in support of their policies through the extensive use of propaganda. A number of agencies was set up, whose duty was to control and influence the press, the radio, films, publishing firms, etc., in Germany, and to supervise entertainment and cultural and artistic activities. All these agencies came under Goebbels' Ministry of the People's Enlightenment and Propaganda, which together with a corresponding organization in the NSDAP and the Reich Chamber of Culture, was ultimately responsible for exercising this supervision. The Defendant Rosenberg played a leading part in disseminating the National Socialist doctrines on behalf of the Party, and the Defendant Fritzsche, in conjunction with Goebbels, performed the same task for the State.

The greatest emphasis was laid on the supreme mission of the German People to lead and dominate by virtue of their Nordic blood and racial purity; and the ground was thus being prepared for the acceptance of the idea of German world supremacy.

Through the effective control of the radio and the press, the German People, during the years which followed 1933, were subjected to the most intensive propaganda in furtherance of the regime. Hostile criticism, indeed criticism of any kind, was forbidden, and the severest penalties were imposed on those who indulged in it.

Independent judgment, based on freedom of thought, was rendered quite impossible.

Measures of Rearmament

During the years immediately following Hitler's appointment as Chancellor, the Nazi Government set about re-organizing the economic life of Germany, and in particular the armament industry. This was done on a vast scale and with extreme thoroughness.

It was necessary to lay a secure financial foundation for the building of armaments, and in April 1936 the Defendant Göring was appointed coordinator for raw materials and foreign exchange, and empowered to supervise all State and Party activities in these fields. In his capacity he brought together the War Minister, the Minister of Economics, the Reich Finance Minister, the President of the Reichsbank and the Prussian Finance Minister to discuss problems connected with war mobilization, and on 27 May 1936, in addressing these men, Göring opposed any financial limitation of war production and added that "all measures are to be considered from the standpoint of an assured waging of war." At the Party Rally in Nuremberg in 1936, Hitler announced the establishment of the Four Year Plan and the appointment of Göring as the Plenipotentiary in charge. Göring was already engaged in building a strong air force and on 8 July 1938 he announced to a number of leading German aircraft manufacturers that the German Air Force was already superior in quality and quantity to the English. On 14 October 1938, at another conference, Göring announced that Hitler had instructed him to organize a gigantic armament program, which would make insignificant all previous achievements. He said that he had been ordered to build as rapidly as possible an air force five times as large as originally planned, to increase the speed of the rearmament of the navy and army, and to concentrate on offensive weapons, principally heavy artillery and heavy tanks. He then laid down a specific program designed to accomplish these ends. The extent to which rearmament had been accomplished was stated by Hitler in his memorandum of 9 October 1939, after the campaign in Poland. He said:

"The military application of our people's strength has been carried through to such an extent that within a short time at any rate it cannot be markedly improved upon by any manner of effort. . . .

"The warlike equipment of the German people is at present larger in quantity and better in quality for a greater number of German divisions than in the year 1914. The weapons themselves, taking a substantial cross-section, are more modern than is the case of any other country in the world at this time. They have just proved their supreme war worthiness in their victorious campaign. . . . There is no evidence available to show that any country in the world disposes of a better total ammunition stock than the Reich. . . . The A. A. artillery is not equalled by any country in the world."

In this reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite

willing to coöperate, and to play its part in the rearmament program. In April 1933 Gustav Krupp von Bohlen submitted to Hitler on behalf of the Reich Association of German Industry a plan for the reorganization of German industry, which he stated was characterized by the desire to coördinate economic measures and political necessity. In the plan itself Krupp stated that "the turn of political events is in line with the wishes which I myself and the board of directors have cherished for a long time." What Krupp meant by this statement is fully shown by the draft text of a speech which he planned to deliver in the University of Berlin in January 1944, though the speech was in fact never delivered. Referring to the years 1919 to 1933, Krupp wrote:

"It is the one great merit of the entire German war economy that it did not remain idle during those bad years, even though its activity could not be brought to light, for obvious reasons. Through years of secret work, scientific and basic groundwork was laid in order to be ready again to work for the German armed forces at the appointed hour, without loss of time or experience. . . . Only through the secret activity of German enterprise together with the experience gained meanwhile through the production of peace time goods was it possible after 1933 to fall into step with the new tasks arrived at, restoring Germany's military power."

In October 1933 Germany withdrew from the International Disarmament Conference and the League of Nations. In 1935 the Nazi Government decided to take the first open steps to free itself from its obligations under the Treaty of Versailles. On 10 March 1935 the Defendant Göring announced that Germany was building a military air force. Six days later, on 16 March 1935, a law was passed bearing the signatures, among others, of the Defendants Göring, Hess, Frank, Frick, Schacht, and Von Neurath, instituting compulsory military service and fixing the establishment of the German Army at a peace time strength of 500,000 men. In an endeavor to reassure public opinion in other countries, the Government announced on 21 May 1935 that Germany would, though renouncing the disarmament clauses, still respect the territorial limitations of the Versailles Treaty, and would comply with the Locarno Pacts. Nevertheless, on the very day of this announcement, the secret Reich Defense Law was passed and its publication forbidden by Hitler. In this law, the powers and duties of the Chancellor and other Ministers were defined, should Germany become involved in war. It is clear from this law that by May of 1935 Hitler and his Government had arrived at the stage in the carrying out of their policies when it was necessary for them to have in existence the requisite machinery for the administration and government of Germany in the event of their policy leading to war.

At the same time that this preparation of the German economy for war was being carried out, the German armed forces themselves were preparing for a rebuilding of Germany's armed strength.

The Germany Navy was particularly active in this regard. The official German Naval historians, Assmann and Gladisch, admit that the Treaty of Versailles had only been in force for a few months before it was violated, particularly in the construction of a new submarine arm.

The publications of Captain Schuessler and Colonel Scherff, both of which were sponsored by the Defendant Raeder, were designed to show the German People the nature of the Navy's effort to rearm in defiance of the Treaty of Versailles.

The full details of these publications have been given in evidence.

On 12 May 1934 the Defendant Raeder issued the Top Secret armament plan for what was called the "Third Armament Phase." This contained the sentence:

"All theoretical and practical A-preparations are to be drawn up with a primary view to readiness for a war *without any alert period.*"

One month later, in June 1934, the Defendant Raeder had a conversation with Hitler in which Hitler instructed him to keep secret the construction of U-boats and of warships over the limit of 10,000 tons which was then being undertaken.

And on 2 November 1934, the Defendant Raeder had another conversation with Hitler and the Defendant Göring, in which Hitler said that he considered it vital that the German Navy "should be increased as planned, as no war could be carried on if the Navy was not able to safeguard the ore imports from Scandinavia."

The large orders for building given in 1933 and 1934 are sought to be executed by the Defendant Raeder on the ground that negotiations were in progress for an agreement between Germany and Great Britain permitting Germany to build ships in excess of the provisions of the Treaty of Versailles. This agreement, which was signed in 1935, restricted the German Navy to a tonnage equal to one-third of that of the British, except in respect of U-boats where 45 per cent was agreed, subject always to the right to exceed this proportion after first informing the British Government and giving them an opportunity of discussion.

The Anglo-German Treaty followed in 1937, under which both Powers bound themselves to notify full details of their building program at least four months before any action was taken.

It is admitted that these clauses were not adhered to by Germany.

In capital vessels, for example, the displacement details were falsified by 20 per cent, whilst in the case of U-boats, the German historians Assmann and Gladisch say:

"It is probably just in the sphere of submarine construction that Germany adhered the least to the restrictions of the German-British Treaty."

The importance of these breaches of the Treaty is seen when the motive for this rearmament is considered. In the year 1940 the Defendant Raeder himself wrote:

"The Führer hoped until the last moment to be able to put off the threatening conflict with England until 1944-45. At that time, the Navy would have had available a fleet with a powerful U-boat superiority, and a much more favorable ratio as regards strength in all other types of ships, particularly those designed for warfare on the High Seas."

The Nazi Government as already stated, announced on 21 May 1935 their intention to respect the territorial limitations of the Treaty of Versailles. On 7 March 1936, in defiance of that Treaty, the demilitarized zone of the Rhineland was entered by German troops. In announcing this action to the German Reichstag, Hitler endeavored to justify the re-entry by references to the recently concluded alliances between France and the Soviet Union, and between Czechoslovakia and the Soviet Union. He also tried to meet the hostile reaction which he no doubt expected to follow this violation of the Treaty by saying:

"We have no territorial claims to make in Europe."

The Common Plan of Conspiracy and Aggressive War

The Tribunal now turns to the consideration of the Crimes against Peace charged in the Indictment. Count One of the Indictment charges the defendants with conspiring or having a common plan to commit crimes against peace. Count Two of the Indictment charges the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States. It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together, and to deal later in this Judgment with the question of the individual responsibility of the defendants.

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

The first acts of aggression referred to in the Indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun on September 1939.

Before examining that charge it is necessary to look more closely at some of the events which preceded these acts of aggression. The war against

Poland did not come suddenly out of an otherwise clear sky; the evidence has made it plain that this war of aggression, as well as the seizure of Austria and Czechoslovakia, was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the pre-ordained scheme and plan. For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.

From the beginning, the National Socialist movement claimed that its object was to unite the German People in the consciousness of their mission and destiny, based on inherent qualities of race, and under the guidance of the Führer.

For its achievement, two things were deemed to be essential: the disruption of the European order as it had existed since the Treaty of Versailles, and the creation of a Greater Germany beyond the frontiers of 1914. This necessarily involved the seizure of foreign territories.

War was seen to be inevitable, or at the very least, highly probable, if these purposes were to be accomplished. The German People, therefore, with all their resources, were to be organized as a great political-military army, schooled to obey without question any policy decreed by the State.

Preparation for Aggression

In *Mein Kampf* Hitler had made this view quite plain. It must be remembered that *Mein Kampf* was no mere private diary in which the secret thoughts of Hitler were set down. Its contents were rather proclaimed from the house-tops. It was used in the schools and Universities and among the Hitler Youth, in the SS and the SA, and among the German People generally, even down to the presentation of an official copy to all newly-married people. By the year 1945 over 6½ million copies had been circulated. The general contents are well known. Over and over again Hitler asserted his belief in the necessity of force as the means of solving international problems, as in the following quotation:

“The soil on which we now live was not a gift bestowed by Heaven on our forefathers. They had to conquer it by risking their lives. So also in the future, our people will not obtain territory, and therewith the means of existence, as a favor from any other people, but will have to win it by the power of a triumphant sword.”

Mein Kampf contains many such passages, and the extolling of force as an instrument of foreign policy is openly proclaimed.

The precise objectives of this policy of force are also set forth in detail. The very first page of the book asserts that “German-Austria must be restored to the great German Motherland,” not on economic grounds, but because “people of the same blood should be in the same Reich.”

The restoration of the German frontiers of 1914 is declared to be wholly insufficient, and if Germany is to exist at all, it must be as a world power with the necessary territorial magnitude.

Mein Kampf is quite explicit in stating where the increased territory is to be found:

"Therefore we National Socialists have purposely drawn a line through the line of conduct followed by pre-war Germany in foreign policy. We put an end to the perpetual Germanic march towards the South and West of Europe, and turn our eyes towards the lands of the East. We finally put a stop to the colonial and trade policy of the pre-war times, and pass over to the territorial policy of the future.

"But when we speak of new territory in Europe today, we must think principally of Russia and the border states subject to her."

Mein Kampf is not to be regarded as a mere literary exercise, nor as an inflexible policy or plan incapable of modification.

Its importance lies in the unmistakable attitude of aggression revealed throughout its pages.

The Planning of Aggression

Evidence from captured documents has revealed that Hitler held four secret meetings to which the Tribunal proposes to make special reference because of the light they shed upon the question of the common plan and aggressive war.

These meetings took place on 5 November 1937, 23 May 1939, 22 August 1939, and 23 November 1939.

At these meetings important declarations were made by Hitler as to his purposes, which are quite unmistakable in their terms.

The documents which record what took place at these meetings have been subject to some criticism at the hands of defending Counsel.

Their essential authenticity is not denied, but it is said, for example, that they do not purport to be verbatim transcripts of the speeches they record, that the document dealing with the meeting on 5 November 1937, was dated five days after the meeting had taken place, and that the two documents dealing with the meeting of 22 August 1939 differ from one another, and are unsigned.

Making the fullest allowance for criticism of this kind, the Tribunal is of opinion that the documents are documents of the highest value, and that their authenticity and substantial truth are established.

They are obviously careful records of the events they describe, and they have been preserved as such in the archives of the German Government, from whose custody they were captured. Such documents could never be dismissed as inventions, nor even as inaccurate or distorted; they plainly record events which actually took place.

Conferences of 23 November 1939 and 5 November 1937

It will perhaps be useful to deal first of all with the meeting of 23 November 1939, when Hitler called his Supreme Commanders together. A record was made of what was said, by one of those present. At the date of the meeting, Austria and Czechoslovakia had been incorporated into the German Reich, Poland had been conquered by the German Armies, and the war with Great Britain and France was still in its static phase. The moment was opportune for a review of past events. Hitler informed the Commanders that the purpose of the Conference was to give them an idea of the world of his thoughts, and to tell them his decision. He thereupon reviewed his political task since 1919, and referred to the secession of Germany from the League of Nations, the denunciation of the Disarmament Conference, the order for re-armament, the introduction of compulsory armed service, the occupation of the Rhineland, the seizure of Austria, and the action against Czechoslovakia. He stated:

"One year later, Austria came; this step also was considered doubtful. It brought about a considerable reinforcement of the Reich. The next step was Bohemia, Moravia, and Poland. This step also was not possible to accomplish in one campaign. First of all, the western fortification had to be finished. It was not possible to reach the goal in one effort. It was clear to me from the first moment that I could not be satisfied with the Sudeten German territory. That was only a partial solution. The decision to march into Bohemia was made. Then followed the erection of the Protectorate and with that the basis for the action against Poland was laid, but I wasn't quite clear at that time whether I should start first against the East and then in the West or vice versa. . . . Basically I did not organize the Armed Forces in order not to strike. The decision to strike was always in me. Earlier or later I wanted to solve the problem. Under pressure it was decided that the East was to be attacked first."

This address, reviewing past events and re-affirming the aggressive intentions present from the beginning, puts beyond any question of doubt the character of the actions against Austria and Czechoslovakia, and the war against Poland.

For they had all been accomplished according to plan; and the nature of that plan must now be examined in a little more detail.

At the meeting of 23 November 1939 Hitler was looking back to things accomplished; at the earlier meetings now to be considered, he was looking forward, and revealing his plans to his confederates. The comparison is instructive.

The meeting held at the Reich Chancellery in Berlin on 5 November 1937 was attended by Lieutenant Colonel Hossbach, Hitler's personal adjutant, who compiled a long note of the proceedings, which he dated 10 November 1937 and signed.

The persons present were Hitler, and the Defendants Göring, Von Neurath, and Raeder, in their capacities as Commander-in-Chief of the Luftwaffe, Reich Foreign Minister, and Commander-in-Chief of the Navy respectively, General Von Blomberg, Minister of War, and General Von Fritsch, the Commander-in-Chief of the Army.

Hitler began by saying that the subject of the conference was of such high importance that in other States it would have taken place before the Cabinet. He went on to say that the subject matter of his speech was the result of his detailed deliberations, and of his experiences during his four and a half years of Government. He requested that the statements he was about to make should be looked upon in the case of his death as his last will and testament. Hitler's main theme was the problem of living space, and he discussed various possible solutions, only to set them aside. He then said that the seizure of living space on the continent of Europe was therefore necessary, expressing himself in these words:

"It is not a case of conquering people but of conquering agriculturally useful space. It would also be more to the purpose to seek raw material producing territory in Europe directly adjoining the Reich and not overseas, and this solution would have to be brought into effect for one or two generations. . . . The history of all times—Roman Empire, British Empire—has proved that every space expansion can only be effected by breaking resistance and taking risks. Even setbacks are unavoidable: neither formerly nor today has space been found without an owner; the attacker always comes up against the proprietor."

He concluded with this observation:

"The question for Germany is where the greatest possible conquest could be made at the lowest cost."

Nothing could indicate more plainly the aggressive intentions of Hitler, and the events which soon followed showed the reality of his purpose. It is impossible to accept the contention that Hitler did not actually mean war; for after pointing out that Germany might expect the opposition of England and France, and analyzing the strength and the weakness of those powers in particular situations, he continued:

"The German question can be solved only by way of force, and this is never without risk. . . . If we place the decision to apply force with risk at the head of the following expositions, then we are left to reply to the questions 'when' and 'how.' In this regard we have to decide upon three different cases."

The first of these three cases set forth a hypothetical international situation, in which he would take action not later than 1943 to 1945, saying:

"If the Führer is still living then it will be his irrevocable decision to solve the German space problem not later than 1943 to 1945. The

necessity for action before 1943 to 1945 will come under consideration in Cases 2 and 3."

The second and third cases to which Hitler referred show the plain intention to seize Austria and Czechoslovakia, and in this connection Hitler said:

"For the improvement of our military-political position, it must be our first aim in every case of entanglement by war to conquer Czechoslovakia and Austria simultaneously in order to remove any threat from the flanks in case of a possible advance westwards."

He further added:

"The annexation of the two States to Germany militarily and politically would constitute a considerable relief, owing to shorter and better frontiers, the freeing of fighting personnel for other purposes, and the possibility of reconstituting new armies up to a strength of about twelve divisions."

This decision to seize Austria and Czechoslovakia was discussed in some detail; the action was to be taken as soon as a favorable opportunity presented itself.

The military strength which Germany had been building up since 1933 was now to be directed at the two specific countries, Austria and Czechoslovakia.

The Defendant Göring testified that he did not believe at that time that Hitler actually meant to attack Austria and Czechoslovakia, and that the purpose of the conference was only to put pressure on Von Fritsch to speed up the re-armament of the Army.

The Defendant Raeder testified that neither he, nor Von Fritsch, nor Von Blomberg, believed that Hitler actually meant war, a conviction which the Defendant Raeder claims that he held up to 22 August 1939. The basis of this conviction was his hope that Hitler would obtain a "political solution" of Germany's problems. But all that this means, when examined, is the belief that Germany's position would be so good, and Germany's armed might so overwhelming that the territory desired could be obtained without fighting for it. It must be remembered too that Hitler's declared intention with regard to Austria was actually carried out within a little over four months from the date of the meeting, and within less than a year the first portion of Czechoslovakia was absorbed, and Bohemia and Moravia a few months later. If any doubts had existed in the minds of any of his hearers in November 1937, after March 1939 there could no longer be any question that Hitler was in deadly earnest in his decision to resort to war. The Tribunal is satisfied that Lieutenant Colonel Hossbach's account of the meeting is substantially correct, and that those present knew that Austria and Czechoslovakia would be annexed by Germany at the first possible opportunity.

The Seizure of Austria

The invasion of Austria was a pre-meditated aggressive step in furthering the plan to wage aggressive wars against other countries. As a result Germany's flank was protected, that of Czechoslovakia being greatly weakened. The first step had been taken in the seizure of "Lebensraum"; many new divisions of trained fighting men had been acquired; and with the seizure of foreign exchange reserves, the re-armament program had been greatly strengthened.

On 21 May 1935 Hitler announced in the Reichstag that Germany did not intend either to attack Austria or to interfere in her internal affairs. On 1 May 1936 he publicly coupled Czechoslovakia with Austria in his avowal of peaceful intentions; and so late as 11 July 1936 he recognized by treaty the full sovereignty of Austria.

Austria was in fact seized by Germany in the month of March 1938. For a number of years before that date, the National Socialists in Germany had been coöperating with the National Socialists of Austria with the ultimate object of incorporating Austria into the German Reich. The Putsch of 25 July 1934, which resulted in the assassination of Chancellor Dollfuss, had the seizure of Austria as its object; but the Putsch failed, with the consequence that the National Socialist Party was outlawed in Austria. On 11 July 1936 an agreement was entered into between the two countries, Article 1 of which stated: "The German Government recognizes the full sovereignty of the Federated State of Austria in the spirit of the pronouncements of the German Führer and Chancellor of 21 May 1935."

Article 2 declared: "Each of the two Governments regards the inner political order (including the question of Austrian National Socialism) obtaining in the other country as an internal affair of the other country, upon which it will exercise neither direct nor indirect influence."

The National Socialist movement in Austria however continued its illegal activities under cover of secrecy; and the National Socialists of Germany gave the Party active support. The resulting "incidents" were seized upon by the German National Socialists as an excuse for interfering in Austrian affairs. After the conference of 5 November 1937, these "incidents" rapidly multiplied. The relationship between the two countries steadily worsened, and finally the Austrian Chancellor Schuschnigg was persuaded by the Defendant Von Papen and others to seek a conference with Hitler, which took place at Berchtesgaden on 12 February 1938. The Defendant Keitel was present at the conference, and Dr. Schuschnigg was threatened by Hitler with an immediate invasion of Austria. Schuschnigg finally agreed to grant a political amnesty to various Nazis convicted of crime, and to appoint the Nazi Seyss-Inquart as Minister of the Interior and Security with control of the Police. On 9 March 1938, in an attempt to preserve the independence of his country, Dr. Schuschnigg decided to

hold a plebiscite on the question of Austrian independence, which was fixed for 13 March 1938. Hitler, two days later, sent an ultimatum to Schuschnigg that the plebiscite must be withdrawn. In the afternoon and evening of 11 March 1938 the Defendant Göring made a series of demands upon the Austrian Government, each backed up by the threat of invasion. After Schuschnigg had agreed to the cancellation of the plebiscite, another demand was put forward that Schuschnigg must resign, and that the Defendant Seyss-Inquart should be appointed Chancellor. In consequence, Schuschnigg resigned, and President Miklas, after at first refusing to appoint Seyss-Inquart as Chancellor, gave way and appointed him.

Meanwhile Hitler had given the final order for the German troops to cross the border at dawn on 12 March and instructed Seyss-Inquart to use formations of Austrian National Socialists to depose Miklas and to seize control of the Austrian Government. After the order to march had been given to the German troops, Göring telephoned the German Embassy in Vienna and dictated a telegram which he wished Seyss-Inquart to send to Hitler to justify the military action which had already been ordered.

It was:

"The provisional Austrian Government, which, after the dismissal of the Schuschnigg Government, considers its task to establish peace and order in Austria, sends to the German Government the urgent request to support it in its task and to help it to prevent bloodshed. For this purpose it asks the German Government to send German troops as soon as possible."

Keppler, an official of the German Embassy, replied: "Well, SA and SS are marching through the streets, but everything is quiet."

After some further discussion, Göring stated: "Please show him (Seyss-Inquart) the text of the telegram and do tell him that we are asking him—well, he doesn't even have to send the telegram. All he needs to do is to say 'Agreed.'"

Seyss-Inquart never sent the telegram; he never even telegraphed "Agreed."

It appears that as soon as he was appointed Chancellor, some time after 10 p.m., he called Keppler and told him to call up Hitler and transmit his protests against the occupation. This action outraged the Defendant Göring, because "it would disturb the rest of the Führer, who wanted to go to Austria the next day." At 11:15 p.m. an official in the Ministry of Propaganda in Berlin telephoned the German Embassy in Vienna and was told by Keppler: "Tell the General Field Marshall that Seyss-Inquart agrees."

At daybreak on 12 March 1938 German troops marched into Austria, and met with no resistance. It was announced in the German press that Seyss-Inquart had been appointed the successor to Schuschnigg, and the telegram which Göring had suggested, but which was never sent, was quoted to show that Seyss-Inquart had requested the presence of German troops to prevent

disorder. On 13 March 1938 a law was passed for the reunion of Austria in the German Reich. Seyss-Inquart demanded that President Miklas should sign this law, but he refused to do so, and resigned his office. He was succeeded by Seyss-Inquart who signed the law in the name of Austria. This law was then adopted as a law of the Reich by a Reich Cabinet decree issued the same day, and signed by Hitler and the Defendants Göring, Frick, Von Ribbentrop, and Hess.

It was contended before the Tribunal that the annexation of Austria was justified by the strong desire expressed in many quarters for the union of Austria and Germany; that there were many matters in common between the two peoples that made this union desirable; and that in the result the object was achieved without bloodshed.

These matters, even if true, are really immaterial, for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered. Moreover, none of these considerations appear from the Hossbach account of the meetings of 5 November 1937 to have been the motives which actuated Hitler on the contrary, all the emphasis is there laid on the advantage to be gained by Germany in her military strength by the annexation of Austria.

The Seizure of Czechoslovakia

The conference of 5 November 1937 made it quite plain that the seizure of Czechoslovakia by Germany had been definitely decided upon. The only question remaining was the selection of the suitable moment to do it. On 4 March 1938 the Defendant Von Ribbentrop wrote to the Defendant Keitel with regard to a suggestion made to Von Ribbentrop by the Hungarian Ambassador in Berlin, that possible war aims against Czechoslovakia should be discussed between the German and Hungarian Armies. In the course of this letter Von Ribbentrop said:

"I have many doubts about such negotiations. In case we should discuss with Hungary possible war aims against Czechoslovakia, the danger exists that other parties as well would be informed about this."

On 11 March 1938 Göring made two separate statements to M. Mastny, the Czechoslovak Minister in Berlin, assuring him that the developments then taking place in Austria would in no way have any detrimental influence on the relations between the German Reich and Czechoslovakia, and emphasized the continued earnest endeavor on the part of the Germans to improve those mutual relations. On 12 March Göring asked M. Mastny to call on him, and repeated these assurances.

This design to keep Czechoslovakia quiet whilst Austria was absorbed was a typical maneuver on the part of the Defendant Göring, which he was to repeat later in the case of Poland, when he made the most strenuous ef-

forts to isolate Poland in the impending struggle. On the same day, 12 March, the Defendant Von Neurath spoke with M. Mastny, and assured him on behalf of Hitler that Germany still considered herself bound by the German-Czechoslovak Arbitration Convention concluded at Locarno in October 1925.

The evidence shows that after the occupation of Austria by the German Army on 12 March and the annexation of Austria on 13 March, Conrad Henlein, who was the leader of the Sudeten German Party in Czechoslovakia, saw Hitler in Berlin on 28 March. On the following day, at a conference in Berlin, when Von Ribbentrop was present with Henlein, the general situation was discussed, and later the Defendant Jodl recorded in his diary:

After the annexation of Austria, the Führer mentions that there is no hurry to solve the Czech question, because Austria has to be digested first. Nevertheless, preparation for Case Grün (that is, the plan against Czechoslovakia) will have to be carried out energetically; they will have to be newly prepared on the basis of the changed strategic position because of the annexation of Austria."

On 21 April 1938 a discussion took place between Hitler and the Defendant Keitel with regard to "Case Grün," showing quite clearly that the preparations for the attack on Czechoslovakia were being fully considered. On 28 May 1938 Hitler ordered that preparations should be made for military action against Czechoslovakia by the 2nd October, and from then onwards the plan to invade Czechoslovakia was constantly under review. On 30 May 1938 a directive signed by Hitler declared his "unalterable decision to smash Czechoslovakia by military action in the near future."

In June 1938 as appears from a captured document taken from the files of the SD in Berlin, an elaborate plan for the employment of the SD in Czechoslovakia had been proposed. This plan provided that "the SD follow, if possible, immediately after the leading troops, and take upon themselves the duties similar to their tasks in Germany. . . ."

Files of information were to be compiled with notations as follows: "To arrest." "To liquidate." "To confiscate." "To deprive of passport," etc.

The plan provided for the temporary division of the country into larger and smaller territorial units, and considered various "suggestions," as they were termed, for the incorporation into the German Reich of the inhabitants and districts of Czechoslovakia. The final "suggestion" included the whole country, together with Slovakia and Carpathian Russia, with a population of nearly 15 millions.

The plan was modified in some respects in September after the Munich Conference, but the fact that the plan existed in such exact detail and was couched in such war-like language indicated a calculated design to resort to force.

On 31 August 1938 Hitler approved a memorandum by Jodl dated 24 August 1938, concerning the timing of the order for the invasion of Czechoslovakia and the question of defense measures. This memorandum contained the following:

"Operation Grün will be set in motion by means of an 'incident' in Czechoslovakia, which will give Germany provocation for military intervention. The fixing of the *exact time* for this incident is of the utmost importance."

These facts demonstrate that the occupation of Czechoslovakia had been planned in detail long before the Munich Conference.

In the month of September 1938 the conferences and talks with military leaders continued. In view of the extraordinarily critical situation which had arisen, the British Prime Minister, Mr. Chamberlain, flew to Munich and then went to Berchtesgaden to see Hitler. On 22 September Mr. Chamberlain met Hitler for further discussions at Bad Godesberg. On 26 September 1938 Hitler said in a speech in Berlin, with reference to this conversation:

"I assured him, moreover, and I repeat it here, that when this problem is solved there will no more territorial problems for Germany in Europe; and I further assured him that from the moment when Czechoslovakia solves its other problems, that is to say, when the Czechs have come to an arrangement with their other minorities, peacefully and without oppression, I will be no longer interested in the Czech State, and that as far as I am concerned I will guarantee it. We don't want any Czechs."

On 29 September 1938, after a conference between Hitler and Mussolini and the British and French Prime Ministers in Munich, the Munich Pact was signed, by which Czechoslovakia was required to acquiesce in the cession of the Sudetenland to Germany. The "piece of paper" which the British Prime Minister brought back to London, signed by himself and Hitler, expressed the hope that for the future Britain and Germany might live without war. That Hitler never intended to adhere to the Munich Agreement is shown by the fact that a little later he asked the Defendant Keitel for information with regard to the military force which in his opinion would be required to break all Czech resistance in Bohemia and Moravia. Keitel gave his reply on 11 October 1938. On 21 October 1938 a directive was issued by Hitler, and countersigned by the Defendant Keitel, to the Armed Forces on their future tasks, which stated:

"Liquidation of the remainder of Czechoslovakia. It must be possible to smash at any time the remainder of Czechoslovakia if her policy should become hostile towards Germany"

On 14 March 1939 the Czech President Hacha and his Foreign Minister Chvalkovsky came to Berlin at the suggestion of Hitler, and attended a

meeting at which the Defendants Von Ribbentrop, Göring, and Keitel were present, with others. The proposal was made to Hacha that if he would sign an agreement consenting to the incorporation of the Czech people in the German Reich at once, Bohemia and Moravia would be saved from destruction. He was informed that German troops had already received orders to march and that any resistance would be broken with physical force. The Defendant Göring added the threat that he would destroy Prague completely from the air. Faced by this dreadful alternative, Hacha and his Foreign Minister put their signatures to the necessary agreement at 4:30 in the morning, and Hitler and Ribbentrop signed on behalf of Germany.

On 15 March German troops occupied Bohemia and Moravia, and on 16 March the German decree was issued incorporating Bohemia and Moravia into the Reich as a protectorate, and this decree was signed by the Defendants Von Ribbentrop and Frick.

The Aggression against Poland

By March 1939 the plan to annex Austria and Czechoslovakia, which had been discussed by Hitler at the meeting of 5 November 1937, had been accomplished. The time had now come for the German leaders to consider further acts of aggression, made more possible of attainment because of that accomplishment.

On 23 May 1939 a meeting was held in Hitler's study in the new Reich Chancellery in Berlin. Hitler announced his decision to attack Poland and gave his reasons, and discussed the effect the decision might have on other countries. In point of time, this was the second of the important meetings to which reference has already been made, and in order to appreciate the full significance of what was said and done, it is necessary to state shortly some of the main events in the history of German-Polish relations.

As long ago as the year 1925 an Arbitration Treaty between Germany and Poland had been made at Locarno, providing for the settlement of all disputes between the two countries. On 26 January 1934, a German-Polish declaration of non-aggression was made, signed on behalf of the German Government by the Defendant Von Neurath. On 30 January 1934, and again on 30 January 1937 Hitler made speeches in the Reichstag in which he expressed his view that Poland and Germany could work together in harmony and peace. On 20 February 1938 Hitler made a third speech in the Reichstag in the course of which he said with regard to Poland:

“And so the way to a friendly understanding has been successfully paved, an understanding which, beginning with Danzig, has today, in spite of the attempts of certain mischief makers, succeeded in finally taking the poison out of the relations between Germany and Poland and transforming them into a sincere, friendly coöperation. . . . Rely-

ing on her friendships, Germany will not leave a stone unturned to save that ideal which provides the foundation for the task which is ahead of us—peace.”

On 26 September 1938, in the middle of the crisis over the Sudetenland, Hitler made the speech in Berlin which has already been quoted, and announced that he had informed the British Prime Minister that when the Czechoslovakian problem was solved there would be no more territorial problems for Germany in Europe. Nevertheless, on 24 November of the same year, an OKW directive was issued to the German Armed Forces to make preparations for an attack upon Danzig; it stated:

The Führer has ordered:

(1) . . . Preparations are also to be made to enable the Free State of Danzig to be occupied by German troops by surprise.”

In spite of having ordered military preparations for the occupation of Danzig, Hitler on 30 January 1939 said in a speech in the Reichstag: “During the troubled months of the past year, the friendship between Germany and Poland has been one of the reassuring factors in the political life of Europe.”

Five days previously, on 25 January 1939, Von Ribbentrop said in the course of a speech in Warsaw: “Thus Poland and Germany can look forward to the future with full confidence in the solid basis of their mutual relations.”

Following on the occupation of Bohemia and Moravia by Germany on 15 March 1939, which was a flagrant breach of the Munich Agreement, Great Britain gave an assurance to Poland on 31 March 1939 that in the event of any action which clearly threatened Polish independence, and which the Polish Government accordingly considered it vital to resist with their National Forces, Great Britain would feel itself bound at once to lend Poland all the support in its power. The French Government took the same stand. It is interesting to note in this connection, that one of the arguments frequently presented by the Defense in the present case is that the Defendants were induced to think that their conduct was not in breach of international law by the acquiescence of other Powers. The declarations of Great Britain and France showed, at least, that this view could be held no longer.

On 3 April 1939 a revised OKW directive was issued to the Armed Forces, which after referring to the question of Danzig made reference to Fall Weiss (the military code name for the German invasion of Poland) and stated:

“The Führer has added the following directions to Fall Weiss. (1) Preparations must be made in such a way that the operation can be carried out at any time from 1 September 1939 onwards. (2) The High Command of the Armed Forces has been directed to draw up a

precise timetable for Fall Weiss and to arrange by conferences the synchronized timings between the three branches of the Armed Forces."

On 11 April 1939 a further directive was signed by Hitler and issued to the Armed Forces, and in one of the annexes to that document the words occur:

"Quarrels with Poland should be avoided. Should Poland however adopt a threatening attitude towards Germany, 'a final settlement' will be necessary, notwithstanding the pact with Poland. The aim is then to destroy Polish military strength, and to create in the East a situation which satisfies the requirements of defense. The Free State of Danzig will be incorporated into Germany at the outbreak of the conflict at the latest. Policy aims at limiting the war to Poland, and this is considered possible in view of the internal crisis in France, and British restraint as a result of this."

In spite of the contents of those two directives, Hitler made a speech in the Reichstag on 28 April 1939 in which, after describing the Polish Government's alleged rejection of an offer he had made with regard to Danzig and the Polish Corridor, he stated:

"I have regretted greatly this incomprehensible attitude of the Polish Government, but that alone is not the decisive fact; the worst is that now Poland like Czechoslovakia a year ago believes, under the pressure of a lying international campaign, that it must call up its troops, although Germany on her part has not called up a single man, and had not thought of proceeding in any way against Poland. . . . The intention to attack on the part of Germany which was merely invented by the international press. . . ."

It was four weeks after making this speech that Hitler, on 23 May 1939, held the important military conference to which reference has already been made. Among the persons present were the Defendants Göring, Raeder, and Keitel. The adjutant on duty that day was Lieutenant Colonel Schmudt, and he made a record of what happened, certifying it with his signature as a correct record.

The purpose of the meeting was to enable Hitler to inform the heads of the Armed Forces and their staffs of his views on the political situation and his future aims. After analyzing the political situation and reviewing the course of events since 1933, Hitler announced his decision to attack Poland. He admitted that the quarrel with Poland over Danzig was not the reason for this attack, but the necessity for Germany to enlarge her living space and secure her food supplies. He said:

"The solution of the problem demands courage. The principle by which one evades solving the problem by adapting oneself to circumstances is inadmissible. Circumstances must rather be adapted to needs. This is impossible without invasion of foreign States or attacks upon foreign property."

Later in his address he added:

"There is therefore no question of sparing Poland, and we are left with the decision to attack Poland at the first suitable opportunity. We cannot expect a repetition of the Czech affair. There will be war. Our task is to isolate Poland. The success of the isolation will be decisive. . . . The isolation of Poland is a matter of skillful politics."

Lieutenant Colonel Schmudt's record of the meeting reveals that Hitler fully realized the possibility of Great Britain and France coming to Poland's assistance. If, therefore, the isolation of Poland could not be achieved, Hitler was of the opinion that Germany should attack Great Britain and France first, or at any rate should concentrate primarily on the war in the West, in order to defeat Great Britain and France quickly, or at least to destroy their effectiveness. Nevertheless, Hitler stressed that war with England and France would be a life and death struggle, which might last a long time, and that preparations must be made accordingly.

During the weeks which followed this conference, other meetings were held and directives were issued in preparation for the war. The Defendant Von Ribbentrop was sent to Moscow to negotiate a non-aggression pact with the Soviet Union.

On 22 August 1939 there took place the important meeting of that day, to which reference has already been made. The Prosecution have put in evidence two unsigned captured documents which appear to be records made of this meeting by persons who were present. The first document is headed: "The Führer's Speech to the Commanders-in-Chief on 22 August 1939." The purpose of the speech was to announce the decision to make war on Poland at once, and Hitler began by saying:

"It was clear to me that a conflict with Poland had to come sooner or later. I had already made this decision in the spring, but I thought that I would first turn against the West in a few years, and only afterwards against the East. . . . I wanted to establish an acceptable relationship with Poland in order to fight first against the West. But this plan, which was agreeable to me, could not be executed since essential points have changed. It became clear to me that Poland would attack us in case of a conflict with the West."

Hitler then went on to explain why he had decided that the most favorable moment had arrived for starting the war:

"Now," said Hitler, "Poland is in the position in which I wanted her. . . . I am only afraid that at the last moment some *Schweinehund* will make a proposal for mediation. . . . A beginning has been made for the destruction of England's hegemony."

This document closely resembles one of the documents put in evidence on behalf of the Defendant Raeder. This latter document consists of a summary of the same speech, compiled on the day it was made, by one Ad-

miral Boehm, from notes he had taken during the meeting. In substance it says that the moment had arrived to settle the dispute with Poland by military invasion, that although a conflict between Germany and the West was unavoidable in the long run, the likelihood of Great Britain and France coming to Poland's assistance was not great, and that even if a war in the West should come about, the first aim should be the crushing of the Polish military strength. It also contains a statement by Hitler that an appropriate propaganda reason for invading Poland would be given, the truth or falsehood of which was unimportant, since "the Right lies in Victory."

The second unsigned document put in evidence by the Prosecution is headed: "Second Speech by the Führer on 22 August 1939," and is in the form of notes of the main points made by Hitler. Some of these are as follows:

"Everybody shall have to make a point of it that we were determined from the beginning to fight the Western Powers. Struggle for life or death . . . destruction of Poland in the foreground. The aim is elimination of living forces, not the arrival at a certain line. Even if war should break out in the West, the destruction of Poland shall be the primary objective. I shall give a propagandist cause for starting the war—never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the Right is what matters, but Victory. . . . The start will be ordered probably by Saturday morning." (That is to say, 26 August.)

In spite of it being described as a second speech, there are sufficient points of similarity with the two previously mentioned documents to make it appear very probable that this is an account of the same speech, not as detailed as the other two, but in substance the same.

These three documents establish that the final decision as to the date of Poland's destruction, which had been agreed upon and planned earlier in the year, was reached by Hitler shortly before 22 August 1939. They also show that although he hoped to be able to avoid having to fight Great Britain and France as well, he fully realized there was a risk of this happening, but it was a risk which he was determined to take.

The events of the last days of August confirm this determination. On 22 August 1939, the same day as the speech just referred to, the British Prime Minister wrote a letter to Hitler, in which he said: "Having thus made our position perfectly clear, I wish to repeat to you my conviction that war between our two peoples would be the greatest calamity that could occur." On 23 August Hitler replied:

"The question of the treatment of European problems on a peaceful basis is not a decision which rests with Germany, but primarily on those who since the crime committed by the Versailles *Diktat* have stubbornly and consistently opposed any peaceful revision. Only after a change of spirit on the part of the responsible Powers can there be any real change in the relationship between England and Germany."

There followed a number of appeals to Hitler to refrain from forcing the Polish issue to the point of war. These were from President Roosevelt on 24 and 25 August; from his Holiness the Pope on 24 and 31 August; and from M. Daladier, the Prime Minister of France, on 26 August. All these appeals fell on deaf ears.

On 25 August, Great Britain signed a pact of mutual assistance with Poland, which reinforced the undertaking she had given to Poland earlier in the year. This, coupled with the news of Mussolini's unwillingness to enter the war on Germany's side, made Hitler hesitate for a moment. The invasion of Poland, which was timed to start on 26 August, was postponed until a further attempt had been made to persuade Great Britain not to intervene. Hitler offered to enter into a comprehensive agreement with Great Britain, once the Polish question had been settled. In reply to this, Great Britain made a counter-suggestion for the settlement of the Polish dispute by negotiation. On 29 August Hitler informed the British Ambassador that the German Government, though skeptical as to the result, would be prepared to enter into direct negotiations with a Polish emissary, provided he arrived in Berlin with plenipotentiary powers by midnight for the following day, 30 August. The Polish Government were informed of this, but with the example of Schuschnigg and Hacha before them, they decided not to send such an emissary. At midnight on 30 August the Defendant Von Ribbentrop read to the British Ambassador at top speed a document containing the first precise formulation of the German demands against Poland. He refused, however, to give the Ambassador a copy of this, and stated that in any case it was too late now, since no Polish plenipotentiary had arrived.

In the opinion of the Tribunal, the manner in which these negotiations were conducted by Hitler and Von Ribbentrop showed that they were not entered into in good faith or with any desire to maintain peace, but solely in the attempt to prevent Great Britain and France from honoring their obligations to Poland.

Parallel with these negotiations were the unsuccessful attempts made by Göring to effect the isolation of Poland by persuading Great Britain not to stand by her pledged word, through the services of one Birger Dahlerus, a Swede. Dahlerus, who was called as a witness by Göring, had a considerable knowledge of England and things English, and in July 1939 was anxious to bring about a better understanding between England and Germany, in the hope of preventing a war between the two countries. He got into contact with Göring as well as with official circles in London, and during the latter part of August, Göring used him as an unofficial intermediary to try and deter the British Government from their opposition to Germany's intentions towards Poland. Dahlerus, of course, had no knowledge at the time of the decision which Hitler had secretly announced on 22 August, nor of the German military directives for the attack on Poland

which were already in existence. As he admitted in his evidence, it was not until 26 September, after the conquest of Poland was virtually complete, that he first realized that Göring's aim all along had been to get Great Britain's consent to Germany's seizure of Poland.

After all attempts to persuade Germany to agree to a settlement of her dispute with Poland on a reasonable basis had failed, Hitler, on 31 August, issued his final directive, in which he announced that the attack on Poland would start in the early morning of 1 September, and gave instructions as to what action would be taken if Great Britain and France should enter the war in defense of Poland.

In the opinion of the Tribunal, the events of the days immediately preceding 1 September 1939 demonstrate the determination of Hitler and his associates to carry out the declared intention of invading Poland at all costs, despite appeals from every quarter. With the ever increasing evidence before him that this intention would lead to war with Great Britain and France as well, Hitler was resolved not to depart from the course he had set for himself. The Tribunal is fully satisfied by the evidence that the war initiated by Germany against Poland on 1 September 1939 was most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.

The Invasion of Denmark and Norway

The aggressive war against Poland was but the beginning. The aggression of Nazi Germany quickly spread from country to country. In point of time the first two countries to suffer were Denmark and Norway.

On 31 May 1939 a Treaty of Non-Agression was made between Germany and Denmark, and signed by the Defendant Von Ribbentrop. It was there solemnly stated that the parties to the Treaty were "firmly resolved to maintain peace between Denmark and Germany under all circumstances." Nevertheless, Germany invaded Denmark on 9 April 1940.

On 2 September 1939, after the outbreak of war with Poland, Germany sent a solemn assurance to Norway in these terms:

"The German Reich Government is determined in view of the friendly relations which exist between Norway and Germany under no circumstance to prejudice the inviolability and integrity of Norway, and to respect the territory of the Norwegian State. In making this declaration the Reich Government naturally expects, on its side, that Norway will observe an unimpeachable neutrality towards the Reich and will not tolerate any breaches of Norwegian neutrality by any third party which might occur. Should the attitude of the Royal Norwegian Government differ from this so that any such breach of neutrality by a third party occurs, the Reich Government would then

obviously be compelled to safeguard the interests of the Reich in such a way as the resulting situation might dictate."

On 9 April 1940, in pursuance of her plan of campaign, Norway was invaded by Germany.

The idea of attacking Norway originated, it appears, with the Defendants Raeder and Rosenberg. On 3 October 1939 Raeder prepared a memorandum on the subject of "gaining bases in Norway," and amongst the questions discussed was the question: "Can bases be gained by military force against Norway's will, if it is impossible to carry this out without fighting?" Despite this fact, three days later, further assurances were given to Norway by Germany, which stated: "Germany has never had any conflicts of interests or even points of controversy with the Northern States and neither has she any today."

Three days later again, the Defendant Dönitz prepared a memorandum on the same subject of bases in Norway, and suggested the establishment of a base in Trondheim with an alternative of supplying fuel in Narvik. At the same time the Defendant Raeder was in correspondence with Admiral Karls, who pointed out to him the importance of an occupation of the Norwegian coast by Germany. On 10 October Raeder reported to Hitler the disadvantages to Germany which an occupation by the British would have. In the months of October and November Raeder continued to work on the possible occupation of Norway, in conjunction with the "Rosenberg Organization." The "Rosenberg Organization" was the Foreign Affairs Bureau of the NSDAP, and Rosenberg as Reichsleiter was in charge of it. Early in December, Quisling, the notorious Norwegian traitor, visited Berlin and was seen by the Defendants Rosenberg and Raeder. He put forward a plan for a *coup d'état* in Norway. On 12 December the Defendant Raeder and the naval staff, together with the Defendants Keitel and Jodl, had a conference with Hitler, when Raeder reported on his interview with Quisling, and set out Quisling's views. On 16 December Hitler himself interviewed Quisling on all these matters. In the report of the activities of the Foreign Affairs Bureau of the NSDAP for the years 1933-43, under the heading of "Political Preparations for the Military Occupation of Norway," it is stated that at the interview with Quisling Hitler said that he would prefer a neutral attitude on the part of Norway as well as the whole of Scandinavia, as he did not desire to extend the theater of war, or to draw other nations into the conflict. If the enemy attempted to extend the war he would be compelled to guard himself against that undertaking. He promised Quisling financial support, and assigned to a special military staff the examination of the military questions involved.

On 27 January 1940 a memorandum was prepared by the Defendant Keitel regarding the plans for the invasion of Norway. On 28 February

1940 the Defendant Jodl entered in his diary: "I proposed first to the Chief of OKW and then to the Führer that Case Yellow (that is the operation against the Netherlands) and Weser Exercise (that is the operation against Norway and Denmark) must be prepared in such a way that they will be independent of one another as regards both time and forces employed."

On 1 March Hitler issued a directive regarding the Weser Exercise which contained the words:

"The development of the situation in Scandinavia requires the making of all preparations for the occupation of Denmark and Norway by a part of the German Armed Forces. This operation should prevent British encroachment on Scandinavia and the Baltic; further, it should guarantee our ore base in Sweden and give our Navy and Air Force a wider start line against Britain. . . . The crossing of the Danish border and the landings in Norway must take place simultaneously. . . . It is most important that the Scandinavian States as well as the Western opponents should be taken by surprise by our measures."

On 24 March the naval operation orders for the Weser Exercise were issued, and on 30 March the Defendant Dönitz as Commander-in-Chief of U-boats issued his operational order for the occupation of Denmark and Norway. On 9 April 1940 the German forces invaded Norway and Denmark.

From this narrative it is clear that as early as October 1939 the question of invading Norway was under consideration. The defense that has been made here is that Germany was compelled to attack Norway to forestall an Allied invasion, and her action was therefore preventive.

It must be remembered that preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation" (The Caroline Case, Moore's *Digest of International Law*, II, 412). How widely the view was held in influential German circles that the Allies intended to occupy Norway cannot be determined with exactitude. Quisling asserted that the Allies would intervene in Norway with the tacit consent of the Norwegian Government. The German Legation at Oslo disagreed with this view, although the Naval Attaché at that Legation shared it.

The War Diary of the German Naval Operations Staff for 13 January 1940 stated that the Chief of the Naval Operations Staff thought that the most favorable solution would be the maintenance of the neutrality of Norway, but he harbored the firm conviction that England intended to occupy Norway in the near future relying on the tacit agreement of the Norwegian Government.

The directive of Hitler issued on 1 March 1940 for the attack on Denmark and Norway stated that the operation "should prevent British encroachment on Scandinavia and the Baltic."

It is, however, to be remembered that the Defendant Raeder's memorandum of 3 October 1939 makes no reference to forestalling the Allies, but is based upon "the aim of improving our strategical and operational position."

The memorandum itself is headed "Gaining of Bases in Norway." The same observation applies *mutatis mutandis* to the memorandum of the Defendant Dönitz of 9 October 1939.

Furthermore, on 13 March the Defendant Jodl recorded in his diary:

"Führer does not give order yet for 'W' (Weser Exercise). He is still looking for an excuse." (Justification?)

On 14 March 1940 he again wrote: "Führer has not yet decided what reason to give for 'Weser Exercise.'" On 21 March 1940 he recorded the misgivings of Task Force XXI about the long interval between taking up readiness positions and the close of the diplomatic negotiations, and added:

"Führer rejects any earlier negotiations, as otherwise calls for help go out to England and America. If resistance is put up it must be ruthlessly broken."

On 2 April he records that all the preparations are completed; on 4 April the Naval Operational Order was issued; and on 9 April, the invasion was begun.

From all this it is clear that when the plans for an attack on Norway were being made, they were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date.

When the final orders for the German invasion of Norway were given, the diary of the Naval Operations Staff for 23 March 1940 records: "A mass encroachment by the English into Norwegian territorial waters . . . is not to be expected at the present time."

And Admiral Assmann's entry for 26 March says: "British landing in Norway not considered serious."

Documents which were subsequently captured by the Germans are relied on to show that the Allied plan to occupy harbors and airports in Western Norway was a definite plan, although in all points considerably behind the German plans under which the invasion was actually carried out. These documents indicate that an altered plan had been finally agreed upon on 20 March 1940, that a convoy should leave England on 5 April, and that mining in Norwegian waters would begin the same day; and that on 5 April the sailing time had been postponed until 8 April. But these plans were not the cause of the German invasion of Norway. Norway was occupied by Germany to afford her bases from which a more effective attack on England and France might be made, pursuant to plans prepared long in advance of the Allied plans which are now relied on to support the argument of self-defense.

It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Kellogg-Briand Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.

No suggestion is made by the defendants that there was any plan by any belligerent, other than Germany, to occupy Denmark. No excuse for that aggression has ever been offered.

As the German Armies entered Norway and Denmark, German memoranda were handed to the Norwegian and Danish Governments which gave the assurance that the German troops did not come as enemies, that they did not intend to make use of the points occupied by German troops as bases for operations against England, as long as they were not forced to do so by measures taken by England and France, and that they had come to protect the North against the proposed occupation of Norwegian strong points by English-French forces.

The memoranda added that Germany had no intention of infringing upon the territorial integrity and political independence of the Kingdom of Norway then or in the future. Nevertheless, on 3 June 1940, a German naval memorandum discussed the use to be made of Norway and Denmark, and put forward one solution for consideration, that the territories of Denmark and Norway acquired during the course of the war should continue to be occupied and organized so that they could in the future be considered as German possessions.

In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war.

The Invasion of Belgium, the Netherlands, and Luxembourg

The plan to seize Belgium and the Netherlands was considered in August 1938, when the attack on Czechoslovakia was being formulated, and the possibility of war with France and England was contemplated. The advantage to Germany of being able to use these countries for their own purposes, particularly as air bases in the war against England and France, was emphasized. In May of 1939, when Hitler made his irrevocable decision to attack Poland, and foresaw the possibility at least of a war with England and France in consequence, he told his military commanders:

"Dutch and Belgian air bases must be occupied. . . . Declarations of neutrality must be ignored."

On 22 August in the same year, he told his military commanders that England and France, in his opinion, would not "violate the neutrality of

these countries." At the same time he assured Belgium and Holland and Luxembourg that he would respect their neutrality; and on 6 October 1939, after the Polish campaign, he repeated this assurance. On 7 October General Von Brauchitsch directed Army Group B to prepare "for the immediate invasion of Dutch and Belgian territory, if the political situation so demands." In a series of orders, which were signed by the Defendants Keitel and Jodl, the attack was fixed for 10 November 1939, but it was postponed from time to time until May of 1940 on account of weather conditions and transport problems.

At the conference on 23 November 1939 Hitler said:

"We have an Achilles heel: The Ruhr. The progress of the war depends on the possession of the Ruhr. If England and France push through Belgium and Holland into the Ruhr, we shall be in the greatest danger. . . . Certainly England and France will assume the offensive against Germany when they are armed. England and France have means of pressure to bring Belgium and Holland to request English and French help. In Belgium and Holland the sympathies are all for France and England. . . . If the French Army marches into Belgium in order to attack us, it will be too late for us. We must anticipate them. . . . We shall sow the English coast with mines which cannot be cleared. This mine warfare with the Luftwaffe demands a different starting point. England cannot live without its imports. We can feed ourselves. The permanent sowing of mines on the English coasts will bring England to her knees. However, this can only occur if we have occupied Belgium and Holland. . . . My decision is unchangeable; I shall attack France and England at the most favorable and quickest moment. Breach of the neutrality of Belgium and Holland is meaningless. No one will question that when we have won. We shall not bring about the breach of neutrality as idiotically as it was in 1914. If we do not break the neutrality, then England and France will. Without attack, the war is not to be ended victoriously."

On 10 May 1940 the German forces invaded the Netherlands, Belgium, and Luxembourg. On the same day the German Ambassadors handed to the Netherlands and Belgian Governments a memorandum alleging that the British and French Armies, with the consent of Belgium and Holland, were planning to march through those countries to attack the Ruhr, and justifying the invasion on these grounds. Germany, however, assured the Netherlands and Belgium that their integrity and their possessions would be respected. A similar memorandum was delivered to Luxembourg on the same date.

There is no evidence before the Tribunal to justify the contention that the Netherlands, Belgium, and Luxembourg were invaded by Germany because their occupation had been planned by England and France. British and French staffs had been coöperating in making certain plans for military operations in the Low Countries, but the purpose of this planning was to defend these countries in the event of a German attack.

The invasion of Belgium, Holland, and Luxembourg was entirely without justification.

It was carried out in pursuance of policies long considered and prepared, and was plainly an act of aggressive war. The resolve to invade was made without any other consideration than the advancement of the aggressive policies of Germany.

The Aggression against Yugoslavia and Greece

On 12 August 1939 Hitler had a conversation with Ciano and the Defendant Von Ribbentrop at Obersalzberg. He said then:

"Generally speaking, the best thing to happen would be for the neutrals to be liquidated one after the other. This process could be carried out more easily if on every occasion one partner of the Axis covered the other while it was dealing with the uncertain neutral. Italy might well regard Yugoslavia as a neutral of this kind."

This observation was made only two months after Hitler had given assurances to Yugoslavia that he would regard her frontier as final and inviolable. On the occasion of the visit to Germany of the Prince Regent of Yugoslavia on 1 June 1939, Hitler had said in a public speech:

"The firmly established reliable relationship of Germany to Yugoslavia now that owing to historical events we have become neighbors with common boundaries fixed for all time, will not only guarantee lasting peace between our two peoples and countries, but can also represent an element of calm to our nerve-racked continent. This peace is the goal of all who are disposed to perform really constructive work."

On 6 October 1939 Germany repeated these assurances to Yugoslavia, after Hitler and Von Ribbentrop had unsuccessfully tried to persuade Italy to enter the war on the side of Germany by attacking Yugoslavia. On 28 October 1940 Italy invaded Greece, but the military operations met with no success. In November Hitler wrote to Mussolini with regard to the invasion of Greece, and the extension of the war in the Balkans, and pointed out that no military operations could take place in the Balkans before the following March, and therefore Yugoslavia must if at all possible be won over by other means, and in other ways. But on 12 November 1940 Hitler issued a directive for the prosecution of the war, and it included the words: "The Balkans: The Commander-in-Chief of the Army will make preparations for occupying the Greek mainland north of the Aegean Sea, in case of need entering through Bulgaria."

On 13 December he issued a directive concerning the operation "Marita," the code name for the invasion of Greece, in which he stated:

"1. The result of the battles in Albania is not yet decisive. Because of a dangerous situation in Albania, it is doubly necessary that the British endeavor be foiled to create air bases under the protection of

a Balkan front, which would be dangerous above all to Italy as to the Rumanian oilfields.

2. My plan therefore is (a) to form a slowly increasing task force in Southern Rumania within the next month, (b) after the setting in of favorable weather, probably in March, to send a task force for the occupation of the Aegean north coast by way of Bulgaria and if necessary to occupy the entire Greek mainland."

On 20 January 1941, at a meeting between Hitler and Mussolini, at which the Defendants Von Ribbentrop, Keitel, Jodl, and others were present, Hitler stated:

"The massing of troops in Rumania serves a threefold purpose:

- (a) An operation against Greece;
- (b) Protection of Bulgaria against Russia and Turkey;
- (c) Safeguarding the guarantee to Rumania. . . .

It is desirable that this deployment be completed without interference from the enemy. Therefore, disclose the game as late as possible. The tendency will be to cross the Danube at the last possible moment, and to line up for attack at the earliest possible moment."

On 19 February 1941 an OKW directive regarding the operation "Marita" stated: "On 18 February the Führer made the following decision regarding the carrying out of Operation Marita: The following dates are envisaged: Commencement of building bridge, 28 February; crossing of the Danube, 2 March."

On 3 March 1941, British troops landed in Greece to assist the Greeks to resist the Italians; and on 18 March, at a meeting between Hitler and the Defendant Raeder, at which the Defendants Keitel and Jodl were also present, the Defendant Raeder asked for confirmation that the "whole of Greece will have to be occupied, even in the event of a peaceful settlement," to which Hitler replied, "The complete occupation is a prerequisite of any settlement."

On 25 March, on the occasion of the adherence of Yugoslavia to the Tripartite Pact at a meeting in Vienna, the Defendant Von Ribbentrop, on behalf of the German Government, confirmed the determination of Germany to respect the sovereignty and territorial integrity of Yugoslavia at all times. On 26 March the Yugoslav Ministers, who had adhered to the Tripartite Pact, were removed from office by a *coup d'état* in Belgrade on their return from Vienna, and the new Government repudiated the Pact. Thereupon on 27 March, at a conference in Berlin with the High Command at which the Defendants Göring, Keitel, and Jodl were present, and the Defendant Von Ribbentrop part of the time, Hitler stated that Yugoslavia was an uncertain factor in regard to the contemplated attack on Greece and even more so with regard to the attack upon Russia which was to be conducted later on. Hitler announced that he was determined, without waiting for possible loyalty declarations of the new Government, to make all

preparations in order to destroy Yugoslavia militarily and as a national unit. He stated that he would act with "unmerciful harshness."

On 6 April German forces invaded Greece and Yugoslavia without warning and Belgrade was bombed by the Luftwaffe. So swift was this particular invasion that there had not been time to establish any "incidents" as a usual preliminary, or to find and publish any adequate "political" explanations. As the attack was starting on * April, Hitler proclaimed to the German people that this attack was necessary because the British forces in Greece (who were helping the Greeks to defend themselves against the Italians) represented a British attempt to extend the war to the Balkans.

It is clear from this narrative that aggressive war against Greece and Yugoslavia had long been in contemplation, certainly as early as August of 1939. The fact that Great Britain had come to the assistance of the Greeks, and might thereafter be in a position to inflict great damage upon German interests was made the occasion for the occupation of both countries.

*The Aggressive War against the Union of
Soviet Socialist Republics*

On 23 August 1939 Germany signed the non-aggression pact with the Union of Soviet Socialist Republics.

The evidence has shown unmistakably that the Soviet Union on their part conformed to the terms of this pact; indeed the German Government itself had been assured of this by the highest German sources. Thus, the German Ambassador in Moscow informed his Government that the Soviet Union would go to war only if attacked by Germany, and this statement is recorded in the German War Diary under the date of 6 June 1941.

Nevertheless, as early as the late summer of 1940, Germany began to make preparations for an attack on the U.S.S.R., in spite of the non-aggression pact. This operation was secretly planned under the code name "Case Barbarossa," and the former Field Marshall Paulus testified that on 3 September 1940 when he joined the German General Staff, he continued developing "Case Barbarossa," which was finally completed at the beginning of November 1940; and that even then, the German General Staff had no information that the Soviet Union was preparing for war.

On 18 December 1940 Hitler issued Directive No. 21, initialed by Keitel and Jodl, which called for the completion of all preparations connected with the realization of "Case Barbarossa" by 15 May 1941. This directive stated:

"The German armed forces must be prepared to crush Soviet Russia in a quick campaign before the end of the war against England. . . . Great caution has to be exercised that the intention of an attack will not be recognized."

Before the directive of 18 December had been made, the Defendant Göring had informed General Thomas, chief of the Office of War Economy of the OKW, of the plan, and General Thomas made surveys of the economic possibilities of the U.S.S.R., including its raw materials, its power and transport system, and its capacity to produce arms.

In accordance with these surveys, an economic staff for the Eastern territories with many military-economic units (inspectors, commandos, groups) was created under the supervision of the Defendant Göring. In conjunction with the military command, these units were to achieve the most complete and efficient economic exploitation of the occupied territories in the interest of Germany.

The framework of the future political and economic organization of the occupied territories was designed by the Defendant Rosenberg over a period of three months, after conferences with and assistance by the Defendants Keitel, Jodl, Raeder, Funk, Göring, Von Ribbentrop, and Frick, or their representatives. It was made the subject of a most detailed report immediately after the invasion.

These plans outlined the destruction of the Soviet Union as an independent State, and its partition, the creation of so-called Reich Commissariats, and the conversion of Estonia, Latvia, Bielrorussia, and other territories into German colonies.

At the same time Germany drew Hungary, Rumania, and Finland into the war against the U.S.S.R. In December 1940 Hungary agreed to participate on the promise of Germany that she should have certain territories at the expense of Yugoslavia.

In May 1941 a final agreement was concluded with Antonescu, the Prime Minister of Rumania, regarding the attack on the U.S.S.R., in which Germany promised to Rumania, Bessarabia, Northern Bukovina, and the right to occupy Soviet territory up to the Dnieper.

On 22 June 1941, without any declaration of war, Germany invaded Soviet territory in accordance with the plans so long made.

The evidence which has been given before this Tribunal proves that Germany had the design carefully thought out, to crush the U.S.S.R. as a political and military power, so that Germany might expand to the east according to her own desire. In *Mein Kampf*, Hitler had written: "If new territory were to be acquired in Europe, it must have been mainly at Russia's cost, and once again the new German Empire should have set out on its march along the same road as was formerly trodden by the Teutonic Knights, this time to acquire soil for the German plough by means of the German sword and thus provide the Nation with its daily bread." But there was a more immediate purpose, and in one of the memoranda of the OKW, that immediate purpose was stated to be to feed the German Armies from Soviet territory in the third year of the war, even if "as a result many

millions of people will be starved to death if we take out of the country the things necessary for us."

The final aims of the attack on the Soviet Union were formulated at a conference with Hitler on 16 July 1941, in which the Defendants Göring, Keitel, Rosenberg, and Bormann participated:

"There can be no talk of the création of a military power west of the Urals, even if we should have to fight 100 years to achieve this. . . . All the Baltic regions must become part of the Reich. The Crimea and adjoining regions (north of the Crimea) must likewise be incorporated into the Reich. The region of the Volga as well as the Baku district must likewise be incorporated into the Reich. The Finns want Eastern Karelia. However, in view of the large deposits of nickel, the Kola peninsula must be ceded to Germany."

It was contended for the defendants that the attack upon the U.S.S.R. was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end. It is impossible to believe that this view was ever honestly entertained.

The plans for the economic exploitation of the U.S.S.R. for the removal of masses of the population, for the murder of Commissars and political leaders, were all part of the carefully prepared scheme launched on 22 June without warning of any kind, and without the shadow of legal excuse. It was plain aggression.

War against the United States

Four days after the attack launched by the Japanese on the United States fleet in Pearl Harbor on 7 December 1941, Germany declared war on the United States.

The Tripartite Pact between Germany, Italy, and Japan, had been signed on 27 September 1940, and from that date until the attack upon the U.S.S.R. the Defendant Von Ribbentrop, with other defendants, was endeavoring to induce Japan to attack British possessions in the Far East. This, it was thought, would hasten England's defeat, and keep the United States out of the war.

The possibility of a direct attack on the United States was considered and discussed as a matter for the future. Major Von Falkenstein, the Luftwaffe liaison officer with the Operations Staff of the OKW, summarizing military problems which needed discussion in Berlin in October of 1940, spoke of the possibility "of the prosecution of the war against America at a later date." It is clear, too, that the German policy of keeping America out of the war, if possible, did not prevent Germany promising support to Japan even against the United States. On 4 April 1941 Hitler told Matsuoaka, the Japanese Foreign Minister, in the presence of the Defendant Von Ribbentrop, that Germany would "strike without delay" if a Japanese attack on Singapore should lead to war between Japan and the United States.

The next day Von Ribbentrop himself urged Matsuoka to bring Japan into the war.

On 28 November 1941, 10 days before the attack of Pearl Harbor, Von Ribbentrop encouraged Japan, through her Ambassador in Berlin, to attack Great Britain and the United States, and stated that should Japan become engaged in a war with the United States, Germany would join the war immediately. A few days later, Japanese representatives told Germany and Italy that Japan was preparing to attack the United States, and asked for their support, Germany and Italy agreed to do this, although in the Tripartite Pact, Italy and Germany had undertaken to assist Japan only if she were attacked. When the assault on Pearl Harbor did take place, the Defendant Von Ribbentrop is reported to have been "overjoyed," and later, at a ceremony in Berlin, when a German medal was awarded to Oshima, the Japanese Ambassador, Hitler indicated his approval of the tactics which the Japanese had adopted of negotiating with the United States as long as possible, and then striking hard without any declaration of war.

Although it is true that Hitler and his colleagues originally did not consider that a war with the United States would be beneficial to their interest, it is apparent that in the course of 1941 that view was revised, and Japan was given every encouragement to adopt a policy which would almost certainly bring the United States into the war. And when Japan attacked the United States fleet in Pearl Harbor and thus made aggressive war against the United States, the Nazi Government caused Germany to enter that war at once on the side of Japan by declaring war themselves on the United States.

Violations of International Treaties

The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against 12 nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances."

These treaties are set out in Appendix C of the Indictment. Those of principal importance are the following.

Hague Conventions

In the 1899 Convention the signatory powers agreed: "before an appeal to arms . . . to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers." A similar clause was inserted in the Convention for Pacific Settlement of International Disputes

of 1907. In the accompanying Convention Relative to Opening of Hostilities, Article I contains this far more specific language: "The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war." Germany was a party to these conventions.

Versailles Treaty

Breaches of certain provisions of the Versailles Treaty are also relied on by the Prosecution—Not to fortify the left bank of the Rhine (Articles 42–44); to "respect strictly the independence of Austria" (Article 80); renunciation of any rights in Memel (Article 99); and the Free City of Danzig (Article 100); the recognition of the independence of the Czechoslovak State; and the military, naval, and air clauses against German rearmament found in Part V. There is no doubt that action was taken by the German Government contrary to all these provisions, the details of which are set out in Appendix C. With regard to the Treaty of Versailles, the matters relied on are:

1. The violation of Articles 42 to 44 in respect of the demilitarized zone of the Rhineland;
2. The annexation of Austria on 13 March 1938, in violation of Article 80;
3. The incorporation of the district of Memel on 22 March 1939, in violation of Article 99;
4. The incorporation of the Free City of Danzig on 1 September 1939, in violation of Article 100;
5. The incorporation of the provinces of Bohemia and Moravia on 16 March 1939, in violation of Article 81;
6. The repudiation of the military, naval, and air clauses of the Treaty, in or about March of 1935.

On 21 May 1935 Germany announced that, whilst renouncing the disarmament clauses of the Treaty, she would still respect the territorial limitations, and would comply with the Locarno Pact. (With regard to the first five breaches alleged, therefore, the Tribunal finds the allegation proved.)

Treaties of Mutual Guarantee, Arbitration, and Non-Aggression

It is unnecessary to discuss in any detail the various treaties entered into by Germany with other Powers. Treaties of mutual guarantee were signed by Germany at Locarno in 1925, with Belgium, France, Great Britain, and Italy, assuring the maintenance of the territorial *status quo*. Arbitration treaties were also executed by Germany at Locarno with Czechoslovakia, Belgium, and Poland.

Article I of the latter treaty is typical, providing: "All disputes of every kind between Germany and Poland . . . which it may not be possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision to an arbitral tribunal. . . ."

Conventions of Arbitration and Conciliation were entered into between Germany, the Netherlands, and Denmark in 1923; and between Germany and Luxembourg in 1929. Non-aggression treaties were executed by Germany with Denmark and Russia in 1939.

Kellogg-Briand Pact

The Pact of Paris was signed on 27 August 1928 by Germany, the United States, Belgium, France, Great Britain, Italy, Japan, Poland, and other countries; and subsequently by other Powers. The Tribunal has made full reference to the nature of this Pact and its legal effect in another part of this judgment. It is therefore not necessary to discuss the matter further here, save to state that in the opinion of the Tribunal this Pact was violated by Germany in all the cases of aggressive war charged in the Indictment. It is to be noted that on 26 January 1934 Germany signed a Declaration for the Maintenance of Permanent Peace with Poland, which was explicitly based on the Pact of Paris, and in which the use of force was outlawed for a period of 10 years.

The Tribunal does not find it necessary to consider any of the other treaties referred to in the Appendix, or the repeated agreements and assurances of her peaceful intentions entered into by Germany.

The Law of the Charter

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law. With regard to the constitution of the

Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. “*Nullum crimen sine lege, nulla poena sine lege.*” It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy and Japan at the outbreak of war in 1939. In the preamble, the signatories declared that they were:

“Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated. . . . all changes in their relations with one another should be sought only by pacific means . . . thus uniting civi-

lised nations of the world in a common renunciation of war as an instrument of their national policy. . . ."

The first two articles are as follows:

"Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another."

"Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1932:

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world . . . an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of the general treaty law. . . . We denounce them as law breakers."

But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage ag-

gressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

The view which the Tribunal takes of the true interpretation of the Pact is supported by the international history which preceded it. In the year 1923 the draft of a Treaty of Mutual Assistance was sponsored by the League of Nations. In Article I the Treaty declared "that aggressive war is an international crime," and that the parties would "undertake that no one of them will be guilty of its commission." The draft treaty was submitted to 29 states, about half of whom were in favor of accepting the text. The principal objection appeared to be in the difficulty of defining the acts which would constitute "aggression," rather than any doubt as to the criminality of aggressive war. The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes ("Geneva Protocol"), after "recognising the solidarity of the members of the international community," declared that "a war of aggression constitutes a violation of this solidarity and is an international crime." It went on to declare that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the States and of ensuring the repression of international crimes." The Protocol was recommended to the members of the League of Nations by a unanimous resolution in the assembly of the 48 members of the League. These members included Italy and Japan, but Germany was not then a member of the League.

Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.

At the meeting of the Assembly of the League of Nations on 24 September 1927, all the delegations then present (including the German, the Italian, and the Japanese), unanimously adopted a declaration concerning wars of aggression. The preamble to the declaration stated:

"The Assembly:

Recognizing the solidarity which unites the community of nations;
Being inspired by a firm desire for the maintenance of general peace;

Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime. . . ."

The unanimous resolution of 18 February 1923 of 21 American republics at the Sixth (Havana) Pan-American Conference, declared that "war of aggression constitutes an international crime against the human species."

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the first World War opposed to Germany, to try the former German Emperor "for a supreme offense against international morality and the sanctity of treaties." The purpose of this trial was expressed to be "to vindicate the solemn obligations of international undertakings, and the validity of international morality." In Article 228 of the Treaty, the German Government expressly recognized the right of the Allied Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *Ex Parte Quirin* (1942 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

"From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals."

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and par-

ticularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

"The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment."

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

"The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment."

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

The Law as to the Common Plan or Conspiracy

In the previous recital of the facts relating to aggressive war, it is clear that planning and preparation had been carried out in the most systematic way at every stage of the history.

Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law.

The Charter defines this offense as planning, preparation, initiation, or waging of a war of aggression "or participation in a Common Plan or Conspiracy for the accomplishment . . . of the foregoing." The Indictment follows this distinction. Count One charges the Common Plan or Conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both Counts. We shall therefore discuss both Counts together, as they are in substance the same. The defendants have been charged under both Counts, and their guilt under each Count must be determined.

The "Common Plan or Conspiracy" charged in the Indictment covers 25 years, from the formation of the Nazi Party in 1919 to the end of the war in 1945. The Party is spoken of as "the instrument of cohesion among the Defendants" for carrying out the purposes of the conspiracy—the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and "Lebensraum" in Europe, by the use, if necessary, of armed force, of aggressive war. The "seizure of power" by the Nazis, the use of terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of Jews, the regimentation of youth—all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it is alleged, in secret rearmament, the withdrawal by Germany from the Disarmament Conference and the League of Nations, universal military service, and seizure of the Rhineland. Finally, according to the Indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936–1938, followed by the planning and waging of war against Poland; and, successively, against 10 other countries.

The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party program, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence. The seizure of power by the Nazi Party, and the subsequent domination by the Nazi State of all spheres of economic and social life must of course be remembered when the later plans for waging war are examined. That plans were made to wage war, as early as 5 November 1937, and probably before that, is apparent. And thereafter, such preparations continued in many directions, and

against the peace of many countries. Indeed the threat of war—and war itself if necessary—was an integral part of the Nazi policy. But the evidence establishes with certainty the existence of many separate plans rather than a single conspiracy embracing them all. That Germany was rapidly moving to complete dictatorship from the moment that the Nazis seized power, and progressively in the direction of war, has been overwhelmingly shown in the ordered sequence of aggressive acts and wars already set out in this Judgment.

In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt. The truth of the situation was well stated by Paul Schmidt, official interpreter of the German Foreign Office, as follows:

“The general objectives of the Nazi leadership were apparent from the start, namely the domination of the European Continent, to be achieved first by the incorporation of all German speaking groups in the Reich, and secondly, by territorial expansion under the slogan “Lebensraum.” The execution of these basic objectives, however, seemed to be characterized by improvisation. Each succeeding step was apparently carried out as each new situation arose, but all consistent with the ultimate objectives mentioned above.”

The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their coöperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader, and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime.

Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit War Crimes and Crimes against Humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

“Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to com-

mit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.

War Crimes and Crimes against Humanity

The evidence relating to War Crimes has been overwhelming, in its volume and its detail. It is impossible for this Judgment adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of "total war," with which the aggressive wars were waged. For in this conception of "total war," the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

On some occasions, War Crimes were deliberately planned long in advance. In the case of the Soviet Union, the plunder of the territories to be occupied, and the ill-treatment of the civilian population, were settled in minute detail before the attack was begun. As early as the autumn of 1940, the invasion of the territories of the Soviet Union was being considered. From that date onwards, the methods to be employed in destroying all possible opposition were continuously under discussion.

Similarly, when planning to exploit the inhabitants of the occupied countries for slave labor on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organized this particular War Crime down to the last elaborate detail.

Other War Crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels.

The Tribunal proposes, therefore, to deal quite generally with the question of War Crimes, and to refer to them later when examining the responsibility of the individual defendants in relation to them. Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production, and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

Murder and Ill-treatment of Prisoners of War

Article 6 (b) of the Charter defines War Crimes in these words:

“War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.”

In the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy. On 18 October 1942, the Defendant Keitel circulated a directive authorized by Hitler, which ordered that all members of Allied “Commando” units, often when in uniform and whether armed or not, were to be “slaughtered to the last man,” even if they attempted to surrender. It was further provided that if such Allied troops came into the hands of the military authorities after being first captured by the local police, or in any other way, they should be handed over immediately to the SD. This order was supplemented from time to time, and was effective throughout the remainder of the war, although after the Allied landings in Normandy in 1944 it was made clear that the order did not apply to “Commandos” captured within the immediate battle area. Under the provisions of this order, Allied “Commando” troops, and other military units operating independently, lost their lives in Norway, France, Czechoslovakia, and Italy. Many of them were killed on the spot, and in no case were those who were executed later in concentration camps ever given a trial of any kind. For example, an American military mission which

landed behind the German front in the Balkans in January, 1945, numbering about twelve to fifteen men and wearing uniform, were taken to Mauthausen under the authority of this order, and according to the affidavit of Adolf Zutte, the adjutant of the Mauthausen Concentration Camp, all of them were shot.

In March 1944 the OKH issued the "Kugel" or "Bullet" decree, which directed that every escaped officer and NCO prisoner of war who had not been put to work, with the exception of British and American prisoners of war, should on recapture be handed over to the SIPO and SD. This order was distributed by the SIPO and SD to their regional offices. These escaped officers and NCO's were to be sent to the concentration camp at Mauthausen, to be executed upon arrival, by means of a bullet shot in the neck.

In March 1944 fifty officers of the British Royal Air Force, who escaped from the camp at Sagan where they were confined as prisoners, were shot on recapture, on the direct orders of Hitler. Their bodies were immediately cremated, and the urns containing their ashes were returned to the camp. It was not contended by the defendants that this was other than plain murder, in complete violation of international law.

When Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them.

The treatment of Soviet prisoners of war was characterized by particular inhumanity. The death of so many of them was not due merely to the action of individual guards, or to the exigencies of life in the camps. It was the result of systematic plans to murder. More than a month before the German invasion of the Soviet Union, the OKW were making special plans for dealing with political representatives serving with the Soviet Armed Forces who might be captured. One proposal was that "political Commissars of the Army are not recognized as *Prisoners of War*, and are to be *liquidated* at the latest in the transient prisoner of war camps." The Defendant Keitel gave evidence that instructions incorporating this proposal were issued to the German Army.

On 8 September 1941 regulations for the treatment of Soviet prisoners of war in all prisoner of war camps were issued, signed by General Reinecke, the head of the prisoner of war department of the High Command. Those orders stated:

"The Bolshevik soldier has therefore lost all claim to treatment as an honorable opponent, in accordance with the Geneva Convention. . . . The order for ruthless and energetic action must be given at the slightest indication of insubordination, especially in the case of Bolshevik fanatics. Insubordination active or passive resistance, must be broken immediately by force of arms (bayonets, butts, and firearms). . . .

Anyone carrying out the order who does not use his weapons, or does so with insufficient energy, is punishable. . . . Prisoners of war attempting escape are to be fired on without previous challenge. No warning shot must ever be fired. . . . The use of arms against prisoners of war is as a rule legal."

The Soviet prisoners of war were left without suitable clothing; the wounded without medical care; they were starved, and in many cases left to die.

On 17 July 1941, the Gestapo issued an order providing for the killing of all Soviet prisoners of war who were or might be dangerous to National Socialism. The order recited:

"The mission of the Commanders of the SIPO and SD stationed in Stalags is the political investigation of all camp inmates, the elimination and further 'treatment' (a) of all political, criminal, or in some other way unbearable elements among them, (b) of those persons who could be used for the reconstruction of the occupied territories. . . . Further, the commanders must make efforts from the beginning to seek out among the prisoners elements which appear reliable, regardless of whether there are Communists concerned or not, in order to use them for intelligence purposes inside of the camp, and if advisable, later in the occupied territories also. By use of such informers, and by use of all other existing possibilities, the discovery of all elements to be eliminated among the prisoners must proceed step by step at once. . . ."

"Above all, the following must be discovered: all important functionaries of State and Party, especially professional revolutionaries . . . all People's Commissars in the Red Army, leading personalities of the State . . . leading personalities of the business world, members of the Soviet Russian Intelligence, all Jews, all persons who are found to be agitators or fanatical Communists. Executions are not to be held in the camp or in the immediate vicinity of the camp. . . . The prisoners are to be taken for special treatment if possible into the former Soviet Russian territory."

The affidavit of Warlimont, Deputy Chief of Staff of the Wehrmacht, and the testimony of Ohlendorf, former Chief of Amt III of the RSHA, and of Lahousen, the head of one of the sections of the Abwehr, the Wehrmacht's Intelligence Service, all indicate the thoroughness with which this order was carried out.

The affidavit of Kurt Lindown, a former Gestapo official, states:

" . . . There existed in the prisoner of war camps on the Eastern Front small screening teams (Einsatz commandos), headed by lower ranking members of the Secret Police (Gestapo). These teams were assigned to the camp commanders and had the job of segregating the prisoners of war who were candidates for execution according to the orders that had been given, and to report them to the office of the Secret Police."

On 23 October 1941 the camp commander of the Gross Rosen concentration camp reported to Müller, Chief of the Gestapo, a list of the Soviet prisoners of war who had been executed there on the previous day.

An account of the general conditions and treatment of Soviet prisoners of war during the first eight months after the German attack upon Russia was given in a letter which the Defendant Rosenberg sent to the Defendant Keitel on 28 February 1942:

"The fate of the Soviet prisoners of war in Germany is on the contrary a tragedy of the greatest extent. . . . A large part of them has starved, or died because of the hazards of the weather. Thousands also died from spotted fever.

"The camp commanders have forbidden the civilian population to put food at the disposal of the prisoners, and they have rather let them starve to death.

"In many cases, when prisoners of war could no longer keep up on the march because of hunger and exhaustion, they were shot before the eyes of the horrified population, and the corpses were left.

"In numerous camps, no shelter for the prisoners of war was provided at all. They lay under the open sky during rain or snow. Even tools were not made available to dig holes or caves."

In some cases Soviet prisoners of war were branded with a special permanent mark. There was put in evidence the OKW order dated 20 July 1942 which laid down that:

"The brand is to take the shape of an acute angle of about 45 degrees, with the long side to be 1 cm. in length, pointing upwards and burnt on the left buttock. . . . This brand is made with the aid of a lancet available in any military unit. The coloring used is Chinese ink."

The carrying out of this order was the responsibility of the military authorities, though it was widely circulated by the Chief of the SIPO and the SD to German police officials for information.

Soviet prisoners of war were also made the subject of medical experiments of the most cruel and inhuman kind. In July 1943 experimental work was begun in preparation for a campaign of bacteriological warfare; Soviet prisoners of war were used in these medical experiments, which more often than not proved fatal. In connection with this campaign for bacteriological warfare, preparations were also made for the spreading of bacterial emulsions from planes, with the object of producing widespread failures of crops and consequent starvation. These measures were never applied, possibly because of the rapid deterioration of Germany's military position.

The argument in defense of the charge with regard to the murder and ill-treatment of Soviet prisoners of war, that the U.S.S.R. was not a party to the Geneva Convention, is quite without foundation. On 15 September 1941 Admiral Canaris protested against the regulations for the treatment

of Soviet prisoners of war, signed by General Reinecke on 8 September 1941. He then stated:

"The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R. Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different viewpoint."

This protest, which correctly stated the legal position, was ignored. The Defendant Keitel made a note on this memorandum:

"The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures."

Murder and Ill-treatment of Civilian Population

Article 6 (b) of the Charter provides that "ill-treatment . . . of civilian population of or in occupied territory . . . killing of hostages . . . wanton destruction of cities, towns, or villages" shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: "Family honor and rights, the lives of persons and private property, as well as religious convictions and practice must be respected."

The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7 December 1941 Hitler issued the directive since known as the "Nacht und Nebel Erlass" (Night and Fog Decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial or punishment in Germany. This decree was signed by the Defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the Defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

"Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany."

Even persons who were only suspected of opposing any of the policies of the German occupation authorities were arrested, and on arrest were interrogated by the Gestapo and the SD in the most shameful manner. On 12 June 1942 the Chief of the SIPO and SD published through Müller, the Gestapo Chief, an order authorizing the use of "third degree" methods of interrogation, where preliminary investigation had indicated that the person could give information on important matters, such as subversive activities, though not for the purpose of extorting confessions of the prisoner's own crimes. This order provided:

"... Third degree may, under this supposition, only be employed against Communists, Marxists, Jehovah's Witnesses, saboteurs, terrorists, members of resistance movements, parachute agents, anti-social elements, Polish or Soviet Russian loafers or tramps; in all other cases my permission must first be obtained. . . . Third degree can, according to circumstances, consist amongst other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than twenty strokes a doctor must be consulted.)"

The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but was also extended to their families. On 19 July 1944 the Commander of the SIPO and SD in the district of Radom, in Poland, published an order, transmitted through the Higher SS and Police Leaders, to the effect that in all cases of assassination or attempted assassination of Germans, or where saboteurs had destroyed vital installations, not only the guilty person, but also all his or her male relatives should be shot, and female relatives over 16 years of age put into a concentration camp.

In the summer of 1944 the Einsatz Commando of the SIPO and SD at Luxembourg caused persons to be confined at Sachsenhausen concentration camp because they were relatives of deserters and were therefore "expected to endanger the interest of the German Reich if allowed to go free."

The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans; an order issued by the Defendant Keitel on 16 September 1941 spoke in terms of fifty or a hundred lives from the occupied areas of the Soviet Union for one German life taken. The order stated that "it should be remembered that a human life in unsettled countries frequently counts for nothing, and a deterrent effect can be obtained only by unusual severity." The exact number of persons killed as a result of this policy is not known, but large numbers were killed in France and the other occupied territories in the West, while in the East

the slaughter was on an even more extensive scale. In addition to the killing of hostages, entire towns were destroyed in some cases; such massacres as those of Oradour-sur-Glane in France and Lidice in Czechoslovakia, both of which were described to the Tribunal in detail, are examples of the organized use of terror by the occupying forces to beat down and destroy all opposition to their rule.

One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps. They were first established in Germany at the moment of the seizure of power by the Nazi Government. Their original purpose was to imprison without trial all those persons who were opposed to the Government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organized and systematic murder, where millions of people were destroyed.

In the administration of the occupied territories the concentration camps were used to destroy all opposition groups. The persons arrested by the Gestapo were as a rule sent to concentration camps. They were conveyed to the camps in many cases without any care whatever being taken for them, and great numbers died on the way. Those who arrived at the camp were subject to systematic cruelty. They were given hard physical labor, inadequate food, clothes and shelter, and were subject at all times to the rigors of a soulless regime, and the private whims of individual guards. In the report of the War Crimes Branch of the Judge Advocate's Section of the Third U. S. Army, under date 21 June 1945, the conditions at the Flossen-
sburg concentration camp were investigated, and one passage may be quoted:

"Flossen-
sburg concentration camp can best be described as a factory dealing in death. Although this camp had in view the primary object of putting to work the mass slave labor, another of its primary objects was the elimination of human lives by the methods employed in handling the prisoners. Hunger and starvation rations, sadism, inadequate clothing, medical neglect, disease, beatings, hangings, freezing, forced suicides, shooting, etc. all played a major role in obtaining their object. Prisoners were murdered at random; spite killings against Jews were common, injections of poison and shooting in the neck were everyday occurrences; epidemics of typhus and spotted fever were permitted to run rampant as a means of eliminating prisoners; life in this camp meant nothing. Killing became a common thing, so common that a quick death was welcomed by the unfortunate ones."

A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the "final solution" of the Jewish problem. Most of the non-Jewish inmates were used for labor, although the conditions under which they worked made labor and death almost synonymous terms.

Those inmates who became ill and were unable to work were either destroyed in the gas chambers or sent to special infirmaries, where they were given entirely inadequate medical treatment, worse food if possible than the working inmates, and left to die.

The murder and ill-treatment of civilian populations reached its height in the treatment of the citizens of the Soviet Union and Poland. Some four weeks before the invasion of Russia began, special task forces of the SIPO and SD, called Einsatz Groups, were formed on the orders of Himmler for the purpose of following the German Armies into Russia, combating partisans and members of Resistance Groups, and exterminating the Jews and communist leaders and other sections of the population. In the beginning, four such Einsatz Groups were formed, one operating in the Baltic States, one towards Moscow, one towards Kiev, and one operating in the south of Russia, Ohlendorf, former Chief of Amt III of the RSHA, who led the fourth group, stated in his affidavit:

"When the German army invaded Russia, I was leader of Einsatzgruppe D, in the southern sector, and in the course of the year during which I was leader of the Einsatzgruppe D it liquidated approximately 90,000 men, women, and children. The majority of those liquidated were Jews, but there were also among them some communist functionaries."

In an order issued by the Defendant Keitel on 23 July 1941, and drafted by the Defendant Jodl, it was stated that:

"In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished, not by legal prosecution of the guilty, but by the spreading of such terror by the Armed Forces as is alone appropriate to eradicate every inclination to resist among the population. . . . Commanders must find the means of keeping order by applying suitable Draconian measures."

The evidence has shown that this order was ruthlessly carried out in the territory of the Soviet Union and in Poland. A significant illustration of the measures actually applied occurs in the document which was sent in 1943 to the Defendant Rosenberg by the Reich Commissar for Eastern Territories, who wrote:

"It should be possible to avoid atrocities and to bury those who have been liquidated. To lock men, women, and children into barns and set fire to them does not appear to be a suitable method of combating bands, even if it is desired to exterminate the population. This method is not worthy of the German cause, and hurts our reputation severely."

The Tribunal has before it an affidavit of one Hermann Graebe, dated 10 November 1945, describing the immense mass murders which he witnessed. He was the manager and engineer in charge of the branch of the Solingen firm of Josef Jung in Spolbunow, Ukraine, from September 1941 to Janu-

ary 1944. He first of all described the attack upon the Jewish ghetto at Rowno:

"... Then the electric floodlights which had been erected all around the ghetto were switched on. SS and militia details of four to six members entered or at least tried to enter the houses. Where the doors and windows were closed, and the inhabitants did not open upon the knocking, the SS men and militia broke the windows, forced the doors with beams and crowbars, and entered the dwelling. The owners were driven on to the street just as they were, regardless of whether they were dressed or whether they had been in bed. . . . Car after car was filled. Over it hung the screaming of women and children, the crackling of whips and rifle shots."

Graebe then described how a mass execution at Dubno, which he witnessed on 5 October 1942, was carried out:

"... Now we heard shots in quick succession from behind one of the earth mounds. The people who had got off the trucks, men, women, and children of all ages, had to undress upon the orders of an SS man who carried a riding or dog whip. . . . Without screaming or crying, these people undressed, stood around by families, kissed each other, said farewells, and waiting for the command of another SS man, who stood near the excavation, also with a whip in his hand. . . . At that moment the SS man at the excavation called something to his comrade. The latter counted off about 20 persons, and instructed them to walk behind the earth mound. . . . I walked around the mound and stood in front of a tremendous grave; closely pressed together, the people were lying on top of each other so that only their heads were visible. The excavation was already two-thirds full; I estimated that it contained about a thousand people. . . . Now already the next group approached, descended into the excavation, lined themselves up against the previous victims and were shot."

The foregoing crimes against the civilian population are sufficiently appalling, and yet the evidence shows that at any rate in the East, the mass murders and cruelties were not committed solely for the purpose of stamping out opposition or resistance to the German occupying forces. In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans. Hitler had written in *Mein Kampf* on these lines, and the plan was clearly stated by Himmler in July 1942, when he wrote: "It is not our task to Germanize the East in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East."

In August 1942 the policy for the Eastern Territories as laid down by Bormann was summarized by a subordinate of Rosenberg as follows:

"The Slavs are to work for us. In so far as we do not need them, they may die. Therefore, compulsory vaccination and Germanic health services are superfluous. The fertility of the Slavs is undesirable."

It was Himmler again who stated in October 1943:

"What happens to a Russian, a Czech, does not interest me in the slightest. What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnapping their children and raising them here with us. Whether nations live in prosperity or starve to death interests me only in so far as we need them as slaves for our Kultur, otherwise it is of no interest to me."

In Poland the intelligentsia had been marked down for extermination as early as September 1939, and in May 1940 the Defendant Frank wrote in his diary of "taking advantage of the focussing of world interest on the Western Front, by wholesale liquidation of thousands of Poles, first leading representatives of the Polish intelligentsia." Earlier, Frank had been directed to reduce the "entire Polish economy to an absolute minimum necessary for bare existence. The Poles shall be the slaves of the Greater German World Empire." In January 1940 he recorded in his diary that "cheap labor must be removed from the General Government by hundreds of thousands. This will hamper the national biological propagation." So successfully did the Germans carry out this policy in Poland that by the end of the war one third of the population had been killed, and the whole of the country devastated.

It was the same story in the occupied area of the Soviet Union. At the time of the launching of the German attack in June 1941 Rosenberg told his collaborators:

"The object of feeding the German People stands this year without a doubt at the top of the list of Germany's claims on the East, and there the southern territories and the Northern Caucasus will have to serve as a balance for the feeding of the German People. . . . A very extensive evacuation will be necessary, without any doubt, and it is sure that the future will hold very hard years in store for the Russians."

Three or four weeks later Hitler discussed with Rosenberg, Göring, Keitel, and others his plan for the exploitation of the Soviet population and territory, which included among other things the evacuation of the inhabitants of the Crimea and its settlement by Germans.

A somewhat similar fate was planned for Czechoslovakia by the Defendant Von Neurath, in August 1940; the intelligentsia were to be "expelled," but the rest of the population was to be Germanized rather than expelled or exterminated, since there was a shortage of Germans to replace them.

In the West the population of Alsace were the victims of a German "expulsion action." Between July and December 1940, 105,000 Alsatians were either deported from their homes or prevented from returning to them. A captured German report dated 7 August 1942 with regard to Alsace states that: "The problem of race will be given first consideration, and this in such a manner that persons of racial value will be deported to Germany proper, and racially inferior persons to France."

Pillage of Public and Private Property

Article 49 of the Hague Convention provides that an occupying Power may levy a contribution of money from the occupied territory to pay for the needs of the army of occupation, and for the administration of the territory in question. Article 52 of the Hague Convention provides that an occupying Power may make requisitions in kind only for the needs of the army of occupation, and that these requisitions shall be in proportion to the resources of the country. These articles, together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55, and 56, dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear. Article 56 reads as follows:

"The property of municipalities of religious, charitable, educational, artistic, and scientific institutions, although belonging to the State, is to be accorded the same standing as private property. All pre-meditated seizure, destruction, or damage of such institutions, historical monuments, works of art and science, is prohibited and should be prosecuted."

The evidence in this case has established, however, that the territories occupied by Germany were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. There was in truth a systematic "plunder of public or private property," which was criminal under Article 6 (b) of the Charter. The German occupation policy was clearly stated in a speech made by the Defendant Goring on 6 August 1942 to the various German authorities in charge of occupied territories:

"God knows, you are not sent out there to work for the welfare of the people in your charge, but to get the utmost out of them, so that the German People can live. That is what I expect of your exertions. This everlasting concern about foreign people must cease now, once and for all. I have here before me reports on what you are expected to deliver. It is nothing at all, when I consider your territories. It makes no difference to me in this connection if you say that your people will starve."

The methods employed to exploit the resources of the occupied territories to the full varied from country to country. In some of the occupied countries in the East and the West, this exploitation was carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. The industries thought to be of value to the German war effort were compelled to continue and most of the rest were closed down

altogether. Raw materials and the finished products alike were confiscated for the needs of the German industry. As early as 19 October 1939 the Defendant Göring had issued a directive giving detailed instructions for the administration of the occupied territories; it provided:

"The task for the economic treatment of the various administrative regions is different, depending on whether the country is involved which will be incorporated politically into the German Reich, or whether we will deal with the Government General, which in all probability will not be made a part of Germany. In the first mentioned territories the . . . safeguarding of all their productive facilities and supplies must be aimed at, as well as a complete incorporation into the Greater German economic system, at the earliest possible time. On the other hand, there must be removed from the territories of the Government General all raw materials, scrap materials, machines, etc., which are of use for the German war economy. Enterprises which are not absolutely necessary for the meager maintenance of the naked existence of the population must be transferred to Germany, unless such transfer would require an unreasonably long period of time, and would make it more practicable to exploit those enterprises by giving them German orders, to be executed at their present location."

As a consequence of this order, agricultural products, raw materials needed by German factories, machine tools, transportation equipment, other finished products, and even foreign securities and holdings of foreign exchange were all requisitioned and sent to Germany. These resources were requisitioned in a manner out of all proportion to the economic resources of those countries, and resulted in famine, inflation, and an active black market. At first the German occupation authorities attempted to suppress the black market, because it was a channel of distribution keeping local products out of German hands. When attempts at suppression failed, a German purchasing agency was organized to make purchases for Germany on the black market, thus carrying out the assurance made by the Defendant Göring that it was "necessary that all should know that if there is to be famine anywhere, it shall in no case be in Germany."

In many of the occupied countries of the East and the West, the authorities maintained the pretense of paying for all the property which they seized. This elaborate pretense of payment merely disguised the fact that the goods sent to Germany from these occupied countries were paid for by the occupied countries themselves, either by the device of excessive occupation costs or by forced loans in return for a credit balance on a "clearing account" which was an account merely in name.

In most of the occupied countries of the East when this pretense of legality was not maintained; economic exploitation became deliberate plunder. This policy was first put into effect in the administration of the Government General in Poland. The main exploitation of the raw materials in the East was centered on agricultural products and very large amounts of food were shipped from the Government General to Germany.

The evidence of the widespread starvation among the Polish People in the Government General indicates the ruthlessness and the severity with which the policy of exploitation was carried out.

The occupation of the territories of the U.S.S.R. was characterized by premeditated and systematic looting. Before the attack on the U.S.S.R. an economic staff—Oldenburg—was organized to ensure the most efficient exploitation of Soviet territories. The German Armies were to be fed out of Soviet territory, even if "many millions of people will be starved to death." An OKW directive issued before the attack said: "To obtain the greatest possible quantity of food and crude oil for Germany—that is the main economic purpose of the campaign."

Similarly, a declaration by the Defendant Rosenberg of 20 June 1941 had advocated the use of the produce from Southern Russia and of the Northern Caucasus to feed the German People, saying:

"We see absolutely no reason for any obligation on our part to feed also the Russian People with the products of that surplus territory. We know that this is a harsh necessity, bare of any feelings."

When the Soviet territory was occupied, this policy was put into effect; there was a large scale confiscation of agricultural supplies, with complete disregard of the needs of the inhabitants of the occupied territory.

In addition to the seizure of raw materials and manufactured articles, a wholesale seizure was made of art treasures, furniture, textiles, and similar articles in all the invaded countries.

The Defendant Rosenberg was designated by Hitler on 29 January 1940 Head of the Center for National Socialist Ideological and Educational Research, and thereafter the organization known as the "Einsatzstab Rosenberg" conducted its operations on a very great scale. Originally designed for the establishment of a research library, it developed into a project for the seizure of cultural treasures. On 1 March 1942 Hitler issued a further decree, authorizing Rosenberg to search libraries, lodges, and cultural establishments, to seize material from these establishments, as well as cultural treasures owned by Jews. Similar directions were given where the ownership could not be clearly established. The decree directed the cooperation of the Wehrmacht High Command, and indicated that Rosenberg's activities in the West were to be conducted in his capacity as Reichsleiter, and in the East in his capacity as Reichsminister. Thereafter, Rosenberg's activities were extended to the occupied countries. The report of Robert Scholz, Chief of the special staff for Pictorial Art, stated: "During the period from March 1941 to July 1944 the special staff for Pictorial Art brought into the Reich 29 large shipments, including 137 freight cars with 4,174 cases of art works."

The report of Scholz refers to 25 portfolios of pictures of the most valuable works of the art collection seized in the West, which portfolios were

presented to the Führer. Thirty-nine volumes, prepared by the Einsatzstab, contained photographs of paintings, textiles, furniture, candelabra, and numerous other objects of art, and illustrated the value and magnitude of the collection which had been made. In many of the occupied countries private collections were robbed, libraries were plundered, and private houses were pillaged.

Museums, palaces, and libraries in the occupied territories of the U.S.S.R. were systematically looted. Rosenberg's Einsatzstab, Von Ribbentrop's special "Battalion," the Reichscommissars and representatives of the Military Command seized objects of cultural and historical value belonging to the People of the Soviet Union, which were sent to Germany. Thus the Reichscommissar of the Ukraine removed paintings and objects of art from Kiev and Kharkov and sent them to East Prussia. Rare volumes and objects of art from the palaces of Peterhof, Tsarskoye Selo, and Pavlovsk were shipped to Germany. In his letter to Rosenberg of 3 October 1941 Reichscommissar Kube stated that the value of the objects of art taken from Bielorussia ran into millions of rubles. The scale of this plundering can also be seen in the letter sent from Rosenberg's department to Von Milde-Schreden in which it is stated that during the month of October 1943 alone, about 40 box-cars loaded with objects of cultural value were transported to the Reich.

With regard to the suggestion that the purpose of the seizure of art treasures was protective and meant for their preservation, it is necessary to say a few words. On 1 December 1939 Himmler, as the Reich Commissioner for the "strengthening of Germanism," issued a decree to the regional officers of the secret police in the annexed eastern territories, and to the commanders of the security service in Radom, Warsaw, and Lublin. This decree contained administrative directions for carrying out the art seizure program, and in Clause 1 it is stated:

"To strengthen Germanism in the defense of the Reich, all articles mentioned in Section 2 of this decree are hereby confiscated. . . . They are confiscated for the benefit of the German Reich, and are at the disposal of the Reich Commissioner for the strengthening of Germanism."

The intention to enrich Germany by the seizures, rather than to protect the seized objects, is indicated in an undated report by Dr. Hans Posse, director of the Dresden State Picture Gallery:

"I was able to gain some knowledge on the public and private collections, as well as clerical property, in Cracow and Warsaw. It is true that we cannot hope too much to enrich ourselves from the acquisition of great art works of paintings and sculptures, with the exception of the Veit-Stoß altar, and the plates of Hans von Kulnback in the Church of Maria in Cracow . . . and several other works from the National Museum in Warsaw."

Slave Labor Policy

Article 6 (b) of the Charter provides that the "ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory" shall be a War Crime. The laws relating to forced labor by the inhabitants of occupied territories are found in Article 52 of the Hague Convention, which provides:

"Requisition in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country."

The policy of the German occupation authorities was in flagrant violation of the terms of this convention. Some idea of this policy may be gathered from the statement made by Hitler in a speech on 9 November 1941:

"The territory which now works for us contains more than 250,000,000 men, but the territory which works indirectly for us includes now more than 350,000,000. In the measure in which it concerns German territory, the domain which we have taken under our administration, it is doubtful that we shall succeed in harnessing the very last man to this work."

The actual results achieved were not so complete as this, but the German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture.

In the early stages of the war, manpower in the occupied territories was under the control of various occupation authorities, and the procedure varied from country to country. In all the occupied territories compulsory labor service was promptly instituted. Inhabitants of the occupied countries were conscripted and compelled to work in local occupations, to assist the German war economy. In many cases they were forced to work on German fortifications and military installations. As local supplies of raw materials and local industrial capacity became inadequate to meet the German requirements, the system of deporting laborers to Germany was put into force. By the middle of April 1940 compulsory deportation of laborers to Germany had been ordered in the Government General; and a similar procedure was followed in other eastern territories as they were occupied. A description of this compulsory deportation from Poland was given by Himmler. In an address to SS officers he recalled how in weather 40 degrees below zero they had to "haul away thousands, tens of thousands, hundreds of thousands." On a later occasion Himmler stated:

"Whether ten thousand Russian females fall down from exhaustion while digging an anti-tank ditch interests me only insofar as the anti-

tank ditch for Germany is finished. . . . We must realize that we have 6-7 million foreigners in Germany. . . . They are none of them dangerous so long as we take severe measures at the merest trifles."

During the first two years of the German occupation of France, Belgium, Holland, and Norway, however, an attempt was made to obtain the necessary workers on a voluntary basis. How unsuccessful this was may be seen from the report of the meeting of the Central Planning Board on 1 March 1944. The representative of the Defendant Speer, one Koehrl, speaking of the situation in France, said: "During all this time a great number of Frenchmen was recruited, and voluntarily went to Germany."

He was interrupted by the Defendant Sauckel: "Not only voluntary, some were recruited forcibly."

To which Koehrl replied: "The calling up started after the recruitment no longer yielded enough results."

To which the Defendant Sauckel replied: "Out of the five million workers who arrived in Germany, not even 200,000 came voluntarily," and Koehrl rejoined: "Let us forget for the moment whether or not some slight pressure was used. Formally, at least, they were volunteers."

Committees were set up to encourage recruiting and a vigorous propaganda campaign was begun to induce workers to volunteer for service in Germany. This propaganda campaign included, for example, the promise that a prisoner of war would be returned for every laborer who volunteered to go to Germany. In some cases it was supplemented by withdrawing the ration cards of laborers who refused to go to Germany, or by discharging them from their jobs and denying them unemployment benefit or an opportunity to work elsewhere. In some cases workers and their families were threatened with reprisals by the police if they refused to go to Germany. It was on 21 March 1942 that the Defendant Sauckel was appointed Plenipotentiary-General for the Utilization of Labor, with authority over "all available manpower, including that of workers recruited abroad, and of prisoners of war."

The Defendant Sauckel was directly under the Defendant Göring as Commissioner of the Four Year Plan, and a Göring decree of 27 March 1942 transferred all his authority over manpower to Sauckel. Sauckel's instructions, too, were that foreign labor should be recruited on a voluntary basis, but also provided that "where, however, in the occupied territories, the appeal for volunteers does not suffice, obligatory service and drafting must under all circumstances be resorted to." Rules requiring labor service in Germany were published in all the occupied territories. The number of laborers to be supplied was fixed by Sauckel, and the local authorities were instructed to meet these requirements by conscription if necessary. That conscription was the rule rather than the exception is shown by the statement of Sauckel already quoted, on 1 March 1944.

The Defendant Sauckel frequently asserted that the workers belonging to foreign nations were treated humanely, and that the conditions in which they lived were good. But whatever the intention of Sauckel may have been, and however much he may have desired that foreign laborers should be treated humanely, the evidence before the Tribunal establishes the fact that the conscription of labor was accomplished in many cases by drastic and violent methods. The "mistakes and blunders" were on a very great scale. Man-hunts took place in the streets, at motion picture houses, even at churches and at night in private houses. Houses were sometimes burnt down, and the families taken as hostages, practices which were described by the Defendant Rosenberg as having their origin "in the blackest periods of the slave trade." The methods used in obtaining forced labor from the Ukraine appear from an order issued to SD officers which stated:

"It will not be possible always to refrain from using force. . . . When searching villages, especially when it has been necessary to burn down a village, the whole population will be put at the disposal of the Commissioner by force. . . . As a rule no more children will be shot. . . . If we limit harsh measures through the above orders for the time being, it is only done for the following reason. . . . The most important thing is the recruitment of workers."

The resources and needs of the occupied countries were completely disregarded in carrying out this policy. The treatment of the laborers was governed by Sauckel's instructions of 20 April 1942 to the effect that: "All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent, at the lowest conceivable degree of expenditure."

The evidence showed that workers destined for the Reich were sent under guard to Germany, often packed in trains without adequate heat, food, clothing, or sanitary facilities. The evidence further showed that the treatment of the laborers in Germany in many cases was brutal and degrading. The evidence relating to the Krupp Works at Essen showed that punishments of the most cruel kind were inflicted on the workers. Theoretically at least the workers were paid, housed, and fed by the DAF, and even permitted to transfer their savings and to send mail and parcels back to their native country; but restrictive regulations took a proportion of the pay; the camps in which they were housed were unsanitary; and the food was very often less than the minimum necessary to give the workers strength to do their jobs. In the case of Poles employed on farms in Germany, the employers were given authority to inflict corporal punishment and were ordered, if possible, to house them in stables, not in their own homes. They were subject to constant supervision by the Gestapo and the SS, and if they attempted to leave their jobs they were sent to correction camps or concentration camps. The concentration camps were also used to increase the supply of labor. Concentration camp commanders were ordered to work

their prisoners to the limits of their physical power. During the latter stages of the war the concentration camps were so productive in certain types of work that the Gestapo was actually instructed to arrest certain classes of laborers so that they could be used in this way. Allied prisoners of war were also regarded as a possible source of labor. Pressure was exercised on non-commissioned officers to force them to consent to work, by transferring to disciplinary camps those who did not consent. Many of the prisoners of war were assigned to work directly related to military operations, in violation of Article 31 of the Geneva Convention. They were put to work in munition factories and even made to load bombers, to carry ammunition, and to dig trenches, often under the most hazardous conditions. This condition applied particularly to the Soviet prisoners of war. On 16 February 1943, at a meeting of the Central Planning Board, at which the Defendants Sauckel and Speer were present, Milch said:

"We have made a request for an order that a certain percentage of men in the Ack-Ack artillery must be Russians; 50,000 will be taken altogether. Thirty thousand are already employed as gunners. This is an amusing thing, that Russians must work the guns."

And on 4 October 1943, at Posen, Himmler, speaking of the Russian prisoners, captured in the early days of the war, said:

"At that time we did not value the mass of humanity as we value it today, as raw material, as labor. What, after all, thinking in terms of generations, is not to be regretted, but is now deplorable by reason of the loss of labor, is that the prisoners died in tens and hundreds of thousands of exhaustion and hunger."

The general policy underlying the mobilization of slave labor was stated by Sauckel on 20 April 1942. He said:

"The aim of this new gigantic labor mobilization is to use all the rich and tremendous sources conquered and secured for us by our fighting Armed Forces under the leadership of Adolf Hitler, for the armament of the Armed Forces, and also for the nutrition of the Homeland. The raw materials, as well as the fertility of the conquered territories and their human labor power, are to be used completely and conscientiously to the profit of Germany and her allies. . . . All prisoners of war from the territories of the West, as well as the East actually in Germany, must be completely incorporated into the German armament and nutrition industries. . . . Consequently it is an immediate necessity to use the human reserves of the conquered Soviet territory to the fullest extent. Should we not succeed in obtaining the necessary amount of labor on a voluntary basis, we must immediately institute conscription or forced labor. . . . The complete employment of all prisoners of war, as well as the use of a gigantic number of new foreign civilian workers, men and women, has become an indisputable necessity for the solution of the mobilization of the labor program in this war."

Reference should also be made to the policy which was in existence in Germany by the summer of 1940, under which all aged, insane, and incurable people, "useless eaters," were transferred to special institutions where they were killed, and their relatives informed that they had died from natural causes. The victims were not confined to German citizens, but included foreign laborers, who were no longer able to work, and were therefore useless to the German war machine. It has been estimated that at least some 275,000 people were killed in this manner in nursing homes, hospitals and asylums, which were under the jurisdiction of the Defendant Frick, in his capacity as Minister of the Interior. How many foreign workers were included in this total it has been quite impossible to determine.

Persecution of the Jews

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, Chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union testified as to the methods employed in the extermination of the Jews. He said that he employed firing squads to shoot the victims in order to lessen the sense of individual guilt on the part of his men; and the 90,000 men, women, and children who were murdered in one year by his particular group were mostly Jews.

When the witness Bach Zelewski was asked how Ohlendorf could admit the murder of 90,000 people, he replied: "I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable."

But the Defendant Frank spoke the final words of this chapter of Nazi history when he testified in this Court:

"We have fought against Jewry: we have fought against it for years: and we have allowed ourselves to make utterances and my own diary has become a witness against me in this connection—utterances which are terrible. . . . A thousand years will pass and this guilt of Germany will still not be erased."

The anti-Jewish policy was formulated in Point 4 of the Party Program which declared "Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently, no Jew can be a member of the race." Other points of the program declared that Jews should be treated as foreigners, that they should not be permitted to hold public office, that they should be expelled from the Reich if it were impossible to nourish the entire population of the State, that they should be denied any further immigration into Germany, and that they should be prohibited from publishing German

newspapers. The Nazi Party preached these doctrines throughout its history, *Der Stürmer* and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back.

It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered. These steps were taken, moreover, with the approval of the Defendant Göring, who had been given responsibility for economic matters of this kind, and who was the strongest advocate of an extensive rearmament program notwithstanding the financial difficulties.

It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. The German Foreign Office circular, in an article of 25 January 1939, entitled "Jewish Question as a Factor in German Foreign Policy in the Year 1938," described the new phase in the Nazi anti-Semitic policy in these words:

"It is certainly no coincidence that the fateful year 1938 has brought nearer the solution of the Jewish question simultaneously with the realization of the idea of Greater Germany, since the Jewish policy was both the basis and consequence of the year 1938. The advance made by Jewish influence and the destructive Jewish spirit in politics, economy, and culture, paralyzed the power and the will of the German People to rise again, more perhaps even than the power policy opposition of the former enemy Allied Powers of the first World War. The healing of this sickness among the people was therefore certainly one of

the most important requirements for exerting the force which, in the year 1938, resulted in the joining together of Greater Germany in defiance of the world."

The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. Originally the policy was similar to that which had been in force inside Germany. Jews were required to register, were forced to live in ghettos, to wear the yellow star, and were used as slave laborers. In the summer of 1941, however, plans were made for the "final solution" of the Jewish question in Europe. This "final solution" meant the extermination of the Jews, which early in 1939 Hitler had threatened would be one of the consequences of an outbreak of war, and a special section in the Gestapo under Adolf Eichmann, as head of Section B 4 of the Gestapo, was formed to carry out the policy.

The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. Einsatzgruppen of the Security Police and SD, formed for the purpose of breaking the resistance of the population of the areas lying behind the German armies in the East, were given the duty of exterminating the Jews in those areas. The effectiveness of the work of the Einsatzgruppen is shown by the fact that in February 1942 Heydrich was able to report that Estonia had already been cleared of Jews and that in Riga the number of Jews had been reduced from 29,500 to 2,500. Altogether the Einsatzgruppen operating in the occupied Baltic States killed over 135,000 Jews in three months.

Nor did these special units operate completely independently of the German Armed Forces. There is clear evidence that leaders of the Einsatzgruppen obtained the cooperation of Army commanders. In one case the relations between an Einsatzgruppe and the military authorities was described at the time as being "very close, almost cordial"; in another case the smoothness of an Einsatzcommando's operation was attributed to the "understanding for this procedure" shown by the Army authorities.

Units of the Security Police and SD in the occupied territories of the East, which were under civil administration, were given a similar task. The planned and systematic character of the Jewish persecutions is best illustrated by the original report of the SS Brigadier-General Stroop, who was in charge of the destruction of the ghetto in Warsaw, which took place in 1943. The Tribunal received in evidence that report, illustrated with photographs, bearing on its title page: "The Jewish Ghetto in Warsaw No Longer Exists." The volume records a series of reports sent by Stroop to the Higher SS and Police Führer East. In April and May of 1943, in one report, Stroop wrote:

"The resistance put up by the Jews and bandits could only be suppressed by energetic actions of our troops day and night. The Reichsführer SS ordered therefore on 23 April 1943 the cleaning out of the

ghetto with utter ruthlessness and merciless tenacity. I therefore decided to destroy and burn down the entire ghetto, without regard to the armament factories. These factories were systematically dismantled and then burnt. Jews usually left their hideouts, but frequently remained in the burning buildings, and jumped out of the windows only when the heat became unbearable. They then tried to crawl with broken bones across the street into buildings which were not afire. . . . Life in the sewers was not pleasant after the first week. Many times we could hear loud voices in the sewers. . . . Tear gas bombs were thrown into the manholes, and the Jews driven out of the sewers and captured. Countless numbers of Jews were liquidated in sewers and bunkers through blasting. The longer the resistance continued, the tougher became the members of the Waffen SS, Police and Wehrmacht, who always discharged their duties in an exemplary manner."

Stroop recorded that his action at Warsaw eliminated "a proved total of 56,065 people. To that we have to add the number of those killed through blasting, fire, etc., which cannot be counted." Grim evidence of mass murders of Jews was also presented to the Tribunal in cinematograph films depicting the communal graves of hundreds of victims which were subsequently discovered by the Allies.

These atrocities were all part and parcel of the policy inaugurated in 1941, and it is not surprising that there should be evidence that one or two German officials entered vain protests against the brutal manner in which the killings were carried out. But the methods employed never conformed to a single pattern. The massacres of Rowno and Dubno, of which the German engineer Graebe spoke, were examples of one method; the systematic extermination of Jews in concentration camps, was another. Part of the "final solution" was the gathering of Jews from all German-occupied Europe in concentration camps. Their physical condition was the test of life or death. All who were fit to work were used as slave laborers in the concentration camps; all who were not fit to work were destroyed in gas chambers and their bodies burnt. Certain concentration camps such as Treblinka and Auschwitz were set aside for this main purpose. With regard to Auschwitz, the Tribunal heard the evidence of Höss, the commandant of the camp from 1 May 1940 to 1 December 1943. He estimated that in the camp of Auschwitz alone in that time 2,500,000 persons were exterminated, and that a further 500,000 died from disease and starvation. Höss described the screening for extermination by stating in evidence:

"We had two SS doctors on duty at Auschwitz to examine the incoming transports of prisoners. The prisoners would be marched by one of the doctors who would make spot decisions as they walked by. Those who were fit for work were sent into the camp. Others were sent immediately to the extermination plants. Children of tender years were invariably exterminated since by reason of their youth they

were unable to work. Still another improvement we made over Treblinka was that at Treblinka the victims almost always knew that they were to be exterminated and at Auschwitz we endeavored to fool the victims into thinking that they were to go through a delousing process. Of course, frequently they realized our true intentions and we sometimes had riots and difficulties due to that fact. Very frequently women would hide their children under their clothes, but of course when we found them we would send the children in to be exterminated."

He described the actual killing by stating:

"It took from three to fifteen minutes to kill the people in the death chamber, depending upon climatic conditions. We knew when the people were dead because their screaming stopped. We usually waited about one half-hour before we opened the doors and removed the bodies. After the bodies were removed our special commandos took off the rings and extracted the gold from the teeth of the corpses."

Beating, starvation, torture, and killing were general. The inmates were subjected to cruel experiments at Dachau in August 1942, victims were immersed in cold water until their body temperature was reduced to 28° Centigrade, when they died immediately. Other experiments included high altitude experiments in pressure chambers, experiments to determine how long human beings could survive in freezing water, experiments with poison bullets, experiments with contagious diseases, and experiments dealing with sterilization of men and women by X-rays and other methods.

Evidence was given of the treatment of the inmates before and after their extermination. There was testimony that the hair of women victims was cut off before they were killed, and shipped to Germany, there to be used in the manufacture of mattresses. The clothes, money, and valuables of the inmates were also salvaged and sent to the appropriate agencies for disposition. After the extermination the gold teeth and fillings were taken from the heads of the corpses and sent to the Reichsbank.

After cremation the ashes were used for fertilizer, and in some instances attempts were made to utilize the fat from the bodies of the victims in the commercial manufacture of soap. Special groups traveled through Europe to find Jews and subject them to the "final solution." German missions were sent to such satellite countries as Hungary and Bulgaria, to arrange for the shipment of Jews to extermination camps and it is known that by the end of 1944, 400,000 Jews from Hungary had been murdered at Auschwitz. Evidence has also been given of the evacuation of 110,000 Jews from part of Rumania for "liquidation." Adolf Eichmann, who had been put in charge of this program by Hitler, has estimated that the policy pursued resulted in the killing of 6 million Jews, of which 4 million were killed in the extermination institutions.

The Law Relating to War Crimes and Crimes against Humanity

Article 6 of the Charter provides:

"(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

"(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

As heretofore stated, the Charter does not define as a separate crime any conspiracy except the one set out in Article 6 (a), dealing with Crimes against Peace.

The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War Crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case, because of the "general participation" clause in Article 2 of the Hague Convention of 1907. That clause provided:

"The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention."

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt "to revise the general laws and customs of war," which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory

of the laws and customs of war which are referred to in Article 6 (b) of the Charter.

A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1 September 1939. As to the War Crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them.

With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

The Accused Organizations

Article 9 of the Charter provides:

“At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which

the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."

"After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard."

Article 10 of the Charter makes clear that the declaration of criminality against an accused organization is final, and cannot be challenged in any subsequent criminal proceeding against a member of the organization. Article 10 is as follows:

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

The effect of the declaration of criminality by the Tribunal is well illustrated by Law Number 10 of the Control Council of Germany passed on 20 December 1945, which provides:

"Each of the following acts is recognized as a crime:

"(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal. . . .

"(3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following:

- (a) Death.
- (b) Imprisonment for life or a term of years, with or without hard labor.
- (c) Fine, and imprisonment with or without hard labor, in lieu thereof."

In effect, therefore, a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

Article 9, it should be noted, uses the words "The Tribunal may declare," so that the Tribunal is vested with discretion as to whether it will declare any organization criminal. This discretion is a judicial one and

does not permit arbitrary action, but should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organization is analogous to a criminal conspiracy in that the essence of both is coöperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.

Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organizations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions, and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.

2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty.

The De-Nazification Law of 5 March 1946, however, passed for Bavaria, Greater-Hesse, and Württemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.

3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organization so that such punish-

ment shall not exceed the punishment prescribed by the De-Nazification Law.

The Indictment asks that the Tribunal declare to be criminal the following organizations: The Leadership Corps of the Nazi Party; the Gestapo; the SD; the SS; the SA; the Reich Cabinet, and the General Staff and High Command of the German Armed Forces.

The Leadership Corps of the Nazi Party

Structure and Component Parts: The Indictment has named the Leadership Corps of the Nazi Party as a group or organization which should be declared criminal. The Leadership Corps of the Nazi Party consisted, in effect, of the official organization of the Nazi Party, with Hitler as Führer at its head. The actual work of running the Leadership Corps was carried out by the Chief of the Party Chancellery (Hess succeeded by Bormann) assisted by the Party Reich Directorate, or Reichsleitung, which was composed of the Reichsleiters, the heads of the functional organizations of the Party, as well as of the heads of the various main departments and offices which were attached to the Party Reich Directorate. Under the Chief of the Party Chancellery were the Gauleiters, with territorial jurisdiction over the major administrative regions of the Party, the Gaue. The Gauleiters were assisted by a Party Gau Directorate or Gauleitung, similar in composition and in function to the Party Reich Directorate. Under the Gauleiters in the Party hierarchy were the Kreisleiters with territorial jurisdiction over a Kreis, usually consisting of a single county, and assisted by a Party Kreis Directorate, or Kreisleitung. The Kreisleiters were the lowest members of the Party hierarchy who were full-time paid employees. Directly under the Kreisleiters were the Ortsgruppenleiters, then the Zellenleiters and then the Blockleiters. Directives and instructions were received from the Party Directorate. The Gauleiters had the function of interpreting such orders and issuing them to lower formations. The Kreisleiters had a certain discretion in interpreting orders, but the Ortsgruppenleiters had not, but acted under definite instructions. Instructions were only issued in writing down as far as the Ortsgruppenleiters. The Block and Zellenleiters usually received instructions orally. Membership in the Leadership Corps at all levels was voluntary.

On 28 February 1946, the Prosecution excluded from the declaration asked for, all members of the staffs of the Ortsgruppenleiters and all assistants of the Zellenleiters and Blockleiters. The declaration sought against the Leadership Corps of the Nazi Party thus includes the Führer, the Reichsleitung, the Gauleiters and their staff officers, the Kreisleiters and their staff officers, the Ortsgruppenleiters, the Zellenleiters and the Blockleiters, a group estimated to contain at least 600,000 people.

Aims and Activities: The primary purpose of the Leadership Corps from its beginning was to assist the Nazis in obtaining and, after 30 January

1933, in retaining, control of the German State. The machinery of the Leadership Corps was used for the widespread dissemination of Nazi propaganda and to keep a detailed check on the political attitudes of the German People. In this activity the lower Political Leaders played a particularly important rôle. The Blockleiters were instructed by the Party Manual to report to the Ortsgruppenleiters all persons circulating damaging rumors or criticism of the regime. The Ortsgruppenleiters, on the basis of information supplied them by the Blockleiters and Zellenleiters, kept a card index of the people within their Ortsgruppe which recorded the factors which would be used in forming a judgment as to their political reliability.

The Leadership Corps was particularly active during plebiscites. All members of the Leadership Corps were active in getting out the vote and insuring the highest possible proportion of "yes" votes. Ortsgruppenleiters and Political Leaders of higher ranks often collaborated with the Gestapo and SD in taking steps to determine those who refused to vote or who voted "no," and in taking steps against them which went as far as arrest and detention in a concentration camp.

Criminal Activity: These steps, which relate merely to the consolidation of control of the Nazi Party, are not criminal under the view of the conspiracy to wage aggressive war which has previously been set forth. But the Leadership Corps was also used for similar steps in Austria and those parts of Czechoslovakia, Lithuania, Poland, France, Belgium, Luxembourg, and Yugoslavia which were incorporated into the Reich and within the Gaue of the Nazi Party. In those territories the machinery of the Leadership Corps was used for their Germanization through the elimination of local customs and the detection and arrest of persons who opposed German occupation. This was criminal under Article 6 (b) of the Charter in those areas governed by the Hague Rules of Land Warfare and criminal under Article 6 (c) of the Charter as to the remainder.

The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to coördinate with the Gauleiters and Kreisleiters the measures taken in the pogroms of 9 and 10 November 1938. The Leadership Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. On 9 October 1942, a confidential information bulletin was sent to all Gauleiters and Kreisleiters entitled "Preparatory Measures for the Final Solution of the Jewish Question in Europe. Rumors concerning the Conditions of the Jews in the East." This bulletin stated that rumors were being started by returning soldiers concerning the conditions of Jews in the East which some Germans might not understand, and outlined in detail the official explanation to be given. This bulletin contained no

explicit statement that the Jews were being exterminated, but it did indicate they were going to labor camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. Thus, even at its face value, it indicated the utilization of the machinery of the Leadership Corps to keep German public opinion from rebelling at a program which was stated to involve condemning the Jews of Europe to a lifetime of slavery. This information continued to be available to the Leadership Corps. The August 1944 edition of *Die Lage*, a publication which was circulated among the Political Leaders, described the deportation of 430,000 Jews from Hungary.

The Leadership Corps played an important part in the administration of the Slave Labor Program. A Sauckel decree dated 6 April 1942 appointed the Gauleiters as Plenipotentiary for Labor Mobilization for their Gaue with authority to coördinate all agencies dealing with labor questions in their Gaue, with specific authority over the employment of foreign workers, including their conditions of work, feeding, and housing. Under this authority the Gauleiters assumed control over the allocation of labor in their Gaue, including the forced laborers from foreign countries. In carrying out this task the Gauleiters used many Party offices within their Gaue, including subordinate Political Leaders. For example, Sauckel's decree of 8 September 1942, relating to the allocation for household labor of 400,000 women laborers brought in from the East, established a procedure under which applications filed for such workers should be passed on by the Kreisleiters, whose judgment was final.

Under Sauckel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiters were specifically instructed to prevent "politically inept factory heads" from giving "too much consideration to the care of Eastern workers." The type of question which was considered in their treatment included reports by the Kreisleiters on pregnancies among the female slave laborers, which would result in an abortion if the child's parentage would not meet the racial standards laid down by the SS and usually detention in a concentration camp for the female slave laborer. The evidence has established that under the supervision of the Leadership Corps, the industrial workers were housed in camps under atrocious sanitary conditions, worked long hours and were inadequately fed. Under similar supervision, the agricultural workers, who were somewhat better treated, were prohibited transportation, entertainment, and religious worship, and were worked without any time limit on their working hours and under regulations which gave the employer the right to inflict corporal punishment. The Political Leaders, at least down to the Ortsgruppenleiters, were responsible for this supervision. On 5 May 1943 a memorandum of Bormann instructing that mistreatment of slave laborers cease was distributed down to the Ortsgruppenleiters. Similarly on 10 November 1944 a Speer circular transmitted a Himmler directive

which provided that all members of the Nazi Party, in accordance with instructions from the Kreisleiter, would be warned by the Ortsgruppenleiters of their duty to keep foreign workers under careful observation.

The Leadership Corps was directly concerned with the treatment of prisoners of war. On 5 November 1941 Bormann transmitted a directive down to the level of Kreisleiter instructing them to insure compliance by the Army with the recent directives of the Department of the Interior ordering that dead Russian prisoners of war should be buried wrapped in tar paper in a remote place without any ceremony or any decorations of their graves. On 25 November 1943 Bormann sent a circular instructing the Gauleiters to report any lenient treatment of prisoners of war. On 13 September 1944, Bormann sent a directive down to the level of Kreisleiter ordering that liaison be established between the Kreisleiters and the guards of the prisoners of war in order "better to assimilate the commitment of the prisoners of war to the political and economic demands." On 17 October 1944 an OKW directive instructed the officer in charge of the prisoners of war to confer with the Kreisleiters on questions of the productivity of labor. The use of prisoners of war, particularly those from the East, was accompanied by a widespread violation of rules of land warfare. This evidence establishes that the Leadership Corps down to the level of Kreisleiter was a participant in this illegal treatment.

The machinery of the Leadership Corps was also utilized in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. On 13 March 1940 a directive of Hess transmitted instructions through the Leadership Corps down to the Blockleiter for the guidance of the civilian population in case of the landing of enemy planes or parachutists, which stated that enemy parachutists were to be immediately arrested or "made harmless." On 30 May 1944 Bormann sent a circular letter to all Gau- and Kreisleiters reporting instances of lynchings of Allied low-level fliers in which no police action was taken. It was requested that Ortsgruppenleiters be informed orally of the contents of this letter. This letter accompanied a propaganda drive which had been instituted by Goebbels to induce such lynchings, and clearly amounted to instructions to induce such lynchings or at least to violate the Geneva Convention by withdrawing any police protection. Some lynchings were carried out pursuant to this program, but it does not appear that they were carried out throughout all of Germany. Nevertheless, the existence of this circular letter shows that the heads of the Leadership Corps were utilizing it for a purpose which was patently illegal and which involved the use of the machinery of the Leadership Corps at least through the Ortsgruppenleiter.

Conclusion

The Leadership Corps was used for purposes which were criminal under the Charter and involved the Germanization of incorporated territory, the

persecution of the Jews, the administration of the slave labor program, and the mistreatment of prisoners of war. The Defendants Bormann and Sauckel, who were members of this organization, were among those who used it for these purposes. The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programs. The Reichsleitung as the staff organization of the Party is also responsible for these criminal programs as well as the heads of the various staff organizations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organizations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the Prosecution in excluding them from the declaration.

The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Leadership Corps holding the positions enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes. The basis of this finding is the participation of the organization in War Crimes and Crimes against Humanity connected with the war; the group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.

Gestapo and SD

Structure and Component Parts: The Prosecution has named Die Geheime Staatspolizei (Gestapo) and Der Sicherheitsdienst des Reichsführer SS (SD) as groups or organizations which should be declared criminal. The Prosecution presented the cases against the Gestapo and SD together, stating that this was necessary because of the close working relationship between them. The Tribunal permitted the SD to present its defense separately because of a claim of conflicting interests, but after examining the evidence has decided to consider the case of the Gestapo and SD together.

The Gestapo and the SD were first linked together on 26 June 1936 by the appointment of Heydrich, who was the Chief of the SD, to the position of Chief of the Security Police, which was defined to include both the Gestapo and the Criminal Police. Prior to that time the SD had been the intelligence agency, first of the SS, and, after 4 June 1934, of the entire Nazi Party. The Gestapo had been composed of the various political police forces of the several German Federal states which had been unified under the personal leadership of Himmler, with the assistance of Göring. Himmler

ler had been appointed Chief of the German Police in the Ministry of the Interior on 17 June 1936, and in his capacity as Reichsführer SS and Chief of the German Police issued his decree of 26 June 1936, which placed both the Criminal Police, or Kripo, and the Gestapo in the Security Police, and placed both the Security Police and the SD under the command of Heydrich.

This consolidation under the leadership of Heydrich of the Security Police, a State organization, and the SD, a Party organization, was formalized by the decree of 27 September 1939, which united the various State and Party offices which were under Heydrich as Chief of the Security Police and SD into one administrative unit, the Reichs Security Head Office (RSHA) which was at the same time both one of the principal offices (Hauptamt) of the SS under Himmler as Reichsführer SS and an office in the Ministry of the Interior under Himmler as Chief of the German Police. The internal structure of the RSHA shows the manner in which it consolidated the offices of the Security Police with those of the SD. The RSHA was divided into seven offices (Ämter), two of which (Amt I and Amt II) dealt with administrative matters. The Security Police were represented by Amt IV, the head office of the Gestapo, and by Amt V, the head office of the Criminal Police. The SD were represented by Amt III, the head office for SD activities inside Germany, by Amt VI, the head office for SD activities outside of Germany and by Amt VII, the office for ideological research. Shortly after the creation of the RSHA, in November 1939, the Security Police was "coördinated" with the SS by taking all officials of the Gestapo and Criminal Police into the SS at ranks equivalent to their positions.

The creation of the RSHA represented the formalization, at the top level, of the relationship under which the SD served as the intelligence agency for the Security Police. A similar coördination existed in the local offices. Within Germany and areas which were incorporated within the Reich for the purpose of civil administration, local offices of the Gestapo, Criminal Police, and SD were formally separate. They were subject to coördination by Inspectors of the Security Police and SD on the staffs of the local Higher SS and Police Leaders, however, and one of the principal functions of the local SD units was to serve as the intelligence agency for the local Gestapo units. In the occupied territories, the formal relationship between local units of the Gestapo, Criminal Police, and SD was slightly closer. They were organized into local units of the Security Police and SD and were under the control of both the RSHA and of the Higher SS and Police Leader who was appointed by Himmler to serve on the staff of the occupying authority. The offices of the Security Police and SD in occupied territory were composed of departments corresponding to the various Amts of the RSHA. In occupied territories which were still considered to be operational military areas or where German control had not been formally established, the organization of the Security Police and SD was only slightly

changed. Members of the Gestapo, Kripo, and SD were joined together into military type organizations known as *Einsatz Kommandos* and *Einsatzgruppen* in which the key positions were held by members of the Gestapo, Kripo, and SD and in which members of the Order Police, the *Waffen SS* and even the *Wehrmacht* were used as auxiliaries. These organizations were under the over-all control of the RSHA, but in front line areas were under the operational control of the appropriate Army Commander.

It can thus be seen that from a functional point of view both the Gestapo and the SD were important and closely related groups within the organization of the Security Police and the SD. The Security Police and SD was under a single command, that of Heydrich and later Kaltenbrunner, as Chief of the Security Police and SD; it had a single headquarters, the RSHA; it had its own command channels and worked as one organization both in Germany, in occupied territories, and in the areas immediately behind the front lines. During the period with which the Tribunal is primarily concerned, applicants for positions in the Security Police and SD received training in all its components, the Gestapo, Criminal Police, and SD. Some confusion has been caused by the fact that part of the organization was technically a formation of the Nazi Party while another part of the organization was an office in the Government, but this is of no particular significance in view of the law of 1 December 1933, declaring the unity of the Nazi Party and the German State.

The Security Police and SD was a voluntary organization. It is true that many civil servants and administrative officials were transferred into the Security Police. The claim that this transfer was compulsory amounts to nothing more than the claim that they had to accept the transfer or resign their positions, with a possibility of having incurred official disfavor. During the war a member of the Security Police and SD did not have a free choice of assignments within that organization and the refusal to accept a particular position, especially when serving in occupied territory, might have led to serious punishment. The fact remains, however, that all members of the Security Police and SD joined the organization voluntarily under no other sanction than the desire to retain their positions as officials.

The organization of the Security Police and SD also included three special units which must be dealt with separately. The first of these was the Frontier Police or *Grenzpolizei* which came under the control of the Gestapo in 1937. Their duties consisted in the control of passage over the borders of Germany. They arrested persons who crossed illegally. It is also clear from the evidence presented that they received directives from the Gestapo to transfer foreign workers whom they apprehended to concentration camps. They could also request the local office of the Gestapo for permission to commit persons arrested to concentration camps. The Tribunal is of the opinion that the Frontier Police must be included in the charge of criminality against the Gestapo.

The border and customs protection or Zollgrenzschutz became part of the Gestapo in the summer of 1944. The functions of this organization were similar to the Frontier Police in enforcing border regulations with particular respect to the prevention of smuggling. It does not appear, however, that their transfer was complete but that about half of their personnel of 54,000 remained under the Reich Finance Administration or the Order Police. A few days before the end of the war the whole organization was transferred back to the Reich Finance Administration. The transfer of the organization to the Gestapo was so late and it participated so little in the over-all activities of the organization that the Tribunal does not feel that it should be dealt with in considering the criminality of the Gestapo.

The third organization was the so-called Secret Field Police which was originally under the Army but which in 1942 was transferred by military order to the Security Police. The Secret Field Police was concerned with security matters within the Army in occupied territory, and also with the prevention of attacks by civilians on military installations or units, and committed War Crimes and Crimes against Humanity on a wide scale. It has not been proved, however, that it was a part of the Gestapo and the Tribunal does not consider it as coming within the charge of criminality contained in the Indictment, except such members as may have been transferred to Amt IV of the RSHA or were members of organizations declared criminal by this Judgment.

Criminal Activity: Originally, one of the primary functions of the Gestapo was the prevention of any political opposition to the Nazi regime, a function which it performed with the assistance of the SD. The principal weapon used in performing this function was the concentration camp. The Gestapo did not have administrative control over the concentration camps, but, acting through the RSHA, was responsible for the detention of political prisoners in those camps. Gestapo officials were usually responsible for the interrogation of political prisoners at the camps.

The Gestapo and the SD also dealt with charges of treason and with questions relating to the press, the churches and the Jews. As the Nazi program of anti-Semitic persecution increased in intensity the role played by these groups became increasingly important. In the early morning of November 1938, Heydrich sent a telegram to all offices of the Gestapo and SD giving instructions for the organization of the pogroms of that date and instructing them to arrest as many Jews as the prisons could hold "especially rich ones," but to be careful that those arrested were healthy and not too old. By 11 November 1938, 20,000 Jews had been arrested and many were sent to concentration camps. On 24 January 1939 Heydrich, the Chief of the Security Police and SD, was charged with furthering the emigration and evacuation of Jews from Germany, and on 31 July 1941, with bringing about a complete solution of the Jewish problem in German-dominated Europe. A special section of the Gestapo office of the RSHA

under Standartenführer Eichmann was set up with responsibility for Jewish matters which employed its own agents to investigate the Jewish problem in occupied territory. Local offices of the Gestapo were used first to supervise the emigration of Jews and later to deport them to the East both from Germany and from the territories occupied during the war. Einsatzgruppen of the Security Police and SD operating behind the lines of the Eastern Front engaged in the wholesale massacre of Jews. A special detachment from Gestapo headquarters in the RSHA was used to arrange for the deportation of Jews from Axis satellites to Germany for the "final solution."

Local offices of the Security Police and SD played an important role in the German administration of occupied territories. The nature of their participation is shown by measures taken in the summer of 1938 in preparation for the attack on Czechoslovakia which was then in contemplation. Einsatzgruppen of the Gestapo and SD were organized to follow the Army into Czechoslovakia to provide for the security of political life in the occupied territories. Plans were made for the infiltration of SD men into the area in advance, and for the building up of a system of files to indicate what inhabitants should be placed under surveillance, deprived of passports, or liquidated. These plans were considerably altered due to the cancellation of the attack on Czechoslovakia, but in the military operations which actually occurred, particularly in the war against U.S.S.R., Einsatzgruppen of the Security Police and SD went into operation, and combined brutal measures for the pacification of the civilian population with the wholesale slaughter of Jews. Heydrich gave orders to fabricate incidents on the Polish-German frontier in 1939 which would give Hitler sufficient provocation to attack Poland. Both Gestapo and SD personnel were involved in these operations.

The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, subjected them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists and saboteurs without a trial, and the enforcement of the "Nacht und Nebel" decrees under which persons charged with a type of offense believed to endanger the security of the occupying forces were either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends.

Offices of the Security Police and SD were involved in the administration of the Slave Labor Program. In some occupied territories they helped local labor authorities to meet the quotas imposed by Sauckel. Gestapo offices

inside of Germany were given surveillance over slave laborers and responsibility for apprehending those who were absent from their place of work. The Gestapo also had charge of the so-called work training camps. Although both German and foreign workers could be committed to these camps, they played a significant role in forcing foreign laborers to work for the German war effort. In the latter stages of the war as the SS embarked on a slave labor program of its own, the Gestapo was used to arrest workers for the purpose of insuring an adequate supply in the concentration camps.

The local offices of the Security Police and SD were also involved in the commission of War Crimes involving the mistreatment and murder of prisoners of war. Soviet prisoners of war in prisoner-of-war camps in Germany were screened by Einsatz Kommandos acting under the directions of the local Gestapo offices. Commissars, Jews, members of the intelligentsia, "fanatical Communists" and even those who were considered incurably sick were classified as "intolerable," and exterminated. The local offices of the Security Police and SD were involved in the enforcement of the "Bullet" decree, put into effect on 4 March 1944, under which certain categories of prisoners of war, who were recaptured, were not treated as prisoners of war but taken to Mauthausen in secret and shot. Members of the Security Police and SD were charged with the enforcement of the decree for the shooting of parachutists and commandos.

Conclusion

The Gestapo and SD were used for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities, and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program, and the mistreatment and murder of prisoners of war. The Defendant-Kaltenbrunner, who was a member of this organization, was among those who used it for these purposes. In dealing with the Gestapo the Tribunal includes all executive and administrative officials of Amt IV of the RSHA or concerned with Gestapo administration in other departments of the RSHA and all local Gestapo officials serving both inside and outside of Germany, including the members of the Frontier Police, but not including the members of the Border and Customs Protection or the Secret Field Police, except such members as have been specified above. At the suggestion of the Prosecution the Tribunal does not include persons employed by the Gestapo for purely clerical, stenographic, janitorial, or similar unofficial routine tasks. In dealing with the SD the Tribunal includes Ämter III, VI, and VII of the RSHA and all other members of the SD, including all local representatives and agents, honorary or otherwise, whether they were technically members of the SS or not, but not including honorary informers who were not members of the SS, and members of the Abwehr who were transferred to the SD.

The Tribunal declares to be criminal within the meaning of the Charter the group composed of those members of the Gestapo and SD holding the positions enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes. The basis for this finding is the participation of the organization in War Crimes and Crimes against Humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to hold the positions enumerated in the preceding paragraph prior to 1 September 1939.

SS

Structure and Component Parts: The Prosecution has named Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the SS) as an organization which should be declared criminal. The portion of the Indictment dealing with the SS also includes Der Sicherheitsdienst des Reichsführer-SS (commonly known as the SD). This latter organization, which was originally an intelligence branch of the SS, later became an important part of the organization of Security Police and SD and is dealt with in the Tribunal's Judgment on the Gestapo.

The SS was originally established by Hitler in 1925 as an elite section of the SA for political purposes under the pretext of protecting speakers at public meetings of the Nazi Party. After the Nazis had obtained power the SS was used to maintain order and control audiences at mass demonstrations and was given the additional duty of "internal security" by a decree of the Führer. The SS played an important role at the time of the Röhm purge of 30 June 1934, and, as a reward for its services, was made an independent unit of the Nazi Party shortly thereafter.

In 1929 when Himmler was first appointed as Reichs Führer the SS consisted of 280 men who were regarded as especially trustworthy. In 1933 it was composed of 52,000 men drawn from all walks of life. The original formation of the SS was the Allgemeine SS, which by 1939 had grown to a corps of 240,000 men, organized on military lines into divisions and regiments. During the war its strength declined to well under 40,000.

The SS originally contained two other formations, the SS Verfügungstruppe, a force consisting of SS members who volunteered for four years' armed service in lieu of compulsory service with the Army, and the SS Totenkopf Verbände, special troops employed to guard concentration camps, which came under the control of the SS in 1934. The SS Verfügungstruppe was organized as an armed unit to be employed with the Army in the event of mobilization. In the summer of 1939, the Verfügungstruppe was equipped as a motorized division to form the nucleus of the

forces which came to be known in 1940 as the Waffen SS. In that year the Waffen SS comprised 100,000 men, 53,000 coming from the Verfügungstruppe and the rest from the Allgemeine SS and the Totenkopf Verbände. At the end of the war it is estimated to have consisted of about 580,000 men and 40 divisions. The Waffen SS was under the tactical command of the Army, but was equipped and supplied through the administrative branches of the SS and under SS disciplinary control.

The SS Central Organization had 12 main offices. The most important of these were the RSHA, which has already been discussed, the WVHA or Economic Administration Main Office which administered concentration camps along with its other duties, a Race and Settlement Office together with auxiliary offices for repatriation of racial Germans (Volksdeutschemittelstelle). The SS Central Organization also had a legal office and the SS possessed its own legal system; and its personnel were under the jurisdiction of special courts. Also attached to the SS main offices was a research foundation known as the Experimentis Ahnenerbe. The scientists attached to this organization are stated to have been mainly honorary members of the SS. During the war an institute for military scientific research became attached to the Ahnenerbe which conducted extensive experiments involving the use of living human beings. An employee of this institute was a certain Dr. Rascher, who conducted these experiments with the full knowledge of the Ahnenerbe, which were subsidized and under the patronage of the Reichsführer SS who was a trustee of the foundation.

Beginning in 1933 there was a gradual but thorough amalgamation of the police and SS. In 1936 Himmler, the Reichsführer SS, became Chief of the German Police with authority over the regular uniformed police as well as the Security Police. Himmler established a system under which Higher SS and Police Leaders, appointed for each Wehrkreis, served as his personal representatives in coördinating the activities of the Order Police, Security Police and SD and Allgemeine SS within their jurisdictions. In 1939 the SS and police systems were coördinated by taking into the SS all officials of the Security and Order Police, at SS ranks equivalent to their rank in the police.

Until 1940 the SS was an entirely voluntary organization. After the formation of the Waffen SS in 1940 there was a gradually increasing number of conscripts into the Waffen SS. It appears that about a third of the total number of people joining the Waffen SS were conscripts, that the proportion of conscripts was higher at the end of the war than at the beginning, but that there continued to be a high proportion of volunteers until the end of the war.

Criminal Activities: SS units were active participants in the steps leading up to aggressive war. The Verfügungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia, and of Memel. The Henlein Free Corps was under the jurisdiction of the Reichsführer SS for opera-

tions in the Sudetenland in 1938, and the Volksdeutschemittelstelle financed fifth-column activities there.

The SS was even a more general participant in the commission of War Crimes and Crimes against Humanity. Through its control over the organization of the Police, particularly the Security Police and SD, the SS was involved in all the crimes which have been outlined in the section of this Judgment dealing with the Gestapo and SD. Other branches of the SS were equally involved in these criminal programs. There is evidence that the shooting of unarmed prisoners of war was the general practice in some Waffen SS divisions. On 1 October 1944 the custody of prisoners of war and interned persons was transferred to Himmler, who in turn transferred prisoner-of-war affairs to SS Obergruppenführer Berger and to SS Obergruppenführer Pohl. The Race and Settlement Office of the SS together with the Volksdeutschemittelstelle were active in carrying out schemes for Germanization of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. Units of the Waffen SS and Einsatzgruppen operating directly under the SS main office were used to carry out these plans. These units were also involved in the widespread murder and ill-treatment of the civilian population of occupied territories. Under the guise of combatting partisan units, units of the SS exterminated Jews and people deemed politically undesirable by the SS, and their reports record the execution of enormous numbers of persons. Waffen SS divisions were responsible for many massacres and atrocities in occupied territories such as the massacres at Oradour and Lidice.

From 1934 onwards the SS was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates of concentration camps was carried out as a result of the general policy of the SS, which was that the inmates were racial inferiors to be treated only with contempt. There is evidence that where manpower considerations permitted, Himmler wanted to rotate guard battalions so that all members of the SS would be instructed as to the proper attitude to take to inferior races. After 1942 when the concentration camps were placed under the control of the WVHA they were used as a source of slave labor. An agreement made with the Ministry of Justice on 18 September 1942 provided that anti-social elements who had finished prison sentences were to be delivered to the SS to be worked to death. Steps were continually taken, involving the use of the Security Police and SD and even the Waffen SS, to insure that the SS had an adequate supply of concentration camp labor for its projects. In connection with the administration of the concentration camps, the SS embarked on a series of experiments on human beings which were performed on prisoners of war or concentration camp inmates. These experiments included freezing to death, and killing by poison bullets. The SS was able to obtain an

allocation of Government funds for this kind of research on the grounds that they had access to human material not available to other agencies.

The SS played a particularly significant rôle in the persecution of the Jews. The SS was directly involved in the demonstrations of 10 November 1938. The evacuation of the Jews from occupied territories was carried out under the directions of the SS with the assistance of SS Police units. The extermination of the Jews was carried out under the direction of the SS Central Organizations. It was actually put into effect by SS formations. The Einsatzgruppen engaged in wholesale massacres of the Jews. SS Police units were also involved. For example, the massacre of Jews in the Warsaw ghetto was carried out under the directions of SS Brigadeführer and Major General of the Police Stroop. A special group from the SS Central Organization arranged for the deportation of Jews from various Axis satellites and their extermination was carried out in the concentration camps run by the WVHA.

It is impossible to single out any one portion of the SS which was not involved in these criminal activities. The Allgemeine SS was an active participant in the persecution of the Jews and was used as a source of concentration camp guards. Units of the Waffen SS were directly involved in the killing of prisoners of war and the atrocities in occupied countries. It supplied personnel for the Einsatzgruppen, and had command over the concentration camp guards after its absorption of the Totenkopf SS, which originally controlled the system. Various SS Police units were also widely used in the atrocities in occupied countries and the extermination of the Jews there. The SS Central Organization supervised the activities of these various formations and was responsible for such special projects as the human experiments and "final solution" of the Jewish question.

The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programs were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognized, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organized. Every effort had been made to make the SS a highly disciplined organization composed of the elite of National Socialism. Himmler had stated that there were people in Germany "who become sick when they see these black coats" and that he did not expect that "they should be loved by too many." Himmler also indicated his view that the SS was concerned with perpetuating the elite racial stock with the object of making Europe a Germanic continent and the SS was instructed that it was designed to assist the Nazi Government in the ultimate domination of Europe and the elimination of all

inferior races. This mystic and fanatical belief in the superiority of the Nordic German developed into the studied contempt and even hatred of other races which led to criminal activities of the type outlined above being considered as a matter of course if not a matter of pride. The actions of a soldier in the Waffen SS who in September 1939, acting entirely on his own initiative, killed 50 Jewish laborers whom he had been guarding, were described by the statement that as an SS man, he was "particularly sensitive to the sight of Jews," and had acted "quite thoughtlessly in a youthful spirit of adventure" and a sentence of three-years imprisonment imposed on him was dropped under an amnesty. Hess wrote with truth that the Waffen SS were more suitable for the specific tasks to be solved in occupied territory owing to their extensive training in questions of race and nationality. Himmler, in a series of speeches made in 1943, indicated his pride in the ability of the SS to carry out these criminal acts. He encouraged his men to be "tough and ruthless," he spoke of shooting "thousands of leading Poles," and thanked them for their coöperation and lack of squeamishness at the sight of hundreds and thousands of corpses of their victims. He extolled ruthlessness in exterminating the Jewish race and later described this process as "dehousing." These speeches show that the general attitude prevailing in the SS was consistent with these criminal acts.

Conclusion: The SS was utilized for purposes which were criminal under the Charter involving the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program and the mistreatment and murder of prisoners of war. The Defendant Kaltenbrunner was a member of the SS implicated in these activities. In dealing with the SS Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbände, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units. Der Sicherheitsdienst des Reichsführer SS (commonly known as the SD) is dealt with in the Tribunal's Judgment on the Gestapo and SD.

The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed no such crimes. The basis of this finding is the participation of the organization in War Crimes and

Crimes against Humanity connected with the war; this group declared criminal cannot include, therefore, persons who had ceased to belong to the organizations enumerated in the preceding paragraph prior to 1 September 1939.

The SA

Structure and Component Parts: The Prosecution has named Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the SA) as an organization which should be declared criminal. The SA was founded in 1921 for political purposes. It was organized on military lines. Its members wore their own uniforms and had their own discipline and regulations. After the Nazis had obtained power the SA greatly increased in membership due to the incorporation within it of certain veterans organizations. In April 1933 the Stahlhelm, an organization of 1½ million members, was transferred into the SA, with the exception of its members over 45 years of age and some others, pursuant to an agreement between their leader Seldte and Hitler. Another veterans organization, the so-called Kyffhauserbund, was transferred in the same manner, together with a number of rural riding organizations.

Until 1933, there is no question but that membership in the SA was voluntary. After 1933 civil servants were under certain political and economic pressure to join the SA. Members of the Stahlhelm, the Kyffhauserbund, and the rural riding associations were transferred into the SA without their knowledge, but the Tribunal is not satisfied that the members in general endeavored to protest against this transfer or that there was any evidence, except in isolated cases, of the consequences of refusal. The Tribunal therefore finds that membership in the SA was generally voluntary.

By the end of 1933 the SA was composed of 4½ million men. As a result of changes made after 1934, in 1935 the SA numbered 1½ million men.

Activities: In the early days of the Nazi movement the storm troopers of the SA acted as the "strong arm of the Party." They took part in the beer hall feuds and were used for street fighting in battles against political opponents. The SA was also used to disseminate Nazi ideology and propaganda and placed particular emphasis on anti-Semitic propaganda, the doctrine of "Lebensraum," the revision of the Versailles Treaty, and the return of Germany's colonies.

After the Nazi advent to power, and particularly after the elections of 5 March 1933, the SA played an important rôle in establishing a Nazi reign of terror over Germany. The SA was involved in outbreaks of violence against the Jews and was used to arrest political opponents and to guard concentration camps, where they subjected their prisoners to brutal mistreatment.

On 30 June and 1 and 2 July 1934 a purge of SA leaders occurred. The pretext which was given for this purge, which involved the killing of Röhm,

the Chief of Staff of the SA, and many other SA leaders, was the existence of a plot against Hitler. This purge resulted in a great reduction in the influence and power of the SA. After 1934, it rapidly declined in political significance.

After 1934 the SA engaged in certain forms of military or para-military training. The SA continued to engage in the dissemination of Nazi propaganda. Isolated units of the SA were even involved in the steps leading up to aggressive war and in the commission of War Crimes and Crimes against Humanity. SA units were among the first in the occupation of Austria in March 1938. The SA supplied many of the men and a large part of the equipment which composed the Sudeten Free Corps of Henlein, although it appears that the corps was under the jurisdiction of SS during its operation in Czechoslovakia.

After the occupation of Poland, the SA group Sudeten was used for transporting prisoners of war. Units of the SA were employed in the guarding of prisoners in Danzig, Posen, Silesia, and the Baltic States.

Some SA units were used to blow up synagogues in the Jewish pogrom of 10 and 11 November 1938. Groups of the SA were concerned in the ill-treatment of Jews in the ghettos of Vilna and Kaunas.

Conclusion

Until the purge beginning on 30 June 1934, the SA was a group composed in large part of ruffians and bullies who participated in the Nazi outrages of that period. It has not been shown, however, that these atrocities were part of a specific plan to wage aggressive war, and the Tribunal therefore cannot hold that these activities were criminal under the Charter. After the purge, the SA was reduced to the status of a group of unimportant Nazi hangers-on. Although in specific instances some units of the SA were used for the commission of War Crimes and Crimes against Humanity, it cannot be said that its members generally participated in or even knew of the criminal acts. For these reasons the Tribunal does not declare the SA to be a criminal organization within the meaning of Article 9 of the Charter.

The Reich Cabinet

The Prosecution has named as a criminal organization the Reich Cabinet (Die Reichsregierung) consisting of members of the ordinary cabinet after 30 January 1933, members of the Council of Ministers for the Defense of the Reich and members of the Secret Cabinet Council. The Tribunal is of opinion that no declaration of criminality should be made with respect to the Reich Cabinet for two reasons: (1) because it is not shown that after 1937 it ever really acted as a group or organization; (2) because the group of persons here charged is so small that members could be conveni-

ently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.

As to the first reason for our decision, it is to be observed that from the time that it can be said that a conspiracy to make aggressive war existed the Reich Cabinet did not constitute a governing body, but was merely an aggregation of administrative officers subject to the absolute control of Hitler. Not a single meeting of the Reich Cabinet was held after 1937, but laws were promulgated in the name of one or more of the cabinet members. The Secret Cabinet Council never met at all. A number of the cabinet members were undoubtedly involved in the conspiracy to make aggressive war; but they were involved as individuals and there is no evidence that the Cabinet as a group or organization took any part in these crimes. It will be remembered that when Hitler disclosed his aims of criminal aggression at the Hossbach Conference, the disclosure was not made before the Cabinet and that the Cabinet was not consulted with regard to it, but, on the contrary, that it was made secretly to a small group upon whom Hitler would necessarily rely in carrying on the war. Likewise no cabinet order authorized the invasion of Poland. On the contrary, the Defendant Schacht testifies that he sought to stop the invasion by a plea to the Commander-in-Chief of the Army that Hitler's order was in violation of the Constitution because not authorized by the Cabinet.

It does appear, however, that various laws authorizing acts which were criminal under the Charter were circulated among the members of the Reich Cabinet and issued under its authority signed by the members whose departments were concerned. This does not, however, prove that the Reich Cabinet, after 1937, ever really acted as an organization.

As to the second reason, it is clear that those members of the Reich Cabinet who have been guilty of crimes should be brought to trial; and a number of them are now on trial before the Tribunal. It is estimated that there are 48 members of the group, that eight of these are dead and 17 are now on trial, leaving only 23 at the most, as to whom the declaration could have any importance. Any others who are guilty should also be brought to trial; but nothing would be accomplished to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal organization. Where an organization with a large membership is used for such purposes, a declaration obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group like the Reich Cabinet.

General Staff and High Command

The Prosecution has also asked that the General Staff and High Command of the German Armed Forces be declared a criminal organization.

The Tribunal believes that no declaration of criminality should be made with respect to the General Staff and High Command. The number of persons charged, while larger than that of the Reich Cabinet, is still so small that individual trials of these officers would accomplish the purpose here sought better than a declaration such as requested. But a more compelling reason is that in the opinion of the Tribunal the General Staff and High Command is neither an "organization" nor a "group" within the meaning of those terms as used in Article 9 of the Charter.

Some comment on the nature of this alleged group is requisite. According to the Indictment and evidence before the Tribunal, it consists of approximately 130 officers, living and dead, who at any time during the period from February 1938, when Hitler reorganized the Armed Forces, and May 1945, when Germany surrendered, held certain positions in the military hierarchy. These men were high-ranking officers in the three armed services: OKH—Army, OKM—Navy, and OKL—Air Force. Above them was the over-all Armed Forces authority, OKW—High Command of the German Armed Forces with Hitler as the Supreme Commander. The officers in OKW, including Defendant Keitel as Chief of the High Command, were in a sense Hitler's personal staff. In the larger sense they coördinated and directed the three services, with particular emphasis on the functions of planning and operations.

The individual officers in this alleged group were, at one time or another, in one of four categories: (1) Commanders-in-Chief of one of the three services; (2) Chief of Staff of one of the three services; (3) "Oberbefehlshabers," the field Commanders-in-Chief of one of the three services, which of course comprised by far the largest number of these persons; or (4) an OKW officer, of which there were three, Defendants Keitel and Jodl, and the latter's Deputy Chief, Warlimont. This is the meaning of the Indictment in its use of the term "General Staff and High Command."

The Prosecution has here drawn the line. The Prosecution does not indict the next level of the military hierarchy consisting of commanders of army corps, and equivalent ranks in the Navy and Air Force, nor the level below, the division commanders or their equivalent in the other branches. And the staff officers of the four staff commands of OKW, OKH, OKM, and OKL are not included, nor are the trained specialists who were customarily called General Staff officers.

In effect, then, those indicted as members are military leaders of the Reich of the highest rank. No serious effort was made to assert that they composed an "organization" in the sense of Article 9. The assertion is rather that they were a "group," which is a wider and more embracing term than "organization."

The Tribunal does not so find. According to the evidence, their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters

was much the same as that of the armies, navies, and air forces of all other countries. The over-all effort of OKW at coordination and direction could be matched by a similar, though not identical form of organization in other military forces, such as the Anglo-American Combined Chiefs of Staff.

To derive from this pattern of their activities the existence of an association or group does not, in the opinion of the Tribunal, logically follow. On such a theory the top commanders of every other nation are just such an association rather than what they actually are, an aggregation of military men, a number of individuals who happen at a given period of time to hold the high-ranking military positions.

Much of the evidence and the argument has centered around the question of whether membership in these organizations was or was not voluntary; in this case, it seems to the Tribunal to be quite beside the point. For this alleged criminal organization has one characteristic, a controlling one, which sharply distinguishes it from the other five indicted. When an individual became a member of the SS for instance, he did so, voluntarily or otherwise, but certainly with the knowledge that he was joining something. In the case of the General Staff and High Command, however, he could not know he was joining a group or organization for such organization did not exist except in the charge of the Indictment. He knew only that he had achieved a certain high rank in one of the three services, and could not be conscious of the fact that he was becoming a member of anything so tangible as a "group," as that word is commonly used. His relations with his brother officers in his own branch of the service and his association with those of the other two branches were, in general, like those of other services all over the world.

The Tribunal therefore does not declare the General Staff and High Command to be a criminal organization.

Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of the officers in planning and waging aggressive war, and in committing War Crimes and Crimes against Humanity. This evidence is, as to many of them, clear and convincing.

They have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women, and children. They have been a disgrace to the honorable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow Nazis would have been academic and sterile. Although they were not a group falling within the words of the Charter, they were certainly a ruthless military caste. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past.

Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to

obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said.

Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment.

Article 26 of the Charter provides that the Judgment of the Tribunal as to the guilt or innocence of any Defendant shall give the reasons on which it is based.

The Tribunal will now state those reasons in declaring its Judgment on such guilt or innocence.

GÖRING

Göring is indicted on all four Counts. The evidence shows that after Hitler he was the most prominent man in the Nazi regime. He was Commander-in-Chief of the Luftwaffe, Plenipotentiary for the Four Year Plan, and had tremendous influence with Hitler, at least until 1943, when their relationship deteriorated, ending in his arrest in 1945. He testified that Hitler kept him informed of all important military and political problems.

Crimes against Peace

From the moment he joined the Party in 1922 and took command of the street-fighting organization, the SA, Göring was the adviser, the active agent of Hitler, and one of the prime leaders of the Nazi movement. As Hitler's political deputy he was largely instrumental in bringing the National Socialists to power in 1933, and was charged with consolidating this power and expanding German armed might. He developed the Gestapo, and created the first concentration camps, relinquishing them to Himmler in 1934, conducted the Röhm purge in that year, and engineered the sordid proceedings which resulted in the removal of Von Blomberg and Von Fritsch from the Army. In 1936 he became Plenipotentiary for the Four Year Plan, and in theory and in practice was the economic dictator of the Reich. Shortly after the Pact of Munich, he announced that he would embark on a five-fold expansion of the Luftwaffe, and speed rearmament with emphasis on offensive weapons.

Göring was one of the five important leaders present at the Hossbach Conference of 5 November 1937, and he attended the other important conferences already discussed in this Judgment. In the Austrian Anschluss he was indeed the central figure, the ringleader. He said in Court: "I

must take 100 per cent responsibility. . . I even overruled objections by the Führer and brought everything to its final development." In the seizure of the Sudetenland, he played his rôle as Luftwaffe chief by planning an air offensive which proved unnecessary, and his rôle as politician by lulling the Czechs with false promises of friendship. The night before the invasion of Czechoslovakia and the absorption of Bohemia and Moravia, at a conference with Hitler and President Hacha he threatened to bomb Prague if Hacha did not submit. This threat he admitted in his testimony.

Göring attended the Reich Chancellery meeting of 23 May 1939 when Hitler told his military leaders "there is, therefore, no question of sparing Poland," and was present at the Obersalzberg briefing of 22 August 1939. And the evidence shows that he was active in the diplomatic maneuvers which followed. With Hitler's connivance, he used the Swedish businessman, Dahlerus, as a go-between to the British, as described by Dahlerus to this Tribunal, to try to prevent the British Government from keeping its guarantee to the Poles.

He commanded the Luftwaffe in the attack on Poland and throughout the aggressive wars which followed.

Even if he opposed Hitler's plans against Norway and the Soviet Union, as he alleged, it is clear that he did so only for strategic reasons; once Hitler had decided the issue, he followed him without hesitation. He made it clear in his testimony that these differences were never ideological or legal. He was "in a rage" about the invasion of Norway, but only because he had not received sufficient warning to prepare the Luftwaffe offensive. He admitted he approved of the attack: "My attitude was perfectly positive." He was active in preparing and executing the Yugoslavian and Greek campaigns, and testified that "Plan Marita," the attack on Greece, had been prepared long beforehand. The Soviet Union he regarded as the "most threatening menace to Germany," but said there was no immediate military necessity for the attack. Indeed, his only objection to the war of aggression against the U.S.S.R. was its timing; he wished for strategic reasons to delay until Britain was conquered. He testified: "My point of view was decided by political and military reasons only."

After his own admissions to this Tribunal, from the positions which he held, the conferences he attended, and the public words he uttered, there can remain no doubt that Göring was the moving force for aggressive war, second only to Hitler. He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued.

War Crimes and Crimes against Humanity

The record is filled with Göring's admissions of his complicity in the use of slave labor.

"We did use this labor for security reasons so that they would not be active in their own country and would not work against us. On the other hand, they served to help in the economic war."

And again:

"Workers were forced to come to the Reich. That is something I have not denied."

The man who spoke these words was Plenipotentiary for the Four Year Plan charged with the recruitment and allocation of manpower. As Luftwaffe Commander-in-Chief he demanded from Himmler more slave laborers for his underground aircraft factories: "That I requested inmates of concentration camps for the armament of the Luftwaffe is correct and it is to be taken as a matter of course."

As Plenipotentiary, Göring signed a directive concerning the treatment of Polish workers in Germany and implemented it by regulation of the SD, including "special treatment." He issued directives to use Soviet and French prisoners of war in the armament industry; he spoke of seizing Poles and Dutch and making them prisoners of war if necessary, and using them for work. He agrees Russian prisoners of war were used to man anti-aircraft batteries.

As Plenipotentiary, Göring was the active authority in the spoliation of conquered territory. He made plans for the spoliation of Soviet territory long before the war on the Soviet Union. Two months prior to the invasion of the Soviet Union, Hitler gave Göring the over-all direction for the economic administration in the territory. Göring set up an economic staff for this function. As Reichsmarshal of the Greater German Reich, "the orders of the Reich Marshal cover all economic fields, including nutrition and agriculture." His so-called "Green" folder, printed by the Wehrmacht, set up an "Economic Executive Staff, East." This directive contemplated plundering and abandonment of all industry in the food deficit regions and, from the food surplus regions, a diversion of food to German needs. Göring claims its purposes have been misunderstood but admits "that as a matter of course and a matter of duty we would have used Russia for our purposes," when conquered.

And he participated in the conference of 16 July 1941 when Hitler said the National Socialists had no intention of ever leaving the occupied countries, and that "all necessary measures—shooting, desettling, etc.," should be taken.

Göring persecuted the Jews, particularly after the November 1938 riots, and not only in Germany where he raised the billion-mark fine as stated elsewhere, but in the conquered territories as well. His own utterances then and his testimony now shows this interest was primarily economic—how to get their property and how to force them out of the economic life of Europe. As these countries fell before the German Army, he extended the

Reich's anti-Jewish laws to them; the *Reichsgesetzblatt* for 1939, 1940, and 1941 contains several anti-Jewish decrees signed by Göring. Although their extermination was in Himmler's hands, Göring was far from disinterested or inactive, despite his protestations in the witness box. By decree of 31 July 1941 he directed Himmler and Heydrich to "bring about a complete solution of the Jewish question in the German sphere of influence in Europe."

There is nothing to be said in mitigation. For Göring was often, indeed almost always, the moving force, second only to his leader. He was the leading war aggressor, both as political and as military leader; he was the director of the slave labor program and the creator of the oppressive program against the Jews and other races, at home and abroad. All of these crimes he has frankly admitted. On some specific cases there may be conflict of testimony but in terms of the broad outline, his own admissions are more than sufficiently wide to be conclusive of his guilt. His guilt is unique in its enormity. The record discloses no excuses for this man.

Conclusion

The Tribunal finds the Defendant Göring guilty on all four Counts of the Indictment.

Hess

Hess is indicted under all four Counts. He joined the Nazi Party in 1920 and participated in the Munich Putsch on 9 November 1923. He was imprisoned with Hitler in the Landsberg fortress in 1924 and became Hitler's closest personal confidant, a relationship which lasted until Hess' flight to the British Isles. On 21 April 1933 he was appointed Deputy to the Führer, and on 1 December 1933 was made Reichsminister without Portfolio. He was appointed member of the Secret Cabinet Council on 4 February 1938, and a member of the Ministerial Council for the Defense of the Reich on 30 August 1939. In September 1939 Hess was officially announced by Hitler as successor designate to the Führer after Göring. On 10 May 1941 he flew from Germany to Scotland.

Crimes against Peace

As deputy to the Führer, Hess was the top man in the Nazi Party with responsibility for handling all Party matters, and authority to make decisions in Hitler's name on all questions of Party leadership. As Reich Minister without Portfolio he had the authority to approve all legislation suggested by the different Reichs Ministers before it could be enacted as law. In these positions, Hess was an active supporter of preparations for war. His signature appears on the law of 16 March 1935 establishing com-

pulsory military service. Throughout the years he supported Hitler's policy of vigorous rearmament in many speeches. He told the people that they must sacrifice for armaments, repeating the phrase, "Guns instead of butter." It is true that between 1933 and 1937 Hess made speeches in which he expressed a desire for peace and advocated international economic coöperation. But nothing which they contained can alter the fact that of all the defendants none knew better than Hess how determined Hitler was to realize his ambitions, how fanatical and violent a man he was, and how little likely he was to refrain from resort to force, if this was the only way in which he could achieve his aims.

Hess was an informed and willing participant in German aggression against Austria, Czechoslovakia, and Poland. He was in touch with the illegal Nazi Party in Austria throughout the entire period between the murder of Dollfuss, and the Anschluss, and gave instructions to it during that period. Hess was in Vienna on 12 March 1938 when the German troops moved in; and on 13 March 1938 he signed the law for the reunion of Austria within the German Reich. A law of 10 June 1939 provided for his participation in the administration of Austria. On 24 July 1938 he made a speech in commemoration of the unsuccessful putsch by Austrian National Socialists which had been attempted four years before, praising the steps leading up to Anschluss and defending the occupation of Austria by Germany.

In the summer of 1938 Hess was in active touch with Henlein, Chief of the Sudeten German Party in Czechoslovakia. On 27 September 1938, at the time of the Munich crisis, he arranged with Keitel to carry out the instructions of Hitler to make the machinery of the Nazi Party available for a secret mobilization. On 14 April 1939 Hess signed a decree setting up the Government of the Sudetenland as an integral part of the Reich; and an ordinance of 10 June 1939 provided for his participation in the administration of the Sudetenland. On 7 November 1938 Hess absorbed Henlein's Sudeten German Party into the Nazi Party, and made a speech in which he emphasized that Hitler had been prepared to resort to war if this had been necessary to acquire the Sudetenland.

On 27 August 1939 when the attack on Poland had been temporarily postponed in an attempt to induce Great Britain to abandon its guarantee to Poland, Hess publicly praised Hitler's "magnanimous offer" to Poland, and attacked Poland for agitating for war and England for being responsible for Poland's attitude. After the invasion of Poland Hess signed decrees incorporating Danzig and certain Polish territories into the Reich, and setting up the General Government (Poland).

These specific steps which this defendant took in support of Hitler's plans for aggressive action do not indicate the full extent of his responsibility. Until his flight to England, Hess was Hitler's closest personal confidant. Their relationship was such that Hess must have been informed of Hitler's

aggressive plans when they came into existence. And he took action to carry out these plans whenever action was necessary.

With him on his flight to England, Hess carried certain peace proposals which he alleged Hitler was prepared to accept. It is significant to note that this flight took place only 10 days after the date on which Hitler fixed, 22 June 1941, as the time for attacking the Soviet Union. In conversations carried on after his arrival in England Hess wholeheartedly supported all Germany's aggressive actions up to that time, and attempted to justify Germany's action in connection with Austria, Czechoslovakia, Poland, Norway, Denmark, Belgium, and the Netherlands. He blamed England and France for the war.

War Crimes and Crimes against Humanity

There is evidence showing the participation of the Party Chancellery, under Hess, in the distribution of orders connected with the commission of War Crimes; that Hess may have had knowledge of, even if he did not participate in, the crimes that were being committed in the East, and proposed laws discriminating against Jews and Poles; and that he signed decrees forcing certain groups of Poles to accept German citizenship. The Tribunal, however, does not find that the evidence sufficiently connects Hess with those crimes to sustain a finding of guilt.

As previously indicated the Tribunal found, after a full medical examination and report on the condition of this defendant, that he should be tried, without any postponement of his case. Since that time further motions have been made that he should again be examined. These the Tribunal denied, after having had a report from the prison psychologist. That Hess acts in an abnormal manner, suffers from loss of memory, and has mentally deteriorated during this Trial, may be true. But there is nothing to show that he does not realize the nature of the charges against him, or is incapable of defending himself. He was ably represented at the Trial by counsel, appointed for that purpose by the Tribunal. There is no suggestion that Hess was not completely sane when the acts charged against him were committed.

Conclusion

The Tribunal finds the Defendant Hess guilty on Counts One and Two; and not guilty on Counts Three and Four.

VON RIBBENTROP

Von Ribbentrop is indicted under all four Counts. He joined the Nazi Party in 1932. By 1933 he had been made Foreign Policy Adviser to Hitler, and in the same year the representative of the Nazi Party on foreign policy. In 1934 he was appointed Delegate for Disarmament Questions,

and in 1935 Minister Plenipotentiary at Large, a capacity in which he negotiated the Anglo-German Naval Agreement in 1935 and the Anti-Comintern Pact in 1936. On 11 August 1936 he was appointed Ambassador to England. On 4 February 1938 he succeeded Von Neurath as Reichsminister for Foreign Affairs as part of the general reshuffle which accompanied the dismissal of Von Fritsch and Von Blomberg.

Crimes against Peace

Von Ribbentrop was not present at the Hossbach Conference held on 5 November 1937, but on 2 January 1938, while still Ambassador to England, he sent a memorandum to Hitler indicating his opinion that a change in the *status quo* in the East in the German sense could only be carried out by force and suggesting methods to prevent England and France from intervening in a European war fought to bring about such a change. When Von Ribbentrop became Foreign Minister Hitler told him that Germany still had four problems to solve, Austria, Sudetenland, Memel, and Danzig, and mentioned the possibility of "some sort of a show-down" or "military settlement" for their solution.

On 12 February 1938 Von Ribbentrop attended the conference between Hitler and Schuschnigg at which Hitler, by threats of invasion, forced Schuschnigg to grant a series of concessions designed to strengthen the Nazis in Austria, including the appointment of Seyss-Inquart as Minister of Security and Interior, with control over the police. Von Ribbentrop was in London when the occupation of Austria was actually carried out and, on the basis of information supplied him by Göring, informed the British Government that Germany had not presented Austria with an ultimatum, but had intervened in Austria only to prevent civil war. On 13 March 1938 Von Ribbentrop signed the law incorporating Austria into the German Reich.

Von Ribbentrop participated in the aggressive plans against Czechoslovakia. Beginning in March 1938, he was in close touch with the Sudeten Germany Party and gave them instructions which had the effect of keeping the Sudeten German question a live issue which might serve as an excuse for the attack which Germany was planning against Czechoslovakia. In August 1938 he participated in a conference for the purpose of obtaining Hungarian support in the event of a war with Czechoslovakia. After the Munich Pact he continued to bring diplomatic pressure with the object of occupying the remainder of Czechoslovakia. He was instrumental in inducing the Slovaks to proclaim their independence. He was present at the conference of 14-15 March 1939 at which Hitler, by threats of invasion, compelled President Hacha to consent to the German occupation of Czechoslovakia. After the German troops had marched in, Von Ribbentrop signed the law establishing a protectorate over Bohemia and Moravia.

Von Ribbentrop played a particularly significant role in the diplomatic activity which led up to the attack on Poland. He participated in a conference held on 12 August 1939, for the purpose of obtaining Italian support if the attack should lead to a general European war. Von Ribbentrop discussed the German demands with respect to Danzig and the Polish Corridor with the British Ambassador in the period from 25 August to 30 August 1939, when he knew that the German plans to attack Poland had merely been temporarily postponed in an attempt to induce the British to abandon their guarantee to the Poles. The way in which he carried out these discussions makes it clear that he did not enter them in good faith in an attempt to reach a settlement of the difficulties between Germany and Poland.

Von Ribbentrop was advised in advance of the attack on Norway and Denmark and of the attack on the Low Countries, and prepared the official Foreign Office memoranda attempting to justify these aggressive actions.

Von Ribbentrop attended the conference on 20 January 1941, at which Hitler and Mussolini discussed the proposed attack on Greece, and the conference in January 1941, at which Hitler obtained from Antonescu permission for German troops to go through Rumania for this attack. On 25 March 1941, when Yugoslavia adhered to the Axis Tri-partite Pact, Von Ribbentrop had assured Yugoslavia that Germany would respect its sovereignty and territorial integrity. On 27 March 1941 he attended the meeting, held after the *coup d'état* in Yugoslavia, at which plans were made to carry out Hitler's announced intention to destroy Yugoslavia.

Von Ribbentrop attended a conference in May 1941 with Hitler and Antonescu relating to Rumanian participation in the attack on the U.S.S.R. He also consulted with Rosenberg in the preliminary planning for the political exploitation of Soviet territories and in July 1941, after the outbreak of war, urged Japan to attack the Soviet Union.

War Crimes and Crimes against Humanity

Von Ribbentrop participated in a meeting of 6 June 1944, at which it was agreed to start a program under which Allied aviators carrying out machine gun attacks on the civilian population should be lynched. In December 1944 Von Ribbentrop was informed of the plans to murder one of the French generals held as a prisoner of war and directed his subordinates to see that the details were worked out in such a way as to prevent its detection by the protecting powers. Von Ribbentrop is also responsible for War Crimes and Crimes against Humanity because of his activities with respect to occupied countries and Axis satellites. The top German official in both Denmark and Vichy France was a Foreign Office representative, and Von Ribbentrop is therefore responsible for the general economic and political policies put into effect in the occupation of those countries. He urged the Italians to adopt a ruthless occupation policy in Yugoslavia and Greece.

He played an important part in Hitler's "final solution" of the Jewish question. In September 1942 he ordered the German diplomatic representatives accredited to various Axis satellites to hasten the deportation of Jews to the East. In June 1942 the German Ambassador to Vichy requested Laval to turn over 50,000 Jews for deportation to the East. On 25 February 1943 Von Ribbentrop protested to Mussolini against Italian slowness in deporting Jews from the Italian occupation zone of France. On 17 April 1943 he took part in a conference between Hitler and Horthy on the deportation of Jews from Hungary and informed Horthy that the "Jews must either be exterminated or taken to concentration camps." At the same conference Hitler had likened the Jews to "tuberculosis bacilli" and said if they did not work they were to be shot.

Von Ribbentrop's defense to the charges made against him is that Hitler made all the important decisions and that he was such a great admirer and faithful follower of Hitler that he never questioned Hitler's repeated assertions that he wanted peace or the truth of the reasons that Hitler gave in explaining aggressive action. The Tribunal does not consider this explanation to be true. Von Ribbentrop participated in all of the Nazi aggressions from the occupation of Austria to the invasion of the Soviet Union. Although he was personally concerned with the diplomatic rather than the military aspect of these actions, his diplomatic efforts were so closely connected with war that he could not have remained unaware of the aggressive nature of Hitler's actions. In the administration of territories over which Germany acquired control by illegal invasion Von Ribbentrop also assisted in carrying out criminal policies, particularly those involving the extermination of the Jews. There is abundant evidence, moreover, that Von Ribbentrop was in complete sympathy with all the main tenets of the National Socialist creed, and that his collaboration with Hitler and with other defendants in the commission of Crimes against Peace, War Crimes, and Crimes against Humanity was whole-hearted. It was because Hitler's policy and plans coincided with his own ideas that Von Ribbentrop served him so willingly to the end.

Conclusion

The Tribunal finds that Von Ribbentrop is guilty on all four Counts.

KEITEL

Keitel is indicted on all four Counts. He was Chief of Staff to the then Minister of War Von Blomberg from 1935 to 4 February 1938; on that day Hitler took command of the Armed Forces, making Keitel Chief of the High Command of the Armed Forces. Keitel did not have command authority over the three Wehrmacht branches which enjoyed direct access to the Supreme Commander. OKW was in effect Hitler's military staff.

Crimes against Peace

Keitel attended the Schuschnigg conference in February 1938 with two other generals. Their presence, he admitted, was a "military demonstration," but since he had been appointed OKW Chief just one week before he had not known why he had been summoned. Hitler and Keitel then continued to put pressure on Austria with false rumors, broadcasts, and troop maneuvers. Keitel made the military and other arrangements, and Jodl's diary noted "the effect is quick and strong." When Schuschnigg called his plebiscite, Keitel that night briefed Hitler and his generals, and Hitler issued "Case Otto" which Keitel initialed.

On 21 April 1938 Hitler and Keitel considered making use of a possible "incident," such as the assassination of the German Minister at Prague, to preface the attack on Czechoslovakia. Keitel signed many directives and memoranda on "Fall Gruen," including the directive of 30 May containing Hitler's statement: "It is my unalterable decision to smash Czechoslovakia by military action in the near future." After Munich, Keitel initialed Hitler's directive for the attack on Czechoslovakia, and issued two supplements. The second supplement said the attack should appear to the outside world as "merely an act of pacification and not a warlike undertaking." The OKW Chief attended Hitler's negotiations with Hacha when the latter surrendered.

Keitel was present on 23 May 1939 when Hitler announced his decision "to attack Poland at the first suitable opportunity." Already he had signed the directive requiring the Wehrmacht to submit its "Fall Weiss" timetable to OKW by 1 May.

The invasion of Norway and Denmark he discussed on 12 December 1939 with Hitler, Jodl, and Raeder. By directive of 27 January 1940 the Norway plans were placed under Keitel's "direct and personal guidance." Hitler had said on 23 May 1939 he would ignore the neutrality of Belgium and the Netherlands, and Keitel signed orders for these attacks on 15 October, 20 November, and 28 November 1939. Orders postponing this attack 17 times until spring all were signed by Keitel or Jodl.

Formal planning for attacking Greece and Yugoslavia had begun in November 1940. On 18 March 1941 Keitel heard Hitler tell Raeder complete occupation of Greece was a prerequisite to settlement, and also heard Hitler decree on 27 March that the destruction of Yugoslavia should take place with "unmerciful harshness."

Keitel testified that he opposed the invasion of the Soviet Union for military reasons, and also because it would constitute a violation of the Non-aggression Pact. Nevertheless he initialed "Case Barbarossa," signed by Hitler on 18 December 1940, and attended the OKW discussion with Hitler on 3 February 1941. Keitel's supplement of 13 March established the relationship between the military and political officers. He issued his timetable

for the invasion on 6 June 1941, and was present at the briefing of 14 June when the generals gave their final reports before attack. He appointed Jodl and Warlimont as OKW representatives to Rosenberg on matters concerning the Eastern Territories. On 16 June he directed all army units to carry out the economic directives issued by Göring in the so-called "Green Folder," for the exploitation of Russian territory, food, and raw materials.

War Crimes and Crimes against Humanity

On 4 August 1942 Keitel issued a directive that paratroopers were to be turned over to the SD. On 18 October Hitler issued the Commando Order which was carried out in several instances. After the landing in Normandy, Keitel reaffirmed the order, and later extended it to Allied missions fighting with partisans. He admits he did not believe the order was legal but claims he could not stop Hitler from decreeing it.

When, on 8 September 1941, OKW issued its ruthless regulations for the treatment of Soviet POW'S, Canaris wrote to Keitel that under international law the SD should have nothing to do with this matter. On this memorandum in Keitel's handwriting, dated 23 September and initialed by him, is the statement:

"The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures."

Keitel testified that he really agreed with Canaris and argued with Hitler, but lost. The OKW Chief directed the military authorities to cooperate with the Einsatzstab Rosenberg in looting cultural property in occupied territories.

Lahousen testified that Keitel told him on 12 September 1939, while aboard Hitler's headquarters train, that the Polish intelligentsia, nobility, and Jews were to be liquidated. On 20 October, Hitler told Keitel the intelligentsia would be prevented from forming a ruling class, the standard of living would remain low, and Poland would be used only for labor forces. Keitel does not remember the Lahousen conversation, but admits there was such a policy and that he had protested without effect to Hitler about it.

On 16 September 1941 Keitel ordered that attacks on soldiers in the East should be met by putting to death 50 to 100 Communists for one German soldier, with the comment that human life was less than nothing in the East. On 1 October he ordered military commanders always to have hostages to execute when soldiers were attacked. When Terboven, the Reich Commissioner in Norway, wrote Hitler that Keitel's suggestion that workmen's relatives be held responsible for sabotage, could work only if firing squads were authorized, Keitel wrote on this memorandum: "Yes, that is the best."

On 12 May 1941, five weeks before the invasion of the Soviet Union, OKW urged upon Hitler a directive of OKH that political commissars be liqui-

dated by the Army, Keitel admitted the directive was passed on to field commanders. And on 13 May Keitel signed an order that civilians suspected of offenses against troops should be shot without trial, and that prosecution of German soldiers for offenses against civilians was unnecessary. On 27 July all copies of this directive were ordered destroyed without affecting its validity. Four days previously he had signed another order that legal punishment was inadequate and troops should use terrorism.

On 7 December 1941, as already discussed in this opinion, the so-called "Nacht und Nebel" Decree, over Keitel's signature, provided that in occupied territories civilians who had been accused of crimes of resistance against the army of occupation would be tried only if a death sentence was likely; otherwise they would be handed to the Gestapo for transportation to Germany.

Keitel directed that Russian POW's be used in German war industry. On 8 September 1942 he ordered French, Dutch, and Belgian citizens to work on the construction of the Atlantic Wall. He was present on 4 January 1944 when Hitler directed Sauckel to obtain 4 million new workers from occupied territories.

In the face of these documents Keitel does not deny his connection with these acts. Rather, his defense relies on the fact that he is a soldier, and on the doctrine of "superior orders," prohibited by Article 8 of the Charter as a defense.

There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.

Conclusion

The Tribunal finds Keitel guilty on all four Counts.

KALTENBRUNNER

Kaltenbrunner is indicted under Counts One, Three, and Four. He joined the Austrian Nazi Party and the SS in 1932. In 1935 he became leader of the SS in Austria. After the Anschluss he was appointed Austrian State Secretary for Security and when this position was abolished in 1941 he was made Higher SS and Police Leader. On 30 January 1943 he was appointed Chief of the Security Police and SD and Head of the Reich Security Head Office (RSHA), a position which had been held by Heydrich until his assassination in June 1942. He held the rank of Obergruppenführer in the SS.

Crimes against Peace

As leader of the SS in Austria Kaltenbrunner was active in the Nazi intrigue against the Schuschnigg Government. On the night of 11 March

1938, after Göring had ordered Austrian National Socialists to seize control of the Austrian Government, 500 Austrian SS men under Kaltenbrunner's command surrounded the Federal Chancellery and a special detachment under the command of his adjutant entered the Federal Chancellery while Seyss-Inquart was negotiating with President Miklas. But there is no evidence connecting Kaltenbrunner with plans to wage aggressive war on any other front. The Anschluss, although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner under Count One does not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war.

War Crimes and Crimes against Humanity

When he became Chief of the Security Police and SD and Head of the RSHA on 30 January 1943, Kaltenbrunner took charge of an organization which included the main offices of the Gestapo, the SD, and the Criminal Police. As Chief of the RSHA, Kaltenbrunner had authority to order protective custody to and release from concentration camps. Orders to this effect were normally sent over his signature. Kaltenbrunner was aware of conditions in concentration camps. He had undoubtedly visited Mauthausen and witnesses testified that he had seen prisoners killed by the various methods of execution, hanging, shooting in the back of the neck, and gassing, as part of a demonstration. Kaltenbrunner himself ordered the execution of prisoners in those camps and his office was used to transmit to the camps execution orders which originated in Himmler's office. At the end of the war Kaltenbrunner participated in the arrangements for the evacuation of inmates of concentration camps, and the liquidation of many of them, to prevent them from being liberated by the Allied armies.

During the period in which Kaltenbrunner was Head of the RSHA, it was engaged in a widespread program of War Crimes and Crimes against Humanity. These crimes included the mistreatment and murder of prisoners of war. Einsatz Kommandos operating under the control of the Gestapo were engaged in screening of Soviet prisoners of war. Jews, commissars, and others who were thought to be ideologically hostile to the Nazi system were reported to the RSHA, which had them transferred to a concentration camp and murdered. An RSHA order issued during Kaltenbrunner's regime established the "Bullet Decree," under which certain escaped prisoners of war who were recaptured were taken to Mauthausen and shot. The order for the execution of commando troops was extended by the Gestapo to include parachutists while Kaltenbrunner was Chief of the RSHA. An order signed by Kaltenbrunner instructed the police not to interfere with attacks on bailed-out Allied fliers. In December 1944 Kaltenbrunner participated in the murder of one of the French generals held as a prisoner of war.

During the period in which Kaltenbrunner was head of the RSHA, the Gestapo and SD in occupied territories continued the murder and ill-treatment of the population, using methods which included torture and confinement in concentration camps, usually under orders to which Kaltenbrunner's name was signed.

The Gestapo was responsible for enforcing a rigid labor discipline on the slave laborers and Kaltenbrunner established a series of labor reformatory camps for this purpose. When the SS embarked on a slave labor program of its own, the Gestapo was used to obtain the needed workers by sending laborers to concentration camps.

The RSHA played a leading part in the "final solution" of the Jewish question by the extermination of the Jews. A special section under the Amt IV of the RSHA was established to supervise this program. Under its direction approximately 6 million Jews were murdered, of which 2 million were killed by Einsatzgruppen and other units of the Security Police. Kaltenbrunner had been informed of the activities of these Einsatzgruppen when he was a Higher SS and Police Leader, and they continued to function after he had become Chief of the RSHA.

The murder of approximately 4 million Jews in concentration camps has heretofore been described. This part of the program was also under the supervision of the RSHA when Kaltenbrunner was head of that organization, and special missions of the RSHA scoured the occupied territories and the various Axis satellites arranging for the deportation of Jews to these extermination institutions. Kaltenbrunner was informed of these activities. A letter which he wrote on 30 June 1944 described the shipment to Vienna of 12,000 Jews for that purpose, and directed that all who could not work would have to be kept in readiness for "special action," which meant murder. Kaltenbrunner denied his signature to this letter, as he did on a very large number of orders on which his name was stamped or typed, and, in a few instances, written. It is inconceivable that in matters of such importance his signature could have appeared so many times without his authority.

Kaltenbrunner has claimed that when he took office as Chief of the Security Police and SD and as Head of the RSHA he did so pursuant to an understanding with Himmler under which he was to confine his activities to matters involving foreign intelligence, and not to assume over-all control over the activities of the RSHA. He claims that the criminal program had been started before his assumption of office; that he seldom knew what was going on; and that when he was informed he did what he could to stop them. It is true that he showed a special interest in matters involving foreign intelligence. But he exercised control over the activities of the RSHA, was aware of the crimes it was committing, and was an active participant in many of them.

Conclusion

The Tribunal finds that Kaltenbrunner is not guilty on Count One. He is guilty under Counts Three and Four.

ROSENBERG

Rosenberg is indicted on all four Counts. He joined the Nazi Party in 1919, participated in the Munich Putsch of 9 November 1923, and tried to keep the illegal Nazi Party together while Hitler was in jail. Recognized as the Party's ideologist, he developed and spread Nazi doctrines in the newspapers *Völkischer Beobachter* and *NS Monatshefte*, which he edited, and in numerous books he wrote. His book, *Myth of the Twentieth Century*, had a circulation of over a million copies.

In 1930 Rosenberg was elected to the Reichstag and he became the Party's representative for Foreign Affairs. In April 1933 he was made Reichsleiter and head of the Office of Foreign Affairs of the NSDAP (the APA). Hitler, in January 1934, appointed Rosenberg his deputy for the supervision of the entire spiritual and ideological training of the NSDAP. In January 1940, he was designated to set up the "Hohe Schule," the Center of National Socialistic Ideological and Educational Research, and he organized the "Einsatzstab Rosenberg" in connection with this task. He was appointed Reich Minister for the Occupied Eastern Territories on 17 July 1941.

Crimes against Peace

As head of the APA, Rosenberg was in charge of an organization whose agents were active in Nazi intrigue in all parts of the world. His own reports, for example, claim that the APA was largely responsible for Rumania's joining the Axis. As head of the APA, he played an important rôle in the preparation and planning of the attack on Norway.

Rosenberg, together with Raeder, was one of the originators of the plan for attacking Norway. Rosenberg had become interested in Norway as early as June 1939, when he conferred with Quisling. Quisling had pointed out the importance of the Norwegian coast in the event of a conflict between Germany and Great Britain, and stated his fears that Great Britain might be able to obtain Norwegian assistance. As a result of this conference Rosenberg arranged for Quisling to collaborate closely with the National Socialists and to receive political assistance by the Nazis.

When the war broke out Quisling began to express fear of British intervention in Norway. Rosenberg supported this view, and transmitted to Raeder a plan to use Quisling for a *coup* in Norway. Rosenberg was instrumental in arranging the conferences in December 1939 between Hitler and Quisling which led to the preparation of the attack on Norway, and

at which Hitler promised Quisling financial assistance. After these conferences Hitler assigned to Rosenberg the political exploitation of Norway. Two weeks after Norway was occupied, Hitler told Rosenberg that he had based his decision to attack Norway "on the continuous warnings of Quisling as reported to him by Reichsleiter Rosenberg."

Rosenberg bears a major responsibility for the formulation and execution of occupation policies in the Occupied Eastern Territories. He was informed by Hitler on 2 April 1941 of the coming attack against the Soviet Union, and he agreed to help in the capacity of a "Political Adviser." On 20 April 1941 he was appointed Commissioner for the Central Control of Questions Connected with the East-European Region. In preparing the plans for the occupation, he had numerous conferences with Keitel, Raeder, Göring, Funk, Von Ribbentrop, and other high Reich authorities. In April and May 1941 he prepared several drafts of instructions concerning the setting up of the administration in the Occupied Eastern Territories. On 20 June 1941, two days before the attack on the U.S.S.R., he made a speech to his assistants about the problems and policies of occupation. Rosenberg attended Hitler's conference of 16 July 1941, in which policies of administration and occupation were discussed. On 17 July 1941 Hitler appointed Rosenberg Reich Minister for the Occupied Eastern Territories, and publicly charged him with responsibility for civil administration.

War Crimes and Crimes against Humanity

Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January 1940 to set up the "Hohe Schule," he organized and directed the "Einsatzstab Rosenberg," which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own reports show the extent of the confiscations. In "Action-M" (Möbel), instituted in December 1941 at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of 14 July 1944, more than 21,903 art objects including famous paintings and museum pieces, had been seized by the Einsatzstab in the West.

With his appointment as Reich Minister for Occupied Eastern Territories on 17 July 1941, Rosenberg became the supreme authority for those areas. He helped to formulate the policies of Germanization, exploitation, forced labor, extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out. He took part in the conference of 16 July 1941, in which Hitler stated that they were faced with the task of "cutting up the giant cake according to our needs, in order to

be able: first, to dominate it; second, to administer it; and third, to exploit it," and indicated that ruthless action was contemplated. Rosenberg accepted his appointment on the following day.

Rosenberg had knowledge of the brutal treatment and terror to which the Eastern people were subjected. He directed that the Hague Rules of Land Warfare were not applicable in the Occupied Eastern Territories. He had knowledge of and took an active part in stripping the Eastern Territories of raw materials and foodstuffs, which were all sent to Germany. He stated that feeding the German People was first on the list of claims on the East, and that the Soviet People would suffer thereby. His directives provided for the segregation of Jews, ultimately in ghettos. His subordinates engaged in mass killings of Jews, and his civil administrators in the East considered that cleansing the Eastern Occupied Territories of Jews was necessary. In December 1941 he made the suggestion to Hitler that in a case of shooting 100 hostages, Jews only be used. Rosenberg had knowledge of the deportation of laborers from the East, of the methods of "recruiting" and the transportation horrors, and of the treatment Eastern laborers received in the Reich. He gave his civil administrators quotas of laborers to be sent to the Reich, which had to be met by whatever means necessary. His signature of approval appears on the order of 14 June 1944 for the "Heu Aktion," the apprehension of 40,000 to 50,000 youths, aged 10-14, for shipment to the Reich.

Upon occasion Rosenberg objected to the excesses and atrocities committed by his subordinates, notably in the case of Koch, but these excesses continued and he stayed in office until the end.

Conclusion

The Tribunal finds that Rosenberg is guilty on all four Counts.

FRANK

Frank is indicted under Counts One, Three, and Four. Frank joined the Nazi Party in 1927. He became a member of the Reichstag in 1930, the Bavarian State Minister of Justice in March 1933, and when this position was incorporated into the Reich Government in 1934, Reich Minister without Portfolio. He was made a Reichsleiter of the Nazi Party in charge of Legal Affairs in 1933, and in the same year President of the Academy of German Law. Frank was also given the honorary rank of Obergruppenführer in the SA. In 1942 Frank became involved in a temporary dispute with Himmler as to the type of legal system which should be in effect in Germany. During the same year he was dismissed as Reichsleiter of the Nazi Party and as President of the Academy of German Law.

Crimes against Peace

The evidence has not satisfied the Tribunal that Frank was sufficiently connected with the common plan to wage aggressive war to allow the Tribunal to convict him on Count One.

War Crimes and Crimes against Humanity

Frank was appointed Chief Civil Administration Officer for occupied Polish territory and, on 12 October 1939, was made Governor General of the occupied Polish territory. On 3 October 1939 he described the policy which he intended to put into effect by stating: "Poland shall be treated like a colony; the Poles will become the slaves of the Greater German World Empire." The evidence establishes that this occupation policy was based on the complete destruction of Poland as a national entity, and a ruthless exploitation of its human and economic resources for the German war effort. All opposition was crushed with the utmost harshness. A reign of terror was instituted, backed by summary police courts which ordered such actions as the public shootings of groups of 20 to 200 Poles, and the widespread shootings of hostages. The concentration camp system was introduced in the General Government by the establishment of the notorious Treblinka and Maidanek camps. As early as 6 February 1940, Frank gave an indication of the extent of this reign of terror by his cynical comment to a newspaper reporter on Von Neurath's poster announcing the execution of the Czech students: "If I wished to order that one should hang up posters about every seven Poles shot, there would not be enough forests in Poland with which to make the paper for these posters." On 30 May 1940 Frank told a police conference that he was taking advantage of the offensive in the West which diverted the attention of the world from Poland to liquidate thousands of Poles who would be likely to resist German domination of Poland, including "the leading representatives of the Polish intelligentsia." Pursuant to these instructions the brutal A.B. action was begun under which the Security Police and SD carried out these exterminations which were only partially subjected to the restraints of legal procedure. On 2 October 1943 Frank issued a decree under which any non-Germans hindering German construction in the General Government were to be tried by summary courts of the Security Police and SD and sentenced to death.

The economic demands made on the General Government were far in excess of the needs of the army of occupation, and were out of all proportion to the resources of the country. The food raised in Poland was shipped to Germany on such a wide scale that the rations of the population of the occupied territories were reduced to the starvation level, and epidemics were widespread. Some steps were taken to provide for the feeding of the agricultural workers who were used to raise the crops, but the requirements of the rest of the population were disregarded. It is undoubtedly

true, as argued by counsel for the Defense, that some suffering in the General Government was inevitable as a result of the ravages of war and the economic confusion resulting therefrom. But the suffering was increased by a planned policy of economic exploitation.

Frank introduced the deportation of slave laborers to Germany in the very early stages of his administration. On 25 January 1940 he indicated his intention of deporting 1 million laborers to Germany, suggesting on 10 May 1940 the use of police raids to meet this quota. On 18 August 1942 Frank reported that he had already supplied 800,000 workers for the Reich, and expected to be able to supply 140,000 more before the end of the year.

The persecution of the Jews was immediately begun in the General Government. The area originally contained from 2½ million to 3½ million Jews. They were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated. On 16 December 1941 Frank told the Cabinet of the Governor General: "We must annihilate the Jews, wherever we find them and wherever it is possible, in order to maintain there the structure of the Reich as a whole." By 25 January 1944, Frank estimated that there were only 100,000 Jews left.

At the beginning of his testimony, Frank stated that he had a feeling of "terrible guilt" for the atrocities committed in the occupied territories. But his defense was largely devoted to an attempt to prove that he was not in fact responsible; that he ordered only the necessary pacification measures; that the excesses were due to the activities of the police which were not under his control; and that he never even knew of the activities of the concentration camps. It had also been argued that the starvation was due to the aftermath of the war and policies carried out under the Four Year Plan; that the forced labor program was under the direction of Sauckel; and that the extermination of the Jews was by the police and SS under direct orders from Himmler.

It is undoubtedly true that most of the criminal program charged against Frank was put into effect through the police, that Frank had jurisdictional difficulties with Himmler over the control of the police, and that Hitler resolved many of these disputes in favor of Himmler. It therefore may well be true that some of the crimes committed in the General Government were committed without the knowledge of Frank, and even occasionally despite his opposition. It may also be true that some of the criminal policies put into effect in the General Government did not originate with Frank but were carried out pursuant to orders from Germany. But it is also true that Frank was a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people; in the deportation to Germany as slave laborers of over a million Poles; and in a program involving the murder of at least 3 million Jews.

Conclusion

The Tribunal finds that Frank is not guilty on Count One but guilty under Counts Three and Four.

FRICK

Frick is indicted on all four Counts. Recognized as the chief Nazi administrative specialist and bureaucrat, he was appointed Reichsminister of the Interior in Hitler's first Cabinet. He retained this important position until August 1943, when he was appointed Reich Protector of Bohemia and Moravia. In connection with his duties at the center of all internal and domestic administration, he became the Prussian Minister of the Interior, Reich Director of Elections, General Plenipotentiary for the Administration of the Reich, and a member of the Reich Defense Council, the Ministerial Council for Defense of the Reich, and the "Three Man College." As the several countries incorporated into the Reich were overrun, he was placed at the head of the central offices for their incorporation.

Though Frick did not officially join the Nazi Party until 1925, he had previously allied himself with Hitler and the National Socialist cause during the Munich Putsch, while he was an official in the Munich Police Department. Elected to the Reichstag in 1924, he became a Reichsleiter as leader of the National Socialist faction in that body.

Crimes against Peace

An avid Nazi, Frick was largely responsible for bringing the German Nation under the complete control of the NSDAP. After Hitler became Reich Chancellor, the new Minister of the Interior immediately began to incorporate local governments under the sovereignty of the Reich. The numerous laws he drafted, signed, and administered abolished all opposition parties and prepared the way for the Gestapo and their concentration camps to extinguish all individual opposition. He was largely responsible for the legislation which suppressed the trade unions, the church, the Jews. He performed this task with ruthless efficiency.

Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich. The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment.

Six months after the seizure of Austria, under the provisions of the Reich Defense Law of 4 September 1938, Frick became General Plenipotentiary for the Administration of the Reich. He was made responsible for war administration, except the military and economic, in the event of

Hitler's proclaiming a state of defense. The Reich Ministries of Justice, Education, Religion, and the Office of Spatial Planning were made subordinate to him. Performing his allotted duties, Frick devised an administrative organization in accordance with wartime standards. According to his own statement, this was actually put into operation after Germany decided to adopt a policy of war.

Frick signed the law of 13 March 1938 which united Austria with the Reich, and he was made responsible for its accomplishment. In setting up German administration in Austria, he issued decrees which introduced German law, the Nuremberg decrees, the Military Service Law, and he provided for police security by Himmler.

He also signed the laws incorporating into the Reich the Sudetenland, Memel, Danzig, the Eastern territories (West Prussia and Posen), and Eupen, Malmedy, and Moresnot. He was placed in charge of the actual incorporation, and of the establishment of German administration over these territories. He signed the law establishing the Protectorate of Bohemia and Moravia.

As the head of the Central Offices for Bohemia and Moravia, the Government General, and Norway, he was charged with obtaining close coöperation between the German officials in these occupied countries and the supreme authorities of the Reich. He supplied German civil servants for the administrations in all occupied territories, advising Rosenberg as to their assignment in the Occupied Eastern Territories. He signed the laws appointing Terboven Reich Commissioner to Norway and Seyss-Inquart to Holland.

War Crimes and Crimes against Humanity

Always rabidly anti-Semitic, Frick drafted, signed, and administered many laws designed to eliminate Jews from German life and economy. His work formed the basis of the Nuremberg Decrees, and he was active in enforcing them. Responsible for prohibiting Jews from following various professions, and for confiscating their property, he signed a final decree in 1943, after the mass destruction of Jews in the East, which placed them "outside the law" and handed them over to the Gestapo. These laws paved the way for the "final solution," and were extended by Frick to the incorporated territories and to certain of the occupied territories. While he was Reich Protector of Bohemia and Moravia, thousands of Jews were transferred from the Terezin Ghetto in Czechoslovakia to Auschwitz, where they were killed. He issued a decree providing for special penal laws against Jews and Poles in the Government General.

The police officially fell under the jurisdiction of the Reichsminister of the Interior. But Frick actually exercised little control over Himmler and police matters. However, he signed the law appointing Himmler Chief of the German Police, as well as the decrees establishing Gestapo jurisdiction

over concentration camps and regulating the execution of orders for protective custody. From the many complaints he received, and from the testimony of witnesses, the Tribunal concludes that he knew of atrocities committed in these camps. With knowledge of Himmler's methods, Frick signed decrees authorizing him to take necessary security measures in certain of the incorporated territories. What these "security measures" turned out to be has already been dealt with.

As the Supreme Reich Authority in Bohemia and Moravia, Frick bears general responsibility for the acts of oppression in that territory after 20 August 1943, such as terrorism of the population, slave labor, and the deportation of Jews to the concentration camps for extermination. It is true that Frick's duties as Reich Protector were considerably more limited than those of his predecessor, and that he had no legislative and limited personal executive authority in the Protectorate. Nevertheless, Frick knew full well what the Nazi policies of occupation were in Europe, particularly with respect to Jews, at that time, and by accepting the office of Reich Protector he assumed responsibility for carrying out those policies in Bohemia and Moravia.

German citizenship in the occupied countries as well as in the Reich came under his jurisdiction while he was Minister of the Interior. Having created a racial register of persons of German extraction, Frick conferred German citizenship on certain groups of citizens of foreign countries. He is responsible for Germanization in Austria, Sudetenland, Memel, Danzig, Eastern territories (West Prussia and Posen), and Eupen, Malmedy, and Moresnot. He forced on the citizens of these territories, German law, German courts, German education, German police security, and compulsory military service.

During the war nursing homes, hospitals, and asylums in which euthanasia was practiced as described elsewhere in this Judgment, came under Frick's jurisdiction. He had knowledge that insane, sick, and aged people, "useless eaters," were being systematically put to death. Complaints of these murders reached him, but he did nothing to stop them. A report of the Czechoslovak War Crimes Commission estimated that 275,000 mentally deficient and aged people, for whose welfare he was responsible, fell victim to it.

Conclusion

The Tribunal finds that Frick is not guilty on Count One. He is guilty on Counts Two, Three, and Four.

STREICHER

Streicher is indicted on Counts One and Four. One of the earliest members of the Nazi Party, joining in 1921, he took part in the Munich Putsch. From 1925 to 1940 he was Gauleiter of Franconia. Elected to the Reich-

stag in 1933, he was an honorary general in the SA. His persecution of the Jews was notorious. He was the publisher of *Der Stürmer*, an anti-Semitic weekly newspaper, from 1923 to 1945 and was its editor until 1933.

Crimes against Peace

Streicher was a staunch Nazi and supporter of Hitler's main policies. There is no evidence to show that he was every within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders. Although he was a Gauleiter there is no evidence to prove that he had acknowledge of those policies. In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment.

Crimes against Humanity

For his 25 years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as "Jew-Baiter Number One." In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution. Each issue of *Der Stürmer*, which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.

Streicher had charge of the Jewish boycott of 1 April 1933. He advocated the Nuremberg Decrees of 1935. He was responsible for the demolition on 10 August 1938, of the synagogue in Nuremberg. And on 10 November 1938 he spoke publicly in support of the Jewish pogrom which was taking place at that time.

But it was not only in Germany that this defendant advocated his doctrines. As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of *Der Stürmer* between 1938 and 1941 were produced in evidence, in which extermination "root and branch" was preached. Typical of his teachings was a leading article in September 1938 which termed the Jew a germ and a pest, not a human being, but "a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind." Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that 50 years hence the Jewish graves "will proclaim that this people of murderers and criminals has after all met its deserved fate." Streicher, in February 1940, published a letter from one of *Der Stürmer's* readers which compared Jews with swarms of locusts which must be exterminated completely. Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the

National Socialist policy of Jewish persecution and extermination. A leading article of *Der Stürmer* in May 1939 shows clearly his aim:

"A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect: Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch."

As the war in the early stages proved successful in acquiring more and more territory for the Reich, Streicher even intensified his efforts to incite the Germans against the Jews. In the record are 26 articles from *Der Stürmer*, published between August 1941 and September 1944, 12 by Streicher's own hand, which demanded annihilation and extermination in unequivocal terms. He wrote and published on 25 December 1941:

"If the danger of the reproduction of that curse of God in the Jewish blood is finally to come to an end, then there is only one way—the extermination of that people whose father is the devil."

And in February 1944 his own article stated:

"Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate, annihilation, death."

With knowledge of the extermination of the Jews in the Occupied Eastern Territory, this defendant continued to write and publish his propaganda of death. Testifying in this trial, he vehemently denied any knowledge of mass executions of Jews. But the evidence makes it clear that he continually received current information on the progress of the "final solution." His press photographer was sent to visit the ghettos of the East in the spring of 1943, the time of the destruction of the Warsaw ghetto. The Jewish newspaper, *Israelitisches Wochenblatt*, which Streicher received and read, carried in each issue accounts of Jewish atrocities in the East, and gave figures on the number of Jews who had been deported and killed. For example, issues appearing in the summer and fall of 1942 reported the death of 72,729 Jews in Warsaw, 17,542 in Lodz, 18,000 in Croatia, 125,000 in Rumania, 14,000 in Latvia, 85,000 in Yugoslavia, 700,000 in all of Poland. In November 1943 Streicher quoted verbatim an article from the *Israelitisches Wochenblatt* which stated that Jews had virtually disappeared from Europe, and commented "That is not a Jewish lie." In December 1942, referring to an article in the *London Times* about the atrocities, aiming at extermination, Streicher said that Hitler had given warning that the second World War would lead to the destruction of Jewry. In January 1943 he wrote and published an article which said that Hitler's prophecy was being fulfilled, that world Jewry was being extirpated, and that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors.

In the face of the evidence before the Tribunal it is idle for Streicher to suggest that the solution of the Jewish problem which he favored was strictly limited to the classification of Jews as aliens, and the passing of discriminatory legislation such as the Nuremberg Laws, supplemented if possible by international agreement on the creation of a Jewish State somewhere in the world, to which all Jews should emigrate.

Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity.

Conclusion

The Tribunal finds that Streicher is not guilty on Count One, but that he is guilty on Count Four.

FUNK

Funk is indicted under all four Counts. Funk, who had previously been a financial journalist, joined the Nazi Party in 1931, and shortly thereafter became one of Hitler's personal economic advisers. On 30 January 1933 Funk was made Press Chief in the Reich Government, and on 11 March 1933 became Under Secretary in the Ministry of Propaganda and shortly thereafter a leading figure in the various Nazi organizations which were used to control the press, films, music and publishing houses. He took office as Minister of Economics and Plenipotentiary General for War Economy in early 1938 and as President of the Reichsbank in January 1939. He succeeded Schacht in all three of these positions. He was made a member of the Ministerial Council for the Defense of the Reich in August 1939, and a member of the Central Planning Board in September 1943.

Crimes against Peace

Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined. One of his representatives attended a conference on 14 October 1938, at which Göring announced a gigantic increase in armaments and instructed the Ministry of Economics to increase exports to obtain the necessary exchange. On 28 January 1939 one of Funk's subordinates sent a memorandum to the OKW on the use of prisoners of war to make up labor deficiencies which would arise in case of mobilization. On 30 May 1939 the Under Secretary of the Ministry of Economics attended a meeting at which detailed plans were made for the financing of the war.

On 25 August 1939 Funk wrote a letter to Hitler expressing his gratitude that he was able to participate in such world-shaking events; that his plans

for the "financing of the war," for the control of wage and price conditions and for the strengthening of the Reichsbank had been completed, and that he had inconspicuously transferred into gold all foreign exchange resources available to Germany. On 14 October 1939, after the war had begun, he made a speech in which he stated that the economic and financial departments of Germany working under the Four Year Plan had been engaged in the secret economic preparation for war for over a year.

Funk participated in the economic planning which preceded the attack on the U.S.S.R. His deputy held daily conferences with Rosenberg on the economic problems which would arise in the occupation of Soviet territory. Funk himself participated in planning for the printing of ruble notes in Germany prior to the attack to serve as occupation currency in the U.S.S.R. After the attack he made a speech in which he described plans he had made for the economic exploitation of the "vast territories of the Soviet Union" which were to be used as a source of raw material for Europe.

Funk was not one of the leading figures in originating the Nazi plans for aggressive war. His activity in the economic sphere was under the supervision of Göring as Plenipotentiary General of the Four Year Plan. He did, however, participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment.

War Crimes against Humanity

In his capacity as Under Secretary in the Ministry of Propaganda and Vice-Chairman of the Reichs Chamber of Culture, Funk had participated in the early Nazi program of economic discrimination against the Jews. On 12 November 1938 after the pogroms of November, he attended a meeting held under the chairmanship of Göring to discuss the solution of the Jewish problem and proposed a decree providing for the banning of Jews from all business activities, which Göring issued the same day under the authority of the Four Year Plan. Funk has testified that he was shocked at the outbreaks of 10 November, but on 15 November he made a speech describing these outbreaks as a "violent explosion of the disgust of the German People, because of a criminal Jewish attack against the German People," and saying that the elimination of the Jews from economic life followed logically their elimination from political life.

In 1942 Funk entered into an agreement with Himmler under which the Reichsbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions. As a result of this agreement the SS sent to the Reichsbank the personal belongings taken from the victims who had been exterminated in the concentration camps. The Reichsbank kept the coins and bank notes and sent the jewels, watches, and personal belongings to

Berlin municipal pawn shops. The gold came from the eyeglasses, and gold teeth and fillings was stored in the Reichsbank vaults. Funk had protested that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal is of the opinion that he either knew what was being received or was deliberately closing his eyes to what was being done.

As Minister of Economics and President of the Reichsbank, Funk participated in the economic exploitation of occupied territories. He was president of the Continental Oil Company which was charged with the exploitation of the oil resources of occupied territories in the East. He was responsible for the seizure of the gold reserves of the Czechoslovakian National Bank and for the liquidation of the Yugoslavian National Bank. On 6 June 1942 his deputy sent a letter to the OKW requesting that funds from the French Occupation Cost Fund be made available for black market purchases. Funk's knowledge of German occupation policies is shown by his presence at the meeting of 8 August 1942, at which Göring addressed the various German occupation chiefs, told them of the products required from their territories, and added: "It makes no difference to me in this connection if you say that your people will starve."

In the fall of 1943 Funk was a member of the Central Planning Board which determined the total number of laborers needed for German industry, and required Sauckel to produce them, usually by deportation from occupied territories. Funk did not appear to be particularly interested in this aspect of the forced labor program, and usually sent a deputy to attend the meetings, often SS General Ohlendorf, the former Chief of the SD inside of Germany and the former Commander of Einsatzgruppe D. But Funk was aware that the Board of which he was a member was demanding the importation of slave laborers, and allocating them to the various industries under its control.

As President of the Reichsbank, Funk was also indirectly involved in the utilization of concentration camp labor. Under his direction the Reichsbank set up a revolving fund of 12,000,000 Reichsmarks to the credit of the SS for the construction of factories to use concentration camp laborers.

In spite of the fact that he occupied important official positions, Funk was never a dominant figure in the various programs in which he participated. This is a mitigating fact of which the Tribunal takes notice.

Conclusion

The Tribunal finds that Funk is not guilty on Count One but is guilty under Counts Two, Three, and Four.

SCHACHT

Schacht is indicted under Counts One and Two of the Indictment. Schacht served as Commissioner of Currency and President of the Reichs-

bank from 1923 to 1930, was reappointed President of the Bank on 17 March 1933, Minister of Economics in August 1934, and Plenipotentiary General for War Economy in May 1935. He resigned from these two positions in November 1937, and was appointed Minister without Portfolio. He was reappointed as President of the Reichsbank for a 1-year term on 16 March 1937, and for a 4-year term on 9 March 1938, but was dismissed on 20 January 1939. He was dismissed as Minister without Portfolio on 22 January 1943.

Crimes against Peace

Schacht was an active supporter of the Nazi Party before its accession to power on 30 January 1933, and supported the appointment of Hitler to the post of Chancellor. After that date he played an important rôle in the vigorous rearmament program which was adopted, using the facilities of the Reichsbank to the fullest extent in the German rearmament effort. The Reichsbank, in its traditional capacity as financial agent for the German Government, floated long-term Government loans, the proceeds of which were used for rearmament. He devised a system under which 5-year notes, known as Mefo bills, guaranteed by the Reichsbank and backed, in effect, by nothing more than its position as a bank of issue, were used to obtain large sums for rearmament from the short-term money market. As Minister of Economics and as Plenipotentiary General for War Economy he was active in organizing the German economy for war. He made detailed plans for industrial mobilization and the coördination of the Army with industry in the event of war. He was particularly concerned with shortages of raw materials and started a scheme of stock-piling, and a system of exchange control designed to prevent Germany's weak foreign exchange position from hindering the acquisition abroad of raw materials needed for rearmament. On 3 May 1935 he sent a memorandum to Hitler stating that "the accomplishment of the armament program with speed and in quantity is the problem of German politics, that everything else therefore should be subordinated to this purpose."

Schacht, by April 1936, began to lose his influence as the central figure in the German rearmament effort when Göring was appointed Coördinator for Raw Materials and Foreign Exchange. Göring advocated a greatly expanded program for the production of synthetic raw materials which was opposed by Schacht on the ground that the resulting financial strain might involve inflation. The influence of Schacht suffered further when, on October 1936, Göring was appointed Plenipotentiary for the Four Year Plan with the task of putting "the entire economy in a state of readiness for war" within four years. Schacht had opposed the announcement of this plan and the appointment of Göring to head it, and it is clear that Hitler's action represented a decision that Schacht's economic policies were too con-

servative for the drastic rearmament policy which Hitler wanted to put into effect.

After Göring's appointment, Schacht and Göring promptly became embroiled in a series of disputes. Although there was an element of personal controversy running through these disputes, Schacht disagreed with Göring on certain basic policy issues. Schacht, on financial grounds, advocated a retrenchment in the rearmament program, opposed as uneconomical much of the proposed expansion of production facilities, particularly for synthetics, urged a drastic tightening on Government credit and a cautious policy in dealing with Germany's foreign exchange reserves. As a result of this dispute and of a bitter argument in which Hitler accused Schacht of upsetting his plans by his financial methods, Schacht went on leave of absence from the Ministry of Economics on 5 September 1937, and resigned as Minister of Economics and as Plenipotentiary General for War Economy on 16 November 1937.

As President of the Reichsbank Schacht was still involved in disputes. Throughout 1938 the Reichsbank continued to function as the financial agent for the German Government in floating long-term loans to financial armaments. But on 32 March 1938 Schacht discontinued the practice of floating short-term notes guaranteed by the Reichsbank for armament expenditures. At the end of 1938, in an attempt to regain control of fiscal policy through the Reichsbank, Schacht refused an urgent request of the Reichsminister of Finance for a special credit to pay the salaries of civil servants which were not covered by existing funds. On 2 January 1939 Schacht held a conference with Hitler at which he urged him to reduce expenditures for armaments. On 7 January 1939 Schacht submitted to Hitler a report signed by the Directors of the Reichsbank which urged a drastic curtailment of armament expenditures and a balanced budget as the only method of preventing inflation. On 19 January Hitler dismissed Schacht as President of the Reichsbank. On 22 January 1943 Hitler dismissed Schacht as Reichsminister without Portfolio, because of his "whole attitude during the present fateful fight of the German Nation." On 23 July 1944 Schacht was arrested by the Gestapo and confined in a concentration camp until the end of the war.

It is clear that Schacht was a central figure in Germany's rearmament program, and the steps which he took, particularly in the early days of the Nazi regime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a Crime against Peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars.

Schacht has contended that he participated in the rearmament program only because he wanted to build up a strong and independent Germany which would carry out a foreign policy which would command respect on

an equal basis with other European countries; that when he discovered that the Nazis were rearming for aggressive purposes he attempted to slow down the speed of rearmament; and that after the dismissal of Von Fritsch and Von Blomberg he participated in plans to get rid of Hitler, first by deposing him and later by assassination.

Schacht, as early as 1936, began to advocate a limitation of the rearmament program for financial reasons. Had the policies advocated by him been put into effect, Germany would not have been prepared for a general European war. Insistence on his policies led to his eventual dismissal from all positions of economic significance in Germany. On the other hand, Schacht with his intimate knowledge of German finance, was in a peculiarly good position to understand the true significance of Hitler's frantic rearmament, and to realize that the economic policy adopted was consistent only with war as its object.

Moreover, Schacht continued to participate in German economic life and even, in a minor way, in some of the early Nazi aggressions. Prior to the occupation of Austria he set a rate of exchange between the mark and the schilling. After the occupation of Austria he arranged for the incorporation of the Austrian National Bank into the Reichsbank and made a violently pro-Nazi speech in which he stated that the Reichsbank would always be Nazi as long as he was connected with it, praised Hitler, defended the occupation of Austria, scoffed at objections to the way it was carried out, and ended with "to our Führer a triple 'Sieg Heil.'" He has not contended that this speech did not represent his state of mind at the time. After this occupation of the Sudetenland, he arranged for currency conversion and for the incorporation into the Reichsbank of local Czech banks of issue. On 29 November 1938 he made a speech in which he pointed with pride to his economic policy which had created the high degree of German armament, and added that this armament had made Germany's foreign policy possible.

Schacht was not involved in the planning of any of the specific wars of aggression charged in Count Two. His participation in the occupation of Austria and the Sudetenland (neither of which are charged as aggressive wars) was on such a limited basis that it does not amount to participation in the common plan charged in Count One. He was clearly not one of the inner circle around Hitler which was most closely involved with this common plan. He was regarded by this group with undisguised hostility. The testimony of Speer shows that Schacht's arrest on 23 July 1944 was based as much on Hitler's enmity towards Schacht growing out of his attitude before the war as it was on suspicion of his complicity in the bomb plot. The case against Schacht therefore depends on the inference that Schacht did in fact know of the Nazi aggressive plans.

On this all-important question evidence has been given for the Prosecution, and a considerable volume of evidence for the Defense. The Tribunal

has considered the whole of this evidence with great care, and comes to the conclusion that this necessary inference has not been established beyond a reasonable doubt.

Conclusion

The Tribunal finds that Schacht is not guilty on this Indictment, and directs that he shall be discharged by the Marshall when the Tribunal presently adjourns.

DÖNITZ

Dönitz is indicted on Counts One, Two, and Three. In 1935 he took command of the first U-boat flotilla commissioned since 1918, became in 1936 commander of the submarine arm, and was made Vice-Admiral in 1940, Admiral in 1942, and on 30 January 1943 Commander-in-Chief of the German Navy. On 1 May 1945 he became the Head of State, succeeding Hitler.

Crimes against Peace

Although Dönitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there. Dönitz did, however, wage aggressive war within the meaning of that word as used by the Charter. Submarine warfare which began immediately upon the outbreak of war, was fully coördinated with the other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage war.

It is true that until his appointment in January 1943 as Commander-in-Chief he was not an "Oberbefehlshaber." But this statement underestimates the importance of Dönitz' position. He was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Dönitz was its leader. The High Seas fleet made a few minor, if spectacular, raids during the early years of the war, but the real damage to the enemy was done almost exclusively by his submarines as the millions of tons of Allied and neutral shipping sunk will testify. Dönitz was solely in charge of this warfare. The Naval War Command reserved for itself only the decision as to the number of submarines in each area. In the invasion of Norway, for example, Dönitz made recommendations in October 1939 as to submarine bases, which he claims were no more than a staff study, and in March 1940 he made out the operational orders for the supporting U-boats, as discussed elsewhere in this Judgment.

That his importance to the German war effort was so regarded is eloquently proved by Raeder's recommendation of Dönitz as his successor and his appointment by Hitler on 30 January 1943 as Commander-in-Chief of the Navy. Hitler, too, knew that submarine warfare was the essential part of Germany's naval warfare.

From January 1943, Dönitz was consulted almost continuously by Hitler. The evidence was that they conferred on naval problems about 120 times during the course of the war.

As late as April 1945, when he admits he knew the struggle was hopeless, Dönitz as its Commander-in-Chief urged the Navy to continue its fight. On 1 May 1945 he became the Head of State and as such ordered the Wehrmacht to continue its war in the East, until capitulation on 9 May 1945. Dönitz explained that his reason for these orders was to insure that the German civilian population might be evacuated and the Army might make an orderly retreat from the East.

In the view of the Tribunal, the evidence shows that Dönitz was active in waging aggressive war.

War Crimes

Dönitz is charged with waging unrestricted submarine warfare contrary to the Naval Protocol of 1936, to which Germany acceded, and which reaffirmed the rules of submarine warfare laid down in the London Naval Agreement of 1930.

The Prosecution has submitted that on 3 September 1939 the German U-boat arm began to wage unrestricted submarine warfare upon all merchant ships, whether enemy or neutral, cynically disregarding the Protocol; and that a calculated effort was made throughout the war to disguise this practice by making hypocritical references to international law and supposed violations by the Allies.

Dönitz insists that at all times the Navy remained within the confines of international law and of the Protocol. He testified that when the war began, the guide to submarine warfare was the German Prize Ordinance taken almost literally from the Protocol, that pursuant to the German view, he ordered submarines to attack all merchant ships in convoy, and all that refused to stop or used their radio upon sighting a submarine. When his reports indicated that British merchant ships were being used to give information by wireless, were being armed, and were attacking submarines on sight, he ordered his submarines on 17 October 1939 to attack all enemy merchant ships without warning on the ground that resistance was to be expected. Orders already had been issued on 21 September 1939 to attack all ships, including neutrals, sailing at night without lights in the English Channel.

On 24 November 1939 the German Government issued a warning to neutral shipping that, owing to the frequent engagements taking place in the

waters around the British Isles and the French Coast between U-boats and Allied merchant ships which were armed and had instructions to use those arms as well as to ram U-boats, the safety of neutral ships in those waters could no longer be taken for granted. On 1 January 1940 the German U-boat Command, acting on the instructions of Hitler, ordered U-boats to attack all Greek merchant ships in the zone surrounding the British Isles which was banned by the United States to its own ships and also merchant ships of every nationality in the limited area of the Bristol Channel. Five days later a further order was given to U-boats to "make immediately unrestricted use of weapons against all ships" in an area of the North Sea, the limits of which were defined. Finally on 18 January 1940, U-boats were authorized to sink, without warning, all ships "in those waters near the enemy coasts in which the use of mines can be pretended." Exceptions were to be made in the cases of United States, Italian, Japanese, and Soviet ships.

Shortly after the outbreak of war the British Admiralty, in accordance with its *Handbook of Instructions* of 1938 to the Merchant Navy, armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October 1939 the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible.

In the actual circumstances of this case, the Tribunal is not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchant ships.

However, the proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914-18 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930, and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War. Yet the Protocol made no exception for operational zones. The order of Dönitz to sink neutral ships without warning when found within these zones was therefore, in the opinion of the Tribunal, a violation of the Protocol.

It is also asserted that the German U-boat arm not only did not carry out the warning and rescue provisions of the Protocol but that Dönitz deliberately ordered the killing of survivors of shipwrecked vessels, whether enemy or neutral. The Prosecution has introduced much evidence surrounding two orders of Dönitz—War Order Number 154, issued in 1939, and the so-called "Laconia" Order of 1942. The Defense argues that these orders and the evidence supporting them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Dönitz

deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.

The evidence further shows that the rescue provisions were not carried out and that the Defendant ordered that they should not be carried out. The argument of the Defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue, and that the development of aircraft made rescue impossible. This may be so, but the Protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Dönitz is guilty of a violation of the Protocol.

In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare.

Dönitz was also charged with responsibility for Hitler's Commando Order of 18 October 1942. Dönitz admitted he received and knew of the order when he was Flag Officer of U-boats, but disclaimed responsibility. He points out that the order by its express terms excluded men captured in naval warfare, that the Navy had no territorial commands on land, and that submarine commanders would never encounter commandos.

In one instance, when he was Commander-in-Chief of the Navy, in 1943, the members of the crew of an Allied motor torpedo boat were captured by German Naval Forces. They were interrogated for intelligence purposes on behalf of the local Admiral, and then turned over by his order to the SD and shot. Dönitz said that if they were captured by the Navy their execution was a violation of the Commando Order, that the execution was not announced in the Wehrmacht communiqué, and that he was never informed of the incident. He pointed out that the Admiral in question was not in his chain of command, but was subordinate to the Army general in command of the Norway occupation. But Dönitz permitted the order to remain in full force when he became Commander-in-Chief, and to that extent he is responsible.

Dönitz, in a conference of 11 December 1944, said "12,000 concentration camp prisoners will be employed in the shipyards as additional labor." At this time Dönitz had no jurisdiction over shipyard construction, and claims that this was merely a suggestion at the meeting that the responsible officials do something about the production of ships, that he took no steps to get these workers since it was not a matter for his jurisdiction and that he does not know whether they ever were procured. He admits he knew of concentration camps. A man in his position must necessarily have

known that citizens of occupied countries in large numbers were confined in the concentration camps.

In 1945 Hitler requested the opinion of Jodi and Dönitz whether the Geneva Convention should be denounced. The notes of the meeting between the two military leaders on 20 February 1945 show that Dönitz expressed his view that the disadvantages of such an action outweighed the advantages. The summary of Dönitz' attitude shown in the notes taken by an officer, included the following sentence: "It would be better to carry out the measures considered necessary without warning, and at all costs to save face with the outer world."

The Prosecution insisted that "the measures" referred to meant the Convention should not be denounced, but should be broken at will. The Defense explanation is that Hitler wanted to break the Convention for two reasons: to take away from German troops the protection of the Convention, thus preventing them from continuing to surrender in large groups to the British and Americans, and also to permit reprisals against Allied prisoners of war because of Allied bombing raids. Dönitz claims that what he meant by "measures" were disciplinary measures against German troops to prevent them from surrendering and that his words had no reference to measures against the Allies; moreover that this was merely a suggestion, and that in any event no such measures were ever taken, either against Allies or Germans. The Tribunal, however, does not believe this explanation. The Geneva Convention was not, however, denounced by Germany. The Defense has introduced several affidavits to prove that British naval prisoners of war in camps under Dönitz' jurisdiction were treated strictly according to the Convention, and the Tribunal takes this fact into consideration, regarding it as a mitigating circumstance.

Conclusion

The Tribunal finds Dönitz is not guilty on Count One of the Indictment, and is guilty on Counts Two and Three.

RAEDER

Raeder is indicted on Counts One, Two, and Three. In 1928 he became Chief of Naval Command and in 1935 Oberbefehlshaker der Kriegsmarine (OKM); in 1939 Hitler made him Gross-Admiral. He was a member of the Reich Defense Council. On 30 January 1943 Dönitz replaced him at his own request, and he became Admiral Inspector of the Navy, a nominal title.

Crimes against Peace

In the 15 years he commanded it, Raeder built and directed the German Navy; he accepts full responsibility until retirement in 1943. He admits

the Navy violated the Versailles Treaty, insisting it was "a matter of honor for every man" to do so, and alleges that the violations were for the most part minor, and Germany built less than her allowable strength. These violations, as well as those of the Anglo-German Naval Agreement of 1935, have already been discussed elsewhere in this Judgment.

Raeder received the directive of 24 June 1937 from Von Blomberg requiring special preparations for war against Austria. He was one of the five leaders present at the Hossbach Conference of 5 November 1937. He claims Hitler merely wished by this conference to spur the Army to faster rearmament, insists he believed the questions of Austria and Czechoslovakia would be settled peacefully, as they were, and points to the new naval treaty with England which had just been signed. He received no orders to speed construction of U-boats, indicating that Hitler was not planning war.

Raeder received directives on "Fall Grün" and the directives on "Fall Weiss" beginning with that of 3 April 1939; the latter directed the Navy to support the Army by intervention from the sea. He was also one of the few chief leaders present at the meeting of 23 May 1939. He attended the Obersalzberg briefing of 22 August 1939.

The conception of the invasion of Norway first arose in the mind of Raeder and not that of Hitler. Despite Hitler's desire, as shown by his directive of October 1939 to keep Scandinavia neutral, the Navy examined the advantages of naval bases there as early as October. Admiral Karls originally suggested to Raeder the desirable aspects of bases in Norway. A questionnaire, dated 3 October 1939, which sought comments on the desirability of such bases, was circulated within SKL. On 10 October Raeder discussed the matter with Hitler; his War Diary entry for that day says Hitler intended to give the matter consideration. A few months later Hitler talked to Raeder, Quisling, Keitel, and Jodl; OKW began its planning and the Naval War Staff worked with OKW staff officers. Raeder received Keitel's directive for Norway on 27 January 1940 and the subsequent directive of 1 March, signed by Hitler.

Raeder defends his actions on the ground it was a move to forestall the British. It is not necessary again to discuss this defense, which has heretofore been treated in some detail, concluding that Germany's invasion of Norway and Denmark was aggressive war. In a letter to the Navy, Raeder said: "The operations of the Navy in the occupation of Norway will for all time remain the great contribution of the Navy to this war."

Raeder received the directives, including the innumerable postponements, for the attack in the West. In a meeting of 18 March 1941 with Hitler he urged the occupation of all Greece. He claims this was only after the British had landed and Hitler had ordered the attack, and points out the Navy had no interest in Greece. He received Hitler's directive on Yugoslavia.

Raeder endeavored to dissuade Hitler from embarking upon the invasion of the U.S.S.R. In September 1940 he urged on Hitler an aggressive Mediterranean policy as an alternative to an attack on Russia. On 14 November 1940 he urged the war against England "as our main enemy" and that submarine and naval air force construction be continued. He voiced "serious objections against the Russian campaign before the defeat of England," according to notes of the German Naval War Staff. He claims his objections were based on the violation of the Non-Aggression Pact as well as strategy. But once the decision had been made, he gave permission 6 days before the invasion of the Soviet Union to attack Russian submarines in the Baltic Sea within a specified warning area and defends this action because these submarines were "snooping" on German activities.

It is clear from this evidence that Raeder participated in the planning and waging of aggressive war.

War Crimes

Raeder is charged with War Crimes on the High Seas. The *Athenia*, an unarmed British passenger liner, was sunk on 3 September 1939, while outward bound to America. The Germans 2 months later charged that Mr. Churchill deliberately sank the *Athenia* to encourage American hostility to Germany. In fact, it was sunk by the German U-boat 30. Raeder claims that an inexperienced U-boat commander sank it in mistake for an armed merchant cruiser, that this was not known until the U-30 returned several weeks after the German denial and that Hitler then directed the Navy and Foreign Office to continue denying it. Raeder denied knowledge of the propaganda campaign attacking Mr. Churchill.

The most serious charge against Raeder is that he carried out unrestricted submarine warfare, including sinking of unarmed merchant ships, of neutrals, non-rescue and machine-gunning of survivors, contrary to the London Protocol of 1936. The Tribunal makes the same finding on Raeder on this charge as it did as to Dönitz, which has already been announced, up until 30 January 1943 when Raeder retired.

The Commando Order of 18 October 1942, which expressly did not apply to naval warfare, was transmitted by the Naval War Staff to the lower naval commanders with the direction it should be distributed orally by flotilla leaders and section commanders to their subordinates. Two commandos were put to death by the Navy, and not the SD, at Bordeaux on 10 December 1942. The comment of the Naval War Staff was that this was "in accordance with the Führer's special order, but is nevertheless something new in international law, since the soldiers were in uniform." Raeder admits he passed the order down through the chain of command, and he did not object to Hitler.

Conclusion

The Tribunal finds that Raeder is guilty on Counts One, Two, and Three.

VON SCHIRACH

Von Schirach is indicted under Counts One and Four. He joined the Nazi Party and the SA in 1925. In 1929 he became the leader of the National Socialist Students Union. In 1931 he was made Reichs Youth Leader of the Nazi Party with control over all Nazi youth organizations, including the Hitler Jugend. In 1933, after the Nazis had obtained control of the Government, Von Schirach was made Leader of Youth in the German Reich, originally a position within the Ministry of the Interior, but, after 1 December 1936, an office in the Reich Cabinet. In 1940 Von Schirach resigned as head of the Hitler Jugend and Leader of Youth in the German Reich, but retained his position as Reichsleiter with control over Youth Education. In 1940 he was appointed Gauleiter of Vienna, Reichs Governor of Vienna, and Reichs Defense Commissioner for that territory.

Crimes against Peace

After the Nazis had come to power Von Schirach, utilizing both physical violence and official pressure, either drove out of existence or took over all youth groups which competed with the Hitler Jugend. A Hitler decree of 1 December 1936 incorporated all German youth within the Hitler Jugend. By the time formal conscription was introduced in 1940, 97 percent of those eligible were already members.

Von Schirach used the Hitler Jugend to educate German Youth "in the spirit of National Socialism" and subjected them to an intensive program of Nazi propaganda. He established the Hitler Jugend as a source of replacements for the Nazi Party formations. In October 1938 he entered into an agreement with Himmler under which members of the Hitler Jugend who met SS standards would be considered as the primary source of replacements for the SS.

Von Schirach used also the Hitler Jugend for pre-military training. Special units were set up whose primary purpose was training specialists for the various branches of the service. On 11 August 1939 he entered into an agreement with Keitel under which the Hitler Jugend agreed to carry out its pre-military activities under standards laid down by the Wehrmacht and the Wehrmacht agreed to train 30,000 Hitler Jugend instructors each year. The Hitler Jugend placed particular emphasis on the military spirit and its training program stressed the importance of return of the colonies, the necessity for Lebensraum, and the noble destiny of German youth to die for Hitler.

Despite the warlike nature of the activities of the Hitler Jugend, however, it does not appear that Von Schirach was involved in the development of Hitler's plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression.

Crimes against Humanity

In July 1940 Von Schirach was appointed Gauleiter of Vienna. At the same time he was appointed Reichs Governor for Vienna and Reichs Defense Commissioner, originally for Military District 17, including the Gaue of Vienna, Upper Danube, and Lower Danube and, after 17 November 1942, for the Gaue of Vienna alone. As Reichs Defense Commissioner, he had control of the civilian war economy. As Reichs Governor he was head of the municipal administration of the City of Vienna, and, under the supervision of the Minister of the Interior, in charge of the governmental administration of the Reich in Vienna.

Von Schirach is not charged with the commission of War Crimes in Vienna, only with the commission of Crimes against Humanity. As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a "crime within the jurisdiction of the Tribunal," as that term is used in Article 6 (c) of the Charter. As a result, "murder, extermination, enslavement, deportation, and other inhumane acts" and "persecutions on political, racial, or religious grounds" in connection with this occupation constitute a Crime against Humanity under that Article.

As Gauleiter of Vienna, Von Schirach came under the Sauckel decree, dated 6 April 1942, making the Gauleiters Sauckel's plenipotentiaries for manpower with authority to supervise the utilization and treatment of manpower within their Gaue. Sauckel's directives provided that the forced laborers were to be fed, sheltered, and treated so as to exploit them to the highest possible degree at the lowest possible expense.

When Von Schirach became Gauleiter of Vienna the deportation of the Jews had already been begun, and only 60,000 out of Vienna's original 190,000 Jews remained. On 2 October 1940 he attended a conference at Hitler's office and told Frank that he had 50,000 Jews in Vienna which the General Government would have to take over from him. On 3 December 1940 Von Schirach received a letter from Lammers stating that after the receipt of the reports made by Von Schirach, Hitler had decided to deport the 60,000 Jews still remaining in Vienna to the General Government because of the housing shortage in Vienna. The deportation of the Jews from Vienna was then begun and continued until the early fall of 1942. On 15 September 1942 Von Schirach made a speech in which he defended his action in having driven "tens of thousands upon tens of thousands of Jews into the ghetto of the East" as "contributing to European culture."

While the Jews were being deported from Vienna, reports, addressed to him in his official capacity, were received in Von Schirach's office from the office of the Chief of the Security Police and SD which contained a description of the activities of Einsatzgruppen in exterminating Jews. Many of these reports were initialed by one of Von Schirach's principal deputies. On 30 June 1944 Von Schirach's office also received a letter from Kaltenbrunner informing him that a shipment of 12,000 Jews was on its way to Vienna for essential war work and that all those who were incapable of work would have to be kept in readiness for "special action."

The Tribunal finds that Von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the ghettos of the East. Bulletins describing the Jewish extermination were in his office.

While Gauleiter of Vienna Von Schirach continued to function as Reichsleiter for Youth Education and in this capacity he was informed of the Hitler Jugend's participation in the plan put into effect in the fall of 1944 under which 50,000 young people between the ages of 10 and 20 were evacuated into Germany from areas recaptured by the Soviet forces and used as apprentices in German industry and as auxiliaries in units of the German Armed Forces. In the summer of 1942 Von Schirach telegraphed Bormann urging that a bombing attack on an English cultural town be carried out in retaliation for the assassination of Heydrich which, he claimed, had been planned by the British.

Conclusion

The Tribunal finds that Von Schirach is not guilty on Count One. He is guilty under Count Four.

SAUCKEL

Sauckel is indicted under all four Counts. Sauckel joined the Nazi Party in 1923, and became Gauleiter of Thuringia in 1927. He was a member of the Thuringian legislature from 1927 to 1933, was appointed Reichsstatthalter for Thuringia in 1932, and Thuringian Minister of the Interior and head of the Thuringian State Ministry in May 1933. He became a member of the Reichstag in 1933. He held the formal rank of Obergruppenführer in both the SA and the SS.

Crimes against Peace

The evidence has not satisfied the Tribunal that Sauckel was sufficiently connected with the common plan to wage aggressive war or sufficiently involved in the planning or waging of the aggressive wars to allow the Tribunal to convict him on Counts One or Two.

War Crimes and Crimes against Humanity

On 21 March 1942 Hitler appointed Sauckel Plenipotentiary General for the Utilization of Labor, with authority to put under uniform control "the utilization of all available manpower, including that of workers recruited abroad and of prisoners of war." Sauckel was instructed to operate within the fabric of the Four Year Plan, and on 27 March 1942 Göring issued a decree as Commissioner for the Four Year Plan transferring his manpower sections to Sauckel. On 30 September 1942 Hitler gave Sauckel authority to appoint Commissioners in the various occupied territories, and "to take all necessary measures for the enforcement" of the Decree of 21 March 1942.

Under the authority which he obtained by these decrees, Sauckel set up a program for the mobilization of the labor resources available to the Reich. One of the important parts of this mobilization was the systematic exploitation, by force, of the labor resources of the occupied territories. Shortly after Sauckel had taken office, he had the governing authorities in the various occupied territories issue decrees, establishing compulsory labor service in Germany. Under the authority of these decrees Sauckel's commissioners, backed up by the police authorities of the occupied territories, obtained and sent to Germany the laborers which were necessary to fill the quotas given them by Sauckel. He described so-called "voluntary" recruiting by a whole batch of male and female agents just as was done in the olden times for shanghaiing." That real voluntary recruiting was the exception rather than the rule is shown by Sauckel's statement on 1 March 1944, that "out of five million foreign workers who arrived in Germany not even 200,000 came voluntarily." Although he now claims that the statement is not true, the circumstances under which it was made, as well as the evidence presented before the Tribunal, leave no doubt that it was substantially accurate.

The manner in which the unfortunate slave laborers were collected and transported to Germany, and what happened to them after they arrived, has already been described. Sauckel argues that he is not responsible for these excesses in the administration of the program. He says that the total number of workers to be obtained was set by the demands from agriculture and from industry; that obtaining the workers was the responsibility of the occupation authorities, transporting them to Germany that of the German railways, and taking care of them in Germany that of the Ministries of Labor and Agriculture, the German Labor Front, and the various industries involved. He testifies that insofar as he had any authority he was constantly urging humane treatment.

There is no doubt, however, that Sauckel had over-all responsibility for the slave labor program. At the time of the events in question he did not fail to assert control over the fields which he now claims were the sole responsibility of others. His regulations provided that his commissioners

should have authority for obtaining labor, and he was constantly in the field supervising the steps which were being taken. He was aware of ruthless methods being taken to obtain laborers, and vigorously supported them on the ground that they were necessary to fill the quotas.

Sauckel's regulations also provided that he had responsibility for transporting the laborers to Germany, allocating them to employers and taking care of them, and that the other agencies involved in these processes were subordinate to him. He was informed of the bad conditions which existed. It does not appear that he advocated brutality for its own sake, or was an advocate of any program such as Himmler's plan for extermination through work. His attitude was thus expressed in a regulation :

"All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure."

The evidence shows that Sauckel was in charge of a program which involved deportation for slave labor of more than 5,000,000 human beings, many of them under terrible conditions of cruelty and suffering.

Conclusion

The Tribunal finds that Sauckel is not guilty on Counts One and Two. He is guilty under Counts Three and Four.

JODL

Jodl is indicted on all four Counts. From 1935 to 1938 he was Chief of the National Defense Section in the High Command. After a year in command of troops, in August 1939 he returned to become Chief of the Operations Staff of the High Command of the Armed Forces. Although his immediate superior was Defendant Keitel, he reported directly to Hitler on operational matters. In the strict military sense, Jodl was the actual planner of the war and responsible in large measure for the strategy and conduct of operations.

Jodl defends himself on the ground he was a soldier sworn to obedience, and not a politician; and that his staff and planning work left him no time for other matters. He said that when he signed or initialed orders, memoranda, and letters, he did so for Hitler and often in the absence of Keitel. Though he claims that as a soldier he had to obey Hitler, he says that he often tried to obstruct certain measures by delay, which occasionally proved successful as when he resisted Hitler's demand that a directive be issued to lynch Allied "terror fliers."

Crimes against Peace

Entries in Jodl's diary of 13 and 14 February 1938 show Hitler instructed both him and Keitel to keep up military pressure against Austria begun at the Schuschnigg conference by simulating military measures, and that these achieved their purpose. When Hitler decided "not to tolerate" Schuschnigg's plebiscite, Jodl brought to the conference the "old draft," the existing staff plan. His diary for 10 March shows Hitler then ordered the preparation of "Case Otto," and the directive was initialed by Jodl. Jodl issued supplementary instructions on 11 March, and initialed Hitler's order for the invasion on the same date.

In planning the attack on Czechoslovakia, Jodl was very active, according to the Schmundt Notes. He initialed items 14, 17, 24, 36, and 37 in the Notes. Jodl admits he agreed with OKH that the "incident" to provide German intervention must occur at the latest by 1400 on X-1 Day, the day before the attack, and said it must occur at a fixed time in good flying weather. Jodl conferred with the propaganda experts on "imminent common tasks" such as German violations of international law, exploitation of them by the enemy and refutations by the Germans, which "task" Jodl considered "particularly important."

After Munich, Jodl wrote:

"Czechoslovakia as a power is out. . . . The genius of the Führer and his determination not to shun even a World War have again won the victory without the use of force. The hope remains that the incredulous, the weak, and the doubtful people have been converted and will remain that way."

Shortly after the Sudeten occupation, Jodl went to a post command and did not become Chief of the Operations Staff in OKW until the end of August 1939.

Jodl discussed the Norway invasion with Hitler, Keitel, and Raeder on 12 December 1939; his diary is replete with late entries on his activities in preparing this attack. Jodl explains his comment that Hitler was still looking for an "excuse" to move meant he was waiting for reliable intelligence on the British plans, and defends the invasion as a necessary move to forestall them. His testimony shows that from October 1939 Hitler planned to attack the West through Belgium, but was doubtful about invading Holland until the middle of November. On 8 February 1940, Jodl, his deputy Warlimont, and Jeschonnek, the Air Forces planner, discussed among themselves the "new idea" of attacking Norway, Denmark, and Holland, but guaranteeing the neutrality of Belgium. Many of the 17 orders postponing the attack in the West for various reasons including weather conditions, until May 1940, were signed by Jodl.

He was active in the planning against Greece and Yugoslavia. The Hitler order of 11 January 1941 to intervene in Albania was initialed by

Jodl. On 20 January, 4 months before the attack, Hitler told a conference of German and Italian generals in Jodl's presence that German troop concentrations in Rumania were to be used against Greece. Jodl was present on 18 March when Hitler told Raeder all Greece must be occupied before any settlement could be reached. On 27 March, when Hitler told the German High Command that the destruction of Yugoslavia should be accomplished with "unmerciful harshness," and the decision was taken to bomb Belgrade without a declaration of war, Jodl was also there.

Jodl testified that Hitler feared an attack by Russia and so attacked first. This preparation began almost a year before the invasion. Jodl told Warlimont as early as 29 July 1940 to prepare the plans since Hitler had decided to attack; and Hitler later told Warlimont he had planned to attack in August 1940 but postponed it for military reasons. He initialed Hitler's directive of 12 November 1940 that preparations verbally ordered should be continued and also initialed "Case Barbarossa" on 18 December. On 3 February 1941 Hitler, Jodl, and Keitel discussed the invasion, and he was present on 14 June when final reports on "Case Barbarossa" were made.

War Crimes and Crimes against Humanity

On 18 October 1942 Hitler issued the Commando Order and a day later a supplementary explanation to commanding officers only. The covering memorandum was signed by Jodl. Early drafts of the order were made by Jodl's staff, with his knowledge. Jodl testified he was strongly opposed on moral and legal grounds, but could not refuse to pass it on. He insists he tried to mitigate its harshness in practice by not informing Hitler when it was not carried out. He initialed the OKW memorandum of 25 June 1944 reaffirming the Order after the Normandy landings.

A plan to eliminate Soviet commissars was in the directive for "Case Barbarossa." The decision whether they should be killed without trial was to be made by an officer. A draft contains Jodl's handwriting suggesting this should be handled as retaliation, and he testified this was his attempt to get around it.

When in 1945 Hitler considered denouncing the Geneva Convention, Jodl argued the disadvantages outweighed the advantages. On 21 February he told Hitler adherence to the Convention would not interfere with the conduct of the war, giving as an example the sinking of a British hospital ship as a reprisal and calling it a mistake. He said he did so because it was the only attitude Hitler would consider, that moral or legal arguments had no effect and argues he thus prevented Hitler from denouncing the Convention.

There is little evidence that Jodl was actively connected with the slave labor program, and he must have concentrated on his strategic planning function. But in his speech of 7 November 1943 to the Gauleiters he said it was necessary to act "with remorseless vigor and resolution" in Denmark, France, and the Low Countries to compel work on the Atlantic Wall.

By teletype of 28 October 1944 Jodl ordered the evacuation of all persons in northern Norway and burning of their houses so they could not help the Russians. Jodl says he was against this, but Hitler ordered it and it was not fully carried out. A document of the Norwegian Government says such an evacuation did take place in northern Norway and 30,000 houses were damaged. On 7 October 1941, Jodl signed an order that Hitler would not accept an offer of surrender of Leningrad or Moscow, but on the contrary he insisted that they be completely destroyed. He says this was done because the Germans were afraid those cities would be mined by the Russians as was Kiev. No surrender was ever offered.

His defense, in brief, is the doctrine of "superior orders," prohibited by Article 8 of the Charter as a defense. There is nothing in mitigation. Participation in such crimes as these have never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of these crimes.

Conclusion

The Tribunal finds that Jodl is guilty on all four Counts.

VON PAPEN

Von Papen is indicted under Counts One and Two. He was appointed Chancellor of the Reich on 1 June 1932, and was succeeded by Von Schleicher on 2 December 1932. He was made Vice Chancellor in the Hitler Cabinet on 30 January 1933, and on 13 November 1933 Plenipotentiary for the Saar. On 26 July 1934 he was appointed Minister to Vienna, and was recalled on 4 February 1938. On 29 April 1939 he was appointed Ambassador to Turkey. He returned to Germany when Turkey broke off diplomatic relations with Germany in August 1944.

Crimes against Peace

Von Papen was active in 1932 and 1933 in helping Hitler to form the Coalition Cabinet and aided in his appointment as Chancellor on 30 January 1933. As Vice Chancellor in that Cabinet he participated in the Nazi consolidation of control in 1933. On 16 June 1934, however, Von Papen made a speech at Marburg which contained a denunciation of the Nazi attempts to suppress the free press and the church, of the existence of a reign of terror, and of "150 percent Nazis" who were mistaking "brutality for vitality." On 30 June 1934, in the wave of violence which accompanied the so-called Röhm Purge, Von Papen was taken into custody by the SS, his office force was arrested, and two of his associates, including the man who had helped him work on the Marburg speech, were murdered. Von Papen was released on 3 July 1934.

Notwithstanding the murder of his associates, Von Papen accepted the position of Minister to Austria on 26 July 1934; the day after Dollfuss had been assassinated. His appointment was announced in a letter from Hitler which instructed him to direct relations between the two countries "into normal and friendly channels" and assured him of Hitler's "complete and unlimited confidence." As Minister to Austria, Von Papen was active in trying to strengthen the position of the Nazi Party in Austria for the purpose of bringing about Anschluss. In early 1935 he attended a meeting in Berlin at which the policy was laid down to avoid everything which would give the appearance of German intervention in the internal affairs of Austria. Yet he arranged for 200,000 marks a month to be transmitted to "the persecuted National Socialist sufferers in Austria." On 17 May 1935 he reported to Hitler the results of a conference with Captain Leopold, the leader of the Austrian Nazis, and urged Hitler to make a statement recognizing the national independence of Austria, and predicting that the result might be to help the formation of a coalition between Schuschnigg's Christian Socialists and the Austrian Nazis against Starhemberg. On 27 July 1935 Von Papen reported to Hitler that the union of Austria and Germany could not be brought about by external pressure but only by the strength of the National Socialist movement. He urged that the Austrian Nazi Party change its character as a centralized Reich German party and become a rallying point for all National Germans.

Von Papen was involved in occasional Nazi political demonstrations, supported Nazi propaganda activities and submitted detailed reports on the activities of the Nazi Party, and routine reports relating to Austrian military defenses. His Austrian policy resulted in the agreement of 11 July 1936, which nominally restored relations between Germany and Austria to "normal and friendly form," but which had a secret supplement providing for an amnesty for Austrian Nazis, the lifting of censorship on Nazi papers, the resumption of political activities by Nazis and the appointment of men friendly to the Nazis in the Schuschnigg Cabinet.

After the signing of this agreement Von Papen offered to resign, but his resignation was not accepted. Thereafter he proceeded to bring continued pressure on the Austrian Government to bring Nazis into the Schuschnigg Cabinet and to get them important positions in the Fatherland Front, Austria's single legal party. On 1 September 1936 Von Papen wrote Hitler advising him that anti-Nazis in the Austrian Ministry of Security were holding up the infiltration of the Nazis into the Austrian Government and recommended bringing "slowly intensified pressure directed at changing the regime."

On 4 February 1938 Von Papen was notified of his recall as Minister to Austria, at the same time that Von Fritsch, Von Blomberg, and Von Neurath were removed from their positions. He informed Hitler that he regretted his recall because he had been trying since November 1937 to induce

Schuschnigg to hold a conference with Hitler and Schuschnigg had indicated his willingness to do so. Acting under Hitler's instructions, Von Papen then returned to Austria and arranged the conference which was held at Berchtesgaden on 12 February 1938. Von Papen accompanied Schuschnigg to that conference, and at its conclusion advised Schuschnigg to comply with Hitler's demands. On 13 March 1938 Hitler ordered Von Papen to return to Berlin. Von Papen was in the Chancellory on 11 March when the occupation of Austria was ordered. No evidence has been offered showing that Von Papen was in favor of the decision to occupy Austria by force, and he had testified that he urged Hitler not to take this step.

After the annexation of Austria Von Papen retired into private life and there is no evidence that he took any part in politics. He accepted the position of Ambassador to Turkey in April 1939, but no evidence has been offered concerning his activities in that position implicating him in crimes.

The evidence leaves no doubt that Von Papen's primary purpose as Minister to Austria was to undermine the Schuschnigg regime and strengthen the Austrian Nazis for the purpose of bringing about Anschluss. To carry through this plan he engaged in both intrigue and bullying. But the Charter does not make criminal such offenses against political morality, however bad these may be. Under the Charter Von Papen can be held guilty only if he was a party to the planning of aggressive war. There is no evidence that he was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary. But it is not established beyond a reasonable doubt that this was the purpose of his activity, and therefore the Tribunal cannot hold that he was a party to the common plan charged in Count One or participated in the planning of the aggressive wars charged under Count Two.

Conclusion

The Tribunal finds that Von Papen is not guilty under this Indictment, and directs that he shall be discharged by the Marshal, when the Tribunal presently adjourns.

SEYSS-INQUART

Seyss-Inquart is indicted under all Four Counts. Seyss-Inquart, an Austrian attorney, was appointed State Councillor in Austria in May 1937 as a result of German pressure. He had been associated with the Austrian Nazi Party since 1931, but had often had difficulties with that Party and did not actually join the Nazi Party until 13 March 1938. He was appointed Austrian Minister of Security and Interior with control over the police, pursuant to one of the conditions which Hitler had imposed on Schuschnigg in the Berchtesgaden Conference of 12 February 1938.

Activities in Austria

Seyss-Inquart participated in the last stages of the Nazi intrigue which preceded the German occupation of Austria, and was made Chancellor of Austria as a result of German threats of invasion.

On 12 March 1938 Seyss-Inquart met Hitler at Linz and made a speech welcoming the German forces and advocating the reunion of Germany and Austria. On 13 March he obtained the passage of a law providing that Austria should become a province of Germany and succeeded Miklas as President of Austria when Miklas resigned rather than sign the law. Seyss-Inquart's title was changed to Reich Governor of Austria on 15 March 1938, and on the same day he was given the title of a general in the SS. He was made a Reich Minister without Portfolio on 1 May 1939.

On 11 March 1939 he visited the Slovakian Cabinet in Bratislava and induced them to declare their independence in a way which fitted in closely with Hitler's offensive against the independence of Czechoslovakia.

As Reich Governor of Austria, Seyss-Inquart instituted a program of confiscating Jewish property. Under his regime Jews were forced to emigrate, were sent to concentration camps, and were subject to pogroms. At the end of his regime he cooperated with the Security Police and SD in the deportation of Jews from Austria to the East. While he was Governor of Austria, political opponents of the Nazis were sent to concentration camps by the Gestapo, mistreated, and often killed.

Criminal Activities in Poland and the Netherlands

In September 1939 Seyss-Inquart was appointed Chief of Civil Administration of South Poland. On 12 October 1939 Seyss-Inquart was made Deputy Governor General of the General Government of Poland under Frank. On 18 May 1940 Seyss-Inquart was appointed Reich Commissioner for Occupied Netherlands. In these positions he assumed responsibility for governing territory which had been occupied by aggressive wars and the administration of which was of vital importance in the aggressive war being waged by Germany.

As Deputy Governor General of the General Government of Poland, Seyss-Inquart was a supporter of the harsh occupation policies which were put in effect. In November 1939, while on an inspection tour through the General Government, Seyss-Inquart stated that Poland was to be so administered as to exploit its economic resources for the benefit of Germany. Seyss-Inquart also advocated the persecution of Jews and was informed of the beginning of the AB action which involved the murder of many Polish intellectuals.

As Reich Commissioner for the Occupied Netherlands, Seyss-Inquart was ruthless in applying terrorism to suppress all opposition to the German occupation, a program which he described as "annihilating" his opponents.

In collaboration with the local Higher SS and Police Leaders he was involved in the shooting of hostages for offenses against the occupation authorities and sending to concentration camps all suspected opponents of occupation policies including priests and educators. Many of the Dutch police were forced to participate in these programs by threats of reprisal against their families. Dutch courts were also forced to participate in this program, but when they indicated their reluctance to give sentences of imprisonment because so many prisoners were in fact killed, a greater emphasis was placed on the use of summary police courts.

Seyss-Inquart carried out the economic administration of the Netherlands without regard for rules of the Hague Convention, which he described as obsolete. Instead, a policy was adopted for the maximum utilization of economic potential of the Netherlands, and executed with small regard for its effect on the inhabitants. There was widespread pillage of public and private property which was given color of legality by Seyss-Inquart's regulations, and assisted by manipulations of the financial institutions of the Netherlands under his control.

As Reich Commissioner for the Netherlands, Seyss-Inquart immediately began sending forced laborers to Germany. Until 1942 labor service in Germany was theoretically voluntary, but was actually coerced by strong economic and governmental pressure. In 1942 Seyss-Inquart formally decreed compulsory labor service, and utilized the services of the Security Police and SD to prevent evasion of his order. During the occupation over 500,000 people were sent from the Netherlands to the Reich as laborers and only a very small proportion were actually volunteers.

One of Seyss-Inquart's first steps as Reich Commissioner of the Netherlands was to put into effect a series of laws imposing economic discriminations against the Jews. This was followed by decrees requiring their registration, decrees compelling them to reside in ghettos and to wear the Star of David, sporadic arrests and detention in concentration camps, and finally, at the suggestion of Heydrich, the mass deportation of almost 120,000 of Holland's 140,000 Jews to Auschwitz and the "final solution." Seyss-Inquart admits knowing that they were going to Auschwitz, but claims that he heard from people who had been to Auschwitz that the Jews were comparatively well off there, and that he thought that they were being held there for resettlement after the war. In light of the evidence and on account of his official position it is impossible to believe this claim.

Seyss-Inquart contends that he was not responsible for many of the crimes committed in the occupation of the Netherlands because they were either ordered from the Reich, committed by the Army, over which he had no control, or by the German Higher SS and Police Leader, who, he claims, reported directly to Himmler. It is true that some of the excesses were the responsibility of the Army, and that the Higher SS and Police Leader, although he was at the disposal of Seyss-Inquart, could always report di-

rectly to Himmler. It is also true that in certain cases Seyss-Inquart opposed the extreme measures used by these other agencies, as when he was largely successful in preventing the Army from carrying out a scorched earth policy, and urged the Higher SS and Police Leaders to reduce the number of hostages to be shot. But the fact remains that Seyss-Inquart was a knowing and voluntary participant in War Crimes and Crimes against Humanity which were committed in the occupation of the Netherlands.

Conclusion

The Tribunal finds that Seyss-Inquart is guilty under Counts Two, Three, and Four. Seyss-Inquart is not guilty on Count One.

SPEER

Speer is indicted under all four Counts. Speer joined the Nazi Party in 1932. In 1934 he was made Hitler's architect and became a close personal confidant. Shortly thereafter he was made a department head in the German Labor Front and the official in charge of capital construction on the staff of the deputy to the Führer, positions which he held through 1941. On 15 February 1942, after the death of Fritz Todt, Speer was appointed Chief of the Organization Todt and Reich Minister for Armaments and Munitions (after 2 September 1943, for Armaments and War Production). The positions were supplemented by his appointments in March and April 1942 as General Plenipotentiary for Armaments and as a member of the Central Planning Board, both within the Four Year Plan. Speer was a member of the Reichstag from 1941 until the end of the war.

Crimes against Peace

The Tribunal is of opinion that Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became the head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count One or waging aggressive war as charged under Count Two.

War Crimes and Crimes against Humanity

The evidence introduced against Speer under Counts Three and Four relates entirely to his participation in the slave labor program. Speer himself had no direct administrative responsibility for this program. Although he had advocated the appointment of a General Plenipotentiary for

the Utilization of Labor because he wanted one central authority with whom he could deal on labor matters, he did not obtain administrative control over Sauckel. Sauckel was appointed directly by Hitler, under the decree of 21 March 1942, which provided that he should be directly responsible to Göring, as Plenipotentiary of the Four Year Plan.

As Reich Minister for Armaments and Munitions and General Plenipotentiary for Armaments under the Four Year Plan, Speer had extensive authority over production. His original authority was over construction and production of arms for the OKW. This was progressively expanded to include naval armaments, civilian production and finally, on 1 August 1944, air armament. As the dominant member of the Central Planning Board, which had supreme authority for the scheduling of German production and the allocation and development of raw materials, Speer took the position that the Board had authority to instruct Sauckel to provide laborers for industries under its control and succeeded in sustaining this position over the objection of Sauckel. The practice was developed under which Speer transmitted to Sauckel an estimate of the total number of workers needed. Sauckel obtained the labor and allocated it to the various industries in accordance with instructions supplied by Speer.

Speer knew when he made his demands on Sauckel that they would be supplied by foreign laborers serving under compulsion. He participated in conferences involving the extension of the slave labor program for the purpose of satisfying his demands. He was present at a conference held during 10 and 12 August 1942 with Hitler and Sauckel, at which it was agreed that Sauckel should bring laborers by force from occupied territories where this was necessary to satisfy the labor needs of the industries under Speer's control. Speer also attended a conference in Hitler's headquarters on 4 January 1944, at which the decision was made that Sauckel should obtain "at least 4 million new workers from occupied territories" in order to satisfy the demands for labor made by Speer, although Sauckel indicated that he could do this only with help from Himmler.

Sauckel continually informed Speer and his representatives that foreign laborers were being obtained by force. At a meeting of 1 March 1944 Speer's deputy questioned Sauckel very closely about his failure to live up to the obligation to supply 4 million workers from occupied territories. In some cases Speer demanded laborers from specific foreign countries. Thus, at the conference of 10-12 August 1942 Sauckel was instructed to supply Speer with "a further million Russian laborers for the German armament industry up to and including October 1942." At a meeting of the Central Planning Board on 22 April 1943 Speer discussed plans to obtain Russian laborers for use in the coal mines, and flatly vetoed the suggestion that this labor deficit should be made up by German labor.

Speer has argued that he advocated the reorganization of the labor program to place a greater emphasis on utilization of German labor in war

production in Germany and on the use of labor in occupied countries in local production of consumer goods formerly produced in Germany. Speer took steps in this direction by establishing the so-called "blocked industries" in the occupied territories which were used to produce goods to be shipped to Germany. Employees of these industries were immune from deportation to Germany as slave laborers and any worker who had been ordered to go to Germany could avoid deportation if he went to work for a blocked industry. This system, although somewhat less inhumane than deportation to Germany, was still illegal. The system of blocked industries played only a small part in the over-all slave labor program, although Speer urged its cooperation with the slave labor program, knowing the way in which it was actually being administered. In an official sense, he was its principal beneficiary and he constantly urged its extension.

Speer was also directly involved in the utilization of forced labor, as Chief of the Organization Todt. The Organization Todt functioned principally in the occupied areas on such projects as the Atlantic Wall and the construction of military highways, and Speer has admitted that he relied on compulsory service to keep it adequately staffed. He also used concentration camp labor in the industries under his control. He originally arranged to tap this source of labor for use in small out-of-the-way factories; and later, fearful of Himmler's jurisdictional ambitions, attempted to use as few concentration camp workers as possible.

Speer was also involved in the use of prisoners of war in armament industries but contends that he utilized Soviet prisoners of war only in industries covered by the Geneva Convention.

Speer's position was such that he was not directly concerned with the cruelty in the administration of the slave labor program, although he was aware of its existence. For example, at meetings of the Central Planning Board he was informed that his demands for labor were so large as to necessitate violent methods in recruiting. At a meeting of the Central Planning Board on 30 October 1942, Speer voiced his opinion that many slave laborers who claimed to be sick were malingerers and stated: "There is nothing to be said against SS and police taking drastic steps and putting those known as slackers into concentration camps." Speer, however, insisted that the slave laborers be given adequate food and working conditions so that they could work efficiently.

In mitigation it must be recognized that Speer's establishment of blocked industries did keep many laborers in their homes and that in the closing stages of the war he was one of the few men who had the courage to tell Hitler that the war was lost and to take steps to prevent the senseless destruction of production facilities, both in occupied territories and in Germany. He carried out his opposition to Hitler's scorched earth program in some of the Western countries and in Germany by deliberately sabotaging it at considerable personal risk.

Conclusion

The Tribunal finds that Speer is not guilty on Counts One and Two, but is guilty under Counts Three and Four.

VON NEURATH

Von Neurath is indicted under all four Counts. He is a professional diplomat who served as German Ambassador to Great Britain from 1930 to 1932. On 2 June 1932 he was appointed Minister of Foreign Affairs in the Von Papen Cabinet, a position which he held under the Cabinets of Von Schleicher and Hitler. Von Neurath resigned as Minister of Foreign Affairs on 4 February 1938, and was made Reich Minister without Portfolio, President of the Secret Cabinet Council, and a member of the Reich Defense Council. On 18 March 1939 he was appointed Reich Protector for Bohemia and Moravia, and served in this capacity until 27 September 1941. He held the formal rank of Obergruppenführer in the SS.

Crimes against Peace

As Minister of Foreign Affairs, Von Neurath advised Hitler in connection with the withdrawal from the Disarmament Conference and the League of Nations on 14 October 1933, the institution of rearmament, the passage on 16 March 1935 of the law for universal military service, and the passage on 21 May 1935 of the secret Reich Defense Law. He was a key figure in the negotiation of the Naval Accord entered into between Germany and England on 18 June 1935. He played an important part in Hitler's decision to reoccupy the Rhineland on 7 March 1936, and predicted that the occupation could be carried through without any reprisals from the French. On 18 May 1936 he told the American Ambassador to France that it was the policy of the German Government to do nothing in foreign affairs until "the Rhineland had been digested," and that as soon as the fortifications in the Rhineland had been constructed and the countries of central Europe realized that France could not enter Germany at will, "all those countries will begin to feel very differently about their foreign policies and a new constellation will develop."

Von Neurath took part in the Hossbach conference of 5 November 1937. He has testified that he was so shocked by Hitler's statements that he had a heart attack. Shortly thereafter he offered to resign, and his resignation was accepted on 4 February 1938, at the same time that Von Fritsch and Von Blomberg were dismissed. Yet with knowledge of Hitler's aggressive plans he retained a formal relationship with the Nazi regime as Reich Minister without Portfolio, President of the Secret Cabinet Council and a member of the Reich Defense Council. He took charge of the Foreign Office at the time of the occupation of Austria, assured the British Ambassador that

this had not been caused by a German ultimatum, and informed the Czechoslovakian Minister that Germany intended to abide by its arbitration convention with Czechoslovakia. Von Neurath participated in the last phase of the negotiations preceding the Munich Pact, but contends that he entered these discussions only to urge Hitler to make every effort to settle the issues by peaceful means.

Criminal Activities in Czechoslovakia

Von Neurath was appointed Reich Protector for Bohemia and Moravia on 18 March, 1939. Bohemia and Moravia were occupied by military force. Hacha's consent, obtained as it was by duress, cannot be considered as justifying the occupation. Hitler's decree of 16 March 1939, establishing the Protectorate, stated that this new territory should "belong henceforth to the territory of the German Reich," an assumption that the Republic of Czechoslovakia no longer existed. But it also went on the theory that Bohemia and Moravia retained their sovereignty subject only to the interests of Germany as expressed by the Protectorate. Therefore even if the doctrine of subjugation should be considered to be applicable to territory occupied by aggressive action, the Tribunal does not believe that this Proclamation amounted to an incorporation which was sufficient to bring the doctrine into effect. The occupation of Bohemia and Moravia must therefore be considered a military occupation covered by the rules of warfare. Although Czechoslovakia was not a party to the Hague Convention of 1907, the rules of land warfare expressed in this Convention are declaratory of existing international law and hence are applicable.

As Reich Protector, Von Neurath instituted an administration in Bohemia and Moravia similar to that in effect in Germany. The free press, political parties, and trade unions were abolished. All groups which might serve as opposition were outlawed. Czechoslovakian industry was worked into the structure of German war production, and exploited for the German war effort. Nazi anti-Semitic policies and laws were also introduced. Jews were barred from leading positions in Government and business.

In August 1939 Von Neurath issued a proclamation warning against any acts of sabotage and stating that "the responsibility for all acts of sabotage is attributed not only to individual perpetrators but to the entire Czech population." When the war broke out on 1 September 1939, 8,000 prominent Czechs were arrested by the Security Police in Bohemia and Moravia and put into protective custody. Many of this group died in concentration camps as a result of mistreatment.

In October and November 1939 Czechoslovakian students held a series of demonstrations. As a result, on Hitler's orders, all universities were closed, 1,200 students imprisoned, and the nine leaders of the demonstration shot by Security Police and SD. Von Neurath testified that he was not informed of this action in advance, but it was announced by proclamation

over his signature posted on placards throughout the Protectorate, which he claims, however, was done without his authority.

On 31 August 1940 Von Neurath transmitted to Lammers a memorandum which he had prepared dealing with the future of the Protectorate, and a memorandum with his approval prepared by Carl Herman Frank on the same subject. Both dealt with the question of Germanization and proposed that the majority of the Czechs might be assimilated racially into the German Nation. Both advocated the elimination of the Czechoslovakian intelligentsia and other groups which might resist Germanization. Von Neurath's by expulsion, Frank's by expulsion or "special treatment."

Von Neurath has argued that the actual enforcement of the repressive measures was carried out by the Security Police and SD who were under the control of his State Secretary. Carl Herman Frank, who was appointed at the suggestion of Himmler and who, as a Higher SS and Police Leader, reported directly to Himmler. Von Neurath further argues that anti-Semitic measures and those resulting in economic exploitation were put into effect in the Protectorate as the result of policies decided upon in the Reich. However this may be, he served as the chief German official in the Protectorate when the administration of this territory played an important rôle in the wars of aggression which Germany was waging in the East knowing that War Crimes and Crimes against Humanity were being committed under his authority.

In mitigation it must be remembered that Von Neurath did intervene with the Security Police and SD for the release of many of the Czechoslovaks who were arrested on 1 September 1939, and for the release of students arrested later in the fall. On 23 September 1941 he was summoned before Hitler and told that he was not being harsh enough and that Heydrich was being sent to the Protectorate to combat the Czechoslovakian resistance groups. Von Neurath attempted to dissuade Hitler from sending Heydrich, but in vain, and when he was not successful, offered to resign. When his resignation was not accepted he went on leave, on 27 September 1941, and refused to act as Protector after that date. His resignation was formally accepted in August 1943.

Conclusion

The Tribunal finds that Von Neurath is guilty under all four Counts.

FRTZSCHE

Fritzsche is indicted on Counts, One, Three, and Four. He was best known as a radio commentator, discussing once a week the events of the day on his own program, "Hans Fritzsche Speaks." He began broadcasting in September 1932; in the same year he was made the head of the Wire-less News Service, a Reich Government agency. When, on 1 May 1933, this

agency was incorporated by the National Socialists into their Reich Ministry of Popular Enlightenment and Propaganda, Fritzsche became a member of the Nazi Party and went to that Ministry. In December 1938 he became head of the Home Press Division of the Ministry; in October 1942 he was promoted to the rank of Ministerial Director. After serving briefly on the Eastern Front in a propaganda company, he was, in November 1942, made head of the Radio Division of the Propaganda Ministry and Plenipotentiary for the Political Organization of the Greater German Radio.

Crimes against Peace

As head of the Home Press Division Fritzsche supervised the German press of 2,300 daily newspapers. In pursuance of this function he held daily press conferences to deliver the directives of the Propaganda Ministry to these papers. He was, however, subordinate to Dietrich, the Reich Press Chief, who was in turn a subordinate of Goebbels. It was Dietrich who received the directives to the press of Goebbels and other Reich Ministers, and prepared them as instructions, which he then handed to Fritzsche for the press.

From time to time, the "Daily Paroles of the Reich Press Chief," as these instructions were labeled, directed the press to present to the people certain themes, such as the Leadership Principle, the Jewish problem, the problem of living space, or other standard Nazi ideas. A vigorous propaganda campaign was carried out before each major act of aggression. While Fritzsche headed the Home Press Division, he instructed the press how the actions or wars against Bohemia and Moravia, Poland, Yugoslavia, and the Soviet Union should be dealt with. Fritzsche had no control of the formulation of these propaganda policies. He was merely a conduit to the press of the instructions handed him by Dietrich. In February 1939 and before the absorption of Bohemia and Moravia, for instance, he received Dietrich's order to bring to the attention of the press Slovakia's efforts for independence, and the anti-Germanic policies and politics of the existing Prague Government. This order to Dietrich originated in the Foreign Office.

The Radio Division, of which Fritzsche became the head in November 1942, was one of the 12 divisions of the Propaganda Ministry. In the beginning Dietrich and other heads of divisions exerted influence over the policies to be followed by radio. Towards the end of the war, however, Fritzsche became the sole authority within the Ministry for radio activities. In this capacity he formulated and issued daily radio "paroles" to all Reich propaganda offices, according to the general political policies of the Nazi regime, subject to the directives of the Radio-Political Division of the Foreign Office, and the personal supervision of Goebbels.

Fritzsche, with other officials of the Propaganda Ministry, was present at Goebbels' daily staff conferences. Here they were instructed in the news

and propaganda policies of the day. After 1943 Fritzsche himself occasionally held these conferences, but only when Goebbels and his State Secretaries were absent. And even then his only function was to transmit the Goebbels' directives relayed to him by telephone.

This is the summary of Fritzsche's positions and influence in the Third Reich. Never did he achieve sufficient stature to attend the planning conferences which led to aggressive war; indeed according to his own uncontradicted testimony he never even had a conversation with Hitler. Nor is there any showing that he was informed of the decisions taken at these conferences. His activities cannot be said to be those which fall within the definition of the common plan to wage aggressive war as already set forth in this Judgment.

War Crimes and Crimes against Humanity

The Prosecution has asserted that Fritzsche incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities under Counts Three and Four. His position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns.

Excerpts in evidence from his speeches show definite anti-Semitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out "as unpleasant as the Führer predicted." But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East. The evidence moreover shows that he twice attempted to have publication of the anti-Semitic *Der Stürmer* suppressed, though unsuccessfully.

In these broadcasts Fritzsche sometimes spread false news, but it was not proved he knew it to be false. For example, he reported that no German U-boat was in the vicinity of the *Athenia* when it was sunk. This information was untrue; but Fritzsche, having received it from the German Navy, had no reason to believe it was untrue.

It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German People to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.

Conclusion

The Tribunal finds that Fritzsche is not guilty under this Indictment, and directs that he shall be discharged by the Marshal when the Tribunal presently adjourns.

BORMANN

Bormann is indicted on Counts One, Three, and Four. He joined the National Socialist Party in 1925, was a member of the Staff of the Supreme Command of the SA from 1928 to 1930, was in charge of the Aid Fund of the Party, and was Reichsleiter from 1933 to 1945. From 1933 to 1941 he was Chief of Staff in the Office of the Führer's Deputy and, after the flight of Hess to England, became Head of the Party Chancellery on 12 May 1941. On 12 April 1943 he became Secretary to the Führer. He was political and organizational head of the Volkssturm and a general in the SS.

Crimes against Peace

Bormann in the beginning a minor Nazi, steadily rose to a position of power and, particularly in the closing days, of great influence over Hitler. He was active in the Party's rise to power and even more so in the consolidation of that power. He devoted much of his time to the persecution of the churches and of the Jews within Germany.

The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate, or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece these plans for aggression. Nor can knowledge be conclusively inferred from the positions he held. It was only when he became head of the Party Chancellery in 1941, and later in 1943 Secretary to the Führer when he attended many of Hitler's conferences, that his positions gave him the necessary access. Under the view stated elsewhere which the Tribunal has taken of the conspiracy to wage aggressive war, there is not sufficient evidence to bring Bormann within the scope of Count One.

War Crimes and Crimes against Humanity

By decree of 29 May 1941 Bormann took over the offices and powers held by Hess; by the decree of 24 January 1942 these powers were extended to give him control over all laws and directives issued by Hitler. He was thus responsible for laws and orders issued thereafter. On 1 December 1942 all Gaue became Reich defense districts, and the Party Gauleiters responsible to Bormann were appointed Reich Defense Commissioners. In effect, this made them the administrators of the entire civilian war effort. This was so not only in Germany, but also in those territories which were incorporated into the Reich from the absorbed and conquered territories.

Through this mechanism Bormann controlled the ruthless exploitations of the subjected populace. His order of 12 August 1942 placed all Party agencies at the disposal of Himmler's program for forced resettlement and denationalization of persons in the occupied countries. Three weeks after

the invasion of Russia, he attended the conference of 16 July 1941 at Hitler's field quarters with Göring, Rosenberg, and Keitel; Bormann's reports show that there were discussed and developed detailed plans of enslavement and annihilation of the population of these territories. And on 8 May 1942 he conferred with Hitler and Rosenberg on the forced resettlement of Dutch personnel in Latvia, the extermination program in Russia, and the economic exploitation of the Eastern territories. He was interested in the confiscation of art and other properties in the East. His letter of 11 January 1944 called for the creation of a large scale organization to withdraw commodities from the occupied territories for the bombed-out German populace.

Bormann was extremely active in the persecution of the Jews, not only in Germany but also in the absorbed and conquered countries. He took part in the discussions which led to the removal of 60,000 Jews from Vienna to Poland in coöperation with the SS and the Gestapo. He signed the decree of 31 May 1941 extending the Nuremberg Laws to the annexed Eastern territories. In an order of 9 October 1942 he declared that the permanent elimination of Jews in Greater German territory could no longer be solved by emigration, but only by applying "ruthless force" in the special camps in the East. On 1 July 1943 he signed an ordinance withdrawing Jews from the protection of the law courts and placing them under the exclusive jurisdiction of Himmler's Gestapo.

Bormann was prominent in the slave labor program. The Party leaders supervised slave labor matters in the respective Gaue, including employment, conditions of work, feeding, and housing. By his circular of 5 May 1943 to the Leadership Corps, distributed down to the level of Ortsgruppenleiter, he issued directions regulating the treatment of foreign workers, pointing out they were subject to SS control on security problems, and ordered the previous mistreatment to cease. A report of 4 September 1942 relating to the transfer of 500,000 female domestic workers from the East to Germany showed that control was to be exercised by Sauckel, Himmler, and Bormann. Sauckel by decree of 8 September directed the Kreisleiter to supervise the distribution and assignment of these female laborers.

Bormann also issued a series of orders to the Party leaders dealing with the treatment of prisoners of war. On 5 November 1941 he prohibited decent burials for Russian prisoners of war. On 25 November 1943 he directed Gauleiter to report cases of lenient treatment of prisoners of war. And on 13 September 1944 he ordered liaison between the Kreisleiter with the camp commandants in determining the use to be made of prisoners of war for forced labor. On 29 January 1943 he transmitted to his leaders OKW instructions allowing the use of firearms, and corporal punishment on recalcitrant prisoners of war, contrary to the Rules of Land Warfare.

On 30 September 1944 he signed a decree taking from the OKW jurisdiction over prisoners of war and handing them over to Himmler and the SS.

Bormann is responsible for the lynching of Allied airmen. On 30 May 1944 he prohibited any police action or criminal proceedings against persons who had taken part in the lynching of Allied fliers. This was accompanied by a Goebbels' propaganda campaign inciting the German people to take action of this nature, and the conference of 6 June 1944, where regulations for the application of lynching were discussed.

His Counsel, who has labored under difficulties, was unable to refute this evidence. In the face of these documents, which bear Bormann's signature, it is difficult to see how he could do so even were the defendant present. Counsel has argued that Bormann is dead and that the Tribunal should not avail itself of Article 12 of the Charter, which gives it the right to take proceedings *in absentia*. But the evidence of death is not conclusive, and the Tribunal, as previously stated, is determined to try him *in absentia*. If Bormann is not dead and is later apprehended, the Control Council for Germany may, under Article 29 of the Charter, consider any facts in mitigation, and alter or reduce his sentence, if deemed proper.

Conclusion

The Tribunal finds that Bormann is not guilty on Count One, but is guilty on Counts Three and Four.

1 October 1946

/s/ GEOFFREY LAWRENCE
President

/s/ FRANCIS BIDDLE

/s/ H. DONNEDIEU DE VABRES

/s/ NIKITCHENKO

/s/ NORMAN BIRKETT

/s/ JOHN J. PARKER

/s/ R. FALCO

/s/ A. VOLCHKOV

Sentences

In accordance with Article 27 of the Charter, the President of the International Military Tribunal, at its concluding session of 1 October 1946, pronounced the sentence on the defendants convicted on the Indictment:

"Defendant Herman Wilhelm Göring, on the Counts of the Indictment on which you have been convicted, the International Military Tribunal sentences you to death by hanging.

"Defendant Rudolf Hess, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to imprisonment for life.

"Defendant Joachim von Ribbentrop, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Wilhelm Keitel, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Ernst Kaltenbrunner, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Alfred Rosenberg, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Hans Frank, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Wilhelm Frick, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Julius Streicher, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Walter Funk, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to imprisonment for life.

"Defendant Karl Dönitz, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to 10 years' imprisonment.

"Defendant Erich Raeder, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to imprisonment for life.

"Defendant Baldur von Schirach, on the Count of the Indictment on which you have been convicted, the Tribunal sentences you to 20 years' imprisonment.

"Defendant Fritz Sauckel, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Alfred Jodl, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Arthur Seyss-Inquart, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to death by hanging.

"Defendant Albert Speer, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to 20 years' imprisonment.

"Defendant Constantin von Neurath, on the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to 15 years' imprisonment.

"The Tribunal sentences the Defendant Martin Bormann, on the Counts of the Indictment on which he has been convicted, to death by hanging."

TABULATION OF SENTENCES

30 September 1946 *

Defendant	Counts on Which Convicted	Sentence
HERMANN WILHELM GÖRING	1, 2, 3, 4	Death by hanging
RUDOLF HESS	1, 2	Imprisonment for life
JOACHIM VON RIBBENTROP	1, 2, 3, 4	Death by hanging
WILHELM KEITEL	1, 2, 3, 4	Death by hanging
ERNEST KALTENBEUNNER	3, 4	Death by hanging
ALFRED ROSENBERG	1, 2, 3, 4	Death by hanging
HANS FRANK	3, 4	Death by hanging
WILHELM FRICK	2, 3, 4	Death by hanging
JULIUS STREICHER	4	Death by hanging
WALTER FUNK	2, 3, 4	Imprisonment for life
HJALMAR SCHACHT	Not guilty	
KARL DÖNITZ	2, 3	Ten years' imprisonment
ERICH RAEDER	1, 2, 3	Imprisonment for life
BALDUR VON SCHIRACH	4	Twenty years' imprisonment
FRIEZ SAUCKEL	3, 4	Death by hanging
ALFRED JODL	1, 2, 3, 4	Death by hanging
FRANZ VON PAPEN	Not guilty	
ARTHUR SEYSS-INQUART	2, 3, 4	Death by hanging
ALBERT SPEER	3, 4	Twenty years' imprisonment
CONSTANTIN VON NEURATH	1, 2, 3, 4	Fifteen years' imprisonment
HANS FRITZSCHE	Not guilty	
MARTIN BORMANN	3, 4	Death by hanging

/s/ GEOFFREY LAWRENCE, President

/s/ FRANCIS BIDDLE

/s/ H. DONNEDIEU DE VABRES

/s/ NIKITCHENKO

A True Copy

/s/ JOHN E. RAY

Colonel, FA

* These sentences were read in open court by the President on 1 October 1946.

BOOK REVIEWS

The Nuremberg Trial and Aggressive War. By Sheldon Glueck. New York: Alfred A. Knopf; 1946. Pp. xvi, 121. \$2.00.

As the title indicates, this book deals with the charges at Nuremberg based upon the planning and waging of aggressive war. The author has written it because in his previous volume¹ he expressed the view that he did not think such acts could be regarded as "international crimes." He has now changed his mind and believes "that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed custom to be accepted as international law" (pp. 4-5). The author became an adviser to the Chief Counsel of the United States at Nuremberg, and Mr. Jackson contributes a commendatory foreword, but the volume was written before the Nuremberg verdict was finally rendered on October 1, 1946.

The reviewer fully agrees with the author in regard to the place of custom in the development of international law. He regards as untenable, however, the argument not only of the author but of the prosecutors and judges at Nuremberg that custom can be judicially established by placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, by citing unratified protocols or public and private resolutions of no legal effect, and by ignoring flagrant and repeated violations of non-aggression pacts by one of the prosecuting governments which, if properly weighed in the evidence, would nullify any judicial holding that a custom outlawing aggressive war had been accepted in international law. The reviewer's leading article in this number of the JOURNAL gives his opinion on the Nuremberg Tribunal's finding under this count of the indictment.

The author, as well as the prosecutors and judges at Nuremberg, tend to confuse the issue in suggesting a qualification of the criminality of aggressive war according to the brutality with which it is waged or its terrible consequences. No such distinctions are made by the count in the indictment charging the planning or waging of aggressive war. Acts of brutality and terrorism were disposed of in the separate counts charging war crimes and crimes against humanity. As pointed out in the reviewer's article referred to, he believes that the proceedings and convictions at Nuremberg on those counts were legally justifiable.

GEORGE A. FINCH

Editor-in-Chief

¹ *War Criminals: Their Prosecution and Punishment*, reviewed in this JOURNAL, Vol. 39 (1945), p. 358.

An Introduction to the Papers of the New York Prize Court, 1861-1865.
By Madeline Russell Robinton. New York: Columbia University Press;
1945. Pp. 203. Index. \$2.75.

Prize law has apparently lost the prominent position which it used to occupy in the minds of international lawyers but it will always retain its importance in the history of international legal development. It is significant of this drift from practice to history that this volume has been prepared by an historian primarily for historians. Famous names like the *Springbok*, the *Peterhoff*, and the *Stephen Hart* leap to the eye of the international lawyer but he will scan the index in vain for light on "contraband" or "continuous voyage." He will find, however, interesting discussions of the law of blockade and of course an abundance of data on prize procedure. These omissions are noted nostalgically and in no sense by way of criticism of the author, who has recorded here the results of a careful and scholarly task of examining, classifying, and analyzing the records of the United States District Court for the Southern District of New York sitting as a prize court in New York City during the Civil War. As the title indicates, the book is essentially a guide to this archival material which the author had microfilmed. Published in Columbia University's Studies in History, Economics and Public Law, the book serves notice on students in all three of those fields that there is a rich store of source material now readily available for use through Dr. Robinton's efforts.

The author explains the nature of the papers examined and incidentally thus contributes an interesting description of ship's papers, which, with the examination *in preparatorio*, constituted until very recent times the sole evidence on which the captor was entitled to rely, unless the Court granted an order for further proof. Chapter III, on the procedure of the Court, contains much information of value to the student of prize law. In Chapter II one is reminded of the paucity of authoritative works on the subject available to American judges and practitioners in 1861 even though British precedent and practice were relied on extensively. As already indicated, blockade is the only aspect of the substantive law which the author discusses in detail but there is no doubt that the papers themselves would repay study by the international lawyer interested in other topics as well.

Among her other achievements, Dr. Robinton has succeeded in making a very readable book out of a report which might easily in less skillful hands have been as dusty dry as the papers she has classified.

PHILIP C. JESSUP

Of the Board of Editors

A Textbook of the English Conflict of Laws (Private International Law).

By Clive M. Schmitthoff. London: Sir Isaac Pitman & Sons, Ltd.; 1945.

Pp. xlvii, 455. Index. 35 sh.

Handbuch des Internationalen Privatrechts unter besonderer Berücksichtigung der Schweizerischen Gesetzgebung und Rechtsprechung.

By Adolf F. Schnitzer. Basel: Verlag für Recht und Gesellschaft, A. G.;

1944. Vol. 1, pp. xvi, 375; Vol. 2, pp. xx, 379-773. Index.

These works are the product of war years. They are here reviewed together for their contrasting interest. Both seek to present the doctrines of the conflict of laws chiefly as interpreted by the practice of a single country. England is a country of unitary jurisdiction, a "legal unit," as Dr. Schmitthoff expresses it; for even the law of Scotland is regarded as foreign law. Switzerland is a country of divided jurisdiction, federal and cantonal. Swiss law, like the English, lays emphasis upon domicile as a determinant of personal and family relations, thus differing from many countries of continental Europe which apply national law.

Dr. Schmitthoff endeavors to expound the English system as concisely as possible. He recognizes the numerous theories and extensive literature which have grown up about the subject. Where the law has been ascertained, he states it clearly; where there is still controversy in the courts, he presents his own point of view. Both Schmitthoff and Schnitzer have favorite key solutions. Schmitthoff leans to the vested-right theory, whereas Schnitzer attempts to find the system of law with which the transaction is principally "tied up": the *Anknüpfungspunkt*. Schmitthoff correctly recognizes the dependence of the former upon the latter when he says that the task is "to determine the territorial law to which the right probably pertains, for that law alone is capable of creating such a right and vesting it in a person" (p. 31).

Schmitthoff's book will be welcomed as a ready reference to English law brought down to date. It has the merit, so often lacking, of adequately presenting the facts of important cases in smaller type by way of introduction to the text of the discussions. This is particularly helpful to the practitioner. Some of the nomenclature will seem strange to American readers. Schmitthoff uses the term "general assignment" to apply to what is usually referred to as the passing of property by operation of law. We doubt the propriety of dealing with questions such as the transfer of property by inheritance or by reason of marriage under the heading of general assignments.

Dr. Schnitzer's two volumes are a later edition of a work first published in 1937 and now greatly revised and enlarged. He endeavors to present Swiss law as a positive system but he also assumes to integrate its provisions with the doctrines followed in other countries so as to meet the necessities of modern international intercourse. When he speaks of a "point of

contact" with the law of a certain territorial jurisdiction, he presupposes an examination of the facts of each case in order to determine the system of law which has the closest relation to the particular issue (p. 41). He is opposed to a narrow nationalism in the choice of law as not being in accordance with the actual conditions of international intercourse. While chiefly presenting the law of Switzerland, he enriches the discussion by a comparative survey of the practice of other countries. Thus, for example, his treatment of the numerous conflict-of-laws problems relating to currency and gold clauses which reached the courts between World War I and World War II is a valuable comparative study. The Swiss concept is that a gold clause constitutes part of the substantive obligation of the contract and that its validity and meaning should be interpreted by the proper law of the contract itself, which may or may not be the law of the place of performance (Vol. ii, p. 595). The author's discussion of the many ramifications of these currency problems are particularly interesting at a time when disputes in this field are just beginning to reach the courts as an aftermath of World War II.

ARTHUR K. KUHN

Of the Board of Editors

Grundlinien der antiken Rechts-und Staatsphilosophie. By Alfred Verdross-Drossberg. Vienna: Springer Verlag: 1946. Pp. vii, 174. Indexes.

The book under review was prepared under conditions of great hardship. Alfred Verdross, a truly leading international lawyer of our time, did the research under a regime which had suspended him from Vienna University and never allowed him to teach the philosophy of law. In the grim days of this war, cut off from the rest of the world, the book was prepared. Seemingly it deals with problems far removed from actuality; but it is exactly in the discussion of the Greek philosophy of the State and of the law that the author voices his opposition against tyrants, his basic belief in the dignity of man, his deep international and universal convictions. It leads from the glory that was Hellas to the future of Western civilization. It is more than a symbol, it is the expression of a conviction and of a faith that the Austrian Verdross dedicates this book to the English Plato scholar Sir Ernest Barker.

We have mentioned the difficulties which beset the author, but we hasten to add that the book needs no excuses. Far from it; it is a brilliant work, an excellent piece of scholarship, the product of a thinker, full of new interpretations and ideas. It is, at the same time, a beautiful book from an artistic point of view, full of understanding not only of the great philosophers but also of the great poets of Hellas.

It is only possible here to point out a few things. Plato is for Verdross the center of the Greek philosophy of the state. In Plato all the former

currents, coming from Pythagoras, Heraclitus, Protagoras, and Socrates, converge; from Plato radiate the influences to Aristotle and the Stoics. But Plato is no eclectic; he creates out of the different currents the stream of the Platonic system, crowned by the philosophy of the ideas.

An originality of Verdross' book is the care with which the often neglected pre-Socratic philosophy of the state, from archaic times to the Sophists, is treated. Verdross contrasts the military ideal of power, as represented by Sparta, with the ideal of the pacific state of law, as represented by Athens. He contrasts the philosophy of Tyrtaios, Lykurgos, Heraclitus, and Thukydides with that of Hesiod and Solon. Of eminent importance is his beautiful chapter on Hesiod, in whom the Western idea of law appears for the first time, for whom the state is a peaceful legal community for work.

The book contains also much of interest for the international lawyer; Verdross' emphasis on Plato's stand against wars of conquest and a foreign policy of expansionism. For Plato war was only a means to execute the law and Verdross sees in him the founder of the doctrine of *bellum justum*.

In Plato as well as in Hippias we find the beginnings of a Pan-Hellenic natural law. With the Stoics Chrysippos and Zenon we find the full cosmopolitan idea, the idea, so much discussed precisely in our own days, of a universal community, of a world law. Cicero, the citizen of the Roman Empire, brings these Stoic ideas to Rome. There runs thus a thread of ideas from ancient Hellas to our own days. Hellas is not only the cradle of our Western civilization, she is not only, as Nietzsche said, of yesterday and today, she is also, as Verdross adds, of to-morrow. To sum up this history of the development of ideas with Verdross' words: The goddess Dike of Hesiod becomes the Platonic idea of law and finally the general law of reason (logos). The Polis of Hesiod as the peaceful legal community of its citizens becomes through the Greek Stoa, through Cicero, Seneca, and Marcus Aurelius the idea of an embracing legal community of mankind.

JOSEF L. KUNZ

Of the Board of Editors

League of Nations. Report on the Work of the League During the War. Geneva: League of Nations; 1945. Pp. 137.

The political failure of the League of Nations in the years preceding World War II fortunately did not prevent the continuation of its so-called technical services in the fields of economics, finance, transit, health, narcotic drugs, and so on, during the war years. While the need for economy resulted in drastic slashes in expenditures—the budget of the Secretariat, for instance, was reduced by eighty per cent—an amazing amount of important work was accomplished under adverse conditions, as shown in this Report. The League's economic and financial experts proceeded with their

research and observations at Princeton, branches of the Narcotic Drugs activity were set up in Washington, the League Treasurer took up quarters in London, and the International Labor Office in Montreal. In Geneva itself the Secretariat went ahead with its work of collecting, classifying, and studying valuable statistics of all kinds. Numerous studies were published, as listed in the appendix to the Report, and contacts with the League's staff members in the United States and elsewhere were maintained. At the same time the framework of the League was preserved in Geneva. In his Introduction the Acting Secretary General points out that this work was pursued "in spite of some feeling of isolation not lessened by the presence of unfriendly forces about ten minutes' walk from the *Palais des Nations*. . . . Within the shelter of the Swiss frontiers the difficulties were partly moral, partly political, and partly material" (p. 11).

The Report offers ample evidence that the years from 1940 to 1945 were busy ones for the League Secretariat and various League Committees. Their varied services to Governments and to other international organizations during the years of bitter international strife were very wide in scope and geographical range. Expected population changes, economic security, rationing and relief, inflation, cartels, balance of payments, broadcasting, international exchange of electric power, malaria, epidemics, "famine disease," opium, refugees, mandates, art, the legal status of women, and a good many other subjects received serious attention, often resulting in the completion of standard studies. The future usefulness of this work to organs of the United Nations and other international as well as national bodies is obvious and cannot be overstressed. A vote of appreciation is due the members of the League Secretariat and Committees as their organization passes out of the world picture—not without leaving the indelible imprint of its contributions to progress in the field of international organization.

JOHN BROWN MASON

Oberlin College

The Economic and Financial Organization of the League of Nations. By Martin Hill. Washington: Carnegie Endowment for International Peace; 1946. Pp. 168. \$2.00.

This is No. 6 in the Carnegie Endowment *Studies in the Administration of International Law and Organization*. It is written by a man intimately associated with the economic and financial work of the League of Nations, and while its first words disclaim any effort to write "a complete history of the Economic and Financial Organization of the League," it is in fact a remarkably compact and useful sketch of that work. It is to be hoped that Mr. Martin will some day write a fuller account, but within the limitations set he has given us a reliable and authoritative survey of the efforts of the League of Nations in this field, and a comprehension of the problems to be encountered which should be helpful in future work.

An introductory chapter provides background and enables understanding of the difficulties to be encountered. The next three chapters deal with Origins, Financial Reconstruction, and Economic Reconstruction. With the beginning of the 1930's the impact of the Great Depression (Ch. V) was felt, and New Tasks and Methods had to be developed, such as the Economic Intelligence Service. Chapter IX describes the Structure of the Organization and its various changes, culminating in the unfulfilled recommendations of the Bruce Committee. The final chapter traces the work during World War II, and at Princeton, which was more fruitful than is perhaps generally known. A bibliography of League publications in the field is included.

CLYDE EAGLETON

Of the Board of Editors

Les Rapports entre l'Organisation Internationale du Travail et la Cour Permanente de Justice Internationale. By Georges Fisher. Paris: Pedone; 1946. Pp. 388.

It is most fitting that at a moment when world organizations are either being created or overhauled for a surer achievement of their objectives, someone should present to the expert as well as to the general reader so thorough a survey as this on the relations between the International Labor Organization and the Permanent Court of International Justice, recently replaced by the International Court of Justice. The volume has the merit of being the first to deal with this subject in a detailed and scholarly manner. In dealing with these two international bodies the author is perforce led to give us a considerable amount of interesting material on the League of Nations which was in turn replaced by the United Nations.

While it has not been found necessary to replace the ILO itself by another organization to deal with social legislation on an international scale, the very fact that the Court and the League were changed or replaced necessitated certain amendments to the Constitution of the ILO. Other amendments were dictated by over a quarter of a century of experience. Hence certain parts of the book under review, in particular those concerned with Arts. 30 and 37 of the Constitution of the ILO, are now of historical value only. But it is of special interest to note that in his discussion of the application of the principles embodied in those two articles the author has rightly concluded in favor of the modifications which have since been effected by the International Labor Conference held in 1946 in Montreal.

Article 30 of the Constitution of the ILO specified that in the event of any Member failing to comply with his obligations in connection with certain decisions of the Conference, any other Member of the Organization was entitled to refer the matter to the Permanent Court of International Justice. The author argued that this judicial process was too cumbersome and suggested that it be replaced by a simpler and more expeditious proce-

ture in which the ILO would play a more important rôle. He had foreseen exactly what was to be done at Montreal when the Conference decided that henceforth failure to comply with obligations imposed by the Conference were to be referred not to the International Court of Justice but to the Governing Body which in turn might, if necessary, report the matter to the Conference.

Likewise Art. 37 of the Constitution stipulated that any question or dispute relating to the interpretation of the Constitution or of certain decisions of the Conference were to be submitted to the Permanent Court of International Justice. For various reasons the author felt that some less solemn procedure should be devised to handle the less important questions. Here again he had anticipated the conclusions of the Montreal Session which, while reserving the possibility of bringing such matters before the International Court of Justice, gave the Governing Body authority to make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of decisions of the Conference.

The Constitution also provided that in the event of a complaint laid by a State Member of the Organization against another Member for not complying with certain decisions of the Conference, the Commission of enquiry entrusted with the dispute in the first instance was to indicate the measures of an economic character to be taken against the defaulting Member who always had a last recourse to the Permanent Court of International Justice, and in the event that the defaulting Member failed to comply with decision of the Commission of Enquiry or of the Permanent Court of International Justice, any other Member could take against the defaulter the economic measures indicated either by the Commission or by the Court, as the case might be. This question of economic measures disturbed the author who argued against their ultimate efficiency, and maintained that in any case they should be prescribed not by a judicial tribunal but by a political body fully informed of the relevant economic facts and aware of the political consequences that may be entailed. Here again the author has shown his unusual analytical foresight. The Conference at its Montreal session deleted from the Constitution all reference to economic sanctions and amended Art. 33 so that in the event of any Member failing to carry out the recommendations either of the Commission or of the Court the necessary steps shall be taken by the Governing Body who may recommend to the Conference such action as it may seem wise and expedient to secure compliance with the recommendations involved. This procedure does not necessarily exclude recourse to economic sanctions but at least it suggests less drastic measures. In the past it has been found that the mere publication of an accusation of undischarged obligations was sufficient to induce any Member State to take suitable action.

The foregoing illustrations should suffice to show how accurate was the author's critical study of the relations between the ILO and the International Court of Justice. Needless to add that several of the amendments which were made to the Constitution were *pro forma* only and do not in any way detract from the value of the survey. It goes without saying also that the decisions of the Permanent Court of International Justice in all matters affecting the ILO constitute legal precedents which the new Court will feel bound to follow with the same respect as if they were its own decisions. The author's analysis of those decisions is therefore of permanent value.

HENRI BINET

International Labor Office

Cinq Siècles de Sécurité Collective (1291-1798). By William E. Rappard. Geneva: Georg et Cie., S. A.; 1945. Pp ix, 603.

La Sécurité Collective. 1919-1945. By Pierre E. Brugière. Paris: Pedone; 1946. Pp. vii, 378.

The monumental volume of the outstanding Swiss scholar presents a most detailed investigation into the working of the security provisions in the different treaties of alliance and mutual aid, which constituted the only juridical basis of the Swiss Confederation for over 500 years. From the first Pact of 1291 between Schwyz, Uri, and Unterwalden up to 1798 Switzerland was a loose Confederation of 13 sovereign Cantons. This study is, first, a contribution to a little explored part of Swiss history but it is for the author primarily the occasion to investigate the lessons which may be drawn from this national experience for current "collective security" experiments on an international scale.

It is not possible here even to summarize the rich contents of the book, concerning the functioning of the Swiss system from 1291 to its downfall through the French aggression of 1798, an aggression helped on by Pierre Ochs, the Swiss "Quisling" of that time. It must be emphasized that the author not only analyzes the documents but studies how they actually worked. The conclusions reached by the author are that the security provision in the alliances had, undoubtedly, some value, but that Switzerland's long security is due, first of all, to the common aspiration of all the Cantons for independence, to the extraordinary military virtues of the Swiss, to their location in the Alps, and to the modesty of the natural resources of the country. The system could only work because of an exceptionally favorable social and natural milieu. Yet the system had at all times to battle with grave difficulties and broke down completely under the impact of the French aggression of 1798. The Swiss drew the lesson by establishing the Federal State in 1848. The old system is, notwithstanding its long past, clearly condemned by the present-day Swiss. And as to the lesson

to be drawn for the international community, where the exceptionally favorable circumstances of the Swiss Confederation are entirely lacking, and at a period where wars are completely different, such lesson necessarily must be purely negative:

The book is a magnificent piece of scholarly research, a model in its unbiased, impartial, absolutely objective and strictly scientific approach, free from all slogans and wishful thinking.

Whereas Rappard reports on a relatively successful system, but reaches a negative result, Brugère reports on the complete and total failure of an international system of "collective security," yet believes in its possibility in the future. The book traces the history of "collective security" from the Paris Peace Conference of 1919 through the Covenant up to the downfall of the League of Nations and the new experiment from the Atlantic Charter to the Charter of the United Nations. Such a general survey has its merits, especially as the author reprints textually all of the important articles in question and gives also the full text in French of the Charter of the United Nations. But the book is less satisfactory as far as interpretation and criticism goes. First, it is hardly possible to give a really full juridical discussion of such a mass of materials. Second, there is a certain superficiality, a lack of depth and of a really objective attitude. In this respect the book suffers particularly if compared with Rappard's work. Entirely superficial is, for instance, the author's discussion of the problem of overpopulation; it is also questionable whether there exists for nations of great fecundity "a real international duty to apply the principles of Malthusianism." As is the case with most French writers on this subject, his point of view is purely static. It seems that writers of this type believe or hope that history can be stopped.

The Charter of the United Nations is praised for its "realism," for "avoiding Wilsonian idealism," for relegating law to the second rank and for being primarily a political instrument under the direction ("le dirigisme") of the "Big Three." While paying lip-service to "sovereign equality," the Charter, he says, practically does away with the sovereignty of the "little nations" and with the principle of equality, a principle, the author holds, "which must be totally abolished." Our Latin American good neighbors won't like these words. He admits that the veto power is juridically indefensible, but politically, he holds, it is simply marvelous. The Security Council, the author tells us, has an international armed force at its immediate disposal, with which to annihilate an aggressor. He concedes that the veto power could theoretically paralyze the action of the Security Council, but fortunately, he tells us, a lack of agreement between the "Big Three" is hardly thinkable. The system of collective security, 1945 model, will work, if there is "Big Three" agreement. But the fact that the meetings of the Military Staff Committee have, up to now, not produced the slightest result, that the work of the Security Council so far is, to put it

mildly, disappointing, and that there is a tense world situation, in consequence of the East-West split, prove that the author is far less "realistic" than he believes.

JOSEF L. KUNZ

Of the Board of Editors

If Men Want Peace: The Mandates of World Order. By Members of the Faculty of the University of Washington. Editors: Joseph B. Harrison, Linden A. Mander, Nathaniel H. Engle. New York: Macmillan; 1946. Pp. 292. \$2.50.

This book is the product of the University of Washington group of the Universities' Committee on Post-War International Problems. The group included most of the disciplines of the university, and was foresighted enough to include topics which have since become more important, such as race, education, and the moral basis of peace. Part I deals with the maintenance of peace, including the "International Law of the Future" by Professor C. E. Martin. Part II considers Political and Human Rights; Part III, Economic and Social Welfare; Part IV, the Cultural Bases of World Order. The standard of treatment is uniformly high. One of the most interesting chapters is that on Arts and Letters, by Professor Harrison. In a concluding statement the Editors agree that the United Nations is an inadequate instrument for the preservation of world peace and that it must be strengthened. They suggest improvements in the international legislative process and they think that international rules should become constitutional obligations of members, that administrative agencies and an international civil service should be developed, that the jurisdiction of international courts should be widened, and that national administrative systems should be geared to international requirements. The book places peace upon a broad basis, as it should be.

CLYDE EAGLETON

Of the Board of Editors

American Foreign Policy in the Making: A Study in Responsibilities. By Charles A. Beard. New Haven: Yale University Press; 1946. Pp. 336. \$4.00.

This volume represents a study in American history by the greatest historian of our time. John Chamberlain is probably correct in characterizing it as among the ten most important books of the year. It has been reviewed most favorably and also adversely, not on its content, which I think is unchallengeable, but on the supposed critical views of the author on American foreign policy. The romanticists who like that policy, knowing well that the author disapproves of it, have expressed their views adversely to the book, whereas the book has nothing to do with the question

of the author's views of policy. To criticize a man for his motives, not expressed in the book he writes, seems an unusual way to review a book.

In the first chapter Dr. Beard examines the record of the Senators who voted against the League of Nations, a vote by which the United States undertook not to stop other nations as does the veto power under the UN, but to say that the United States would withhold its aid if it did not think it proper. Could American action of that kind properly be challenged? Mr. Bailey, an historian of no mean reputation, comes off rather poorly in the chapter.

The second chapter examines the thesis that so-called World War II is to be blamed on the American people.

Chapter III, a short chapter, deals with the problems raised by the question of war guilt.

Chapter IV discusses the attitude of the Democratic leadership as displayed by the platforms of 1924 and 1928, a disclosure which does very little to enhance the reputation of Newton D. Baker for astuteness.

Thus the author comes up to 1932 and from that point to the end of the book deals exclusively with the statements made from time to time by Franklin D. Roosevelt and Cordell Hull. To criticize these chapters requires the critic to show that the statements were not made or that they were contradicted by other statements of the same speaker. No reviewer has attempted this task, and it would be hard to perform it. Dr. Beard shows in effect that Roosevelt was as much opposed to war—if his statements are to be believed—as anybody in the country. Dr. Beard's definition of "isolation," namely,

Rejection of membership in the League of Nations; non-entanglement in the political controversies of Europe and Asia; non-intervention in the wars of those continents; neutrality, peace and defense for the United States through measures appropriate to those purposes; and the pursuit of a foreign policy friendly to all nations disposed to reciprocate (page 17, note),

would, it seems, be hard for any American citizen to repudiate. It is not the definition often associated with that chameleonic term. Like the term "aggressor," it means anything that the speaker desires.

Dr. Beard shows that President Roosevelt in word agreed with every element of the definition advanced. What he actually did is left to the reader to remember.

The story closes with the campaign of 1940. The events of the important year 1941, which marked the American approach to war, will remain for discussion in another volume.

The suggestion of one reviewer that the statements made by leading statesmen should not be accepted as truthful is a mark of a depreciated morality. If we cannot believe our statesmen, whom are we to believe?

The author has made a contribution of the first importance to the establishment of the truth.

EDWIN BORCHARD

Of the Board of Editors

Les États-Unis et la neutralité de 1939 à 1941. By Pierre Monniot. Paris: Pédone; 1946. Pp. vii, 414.

This is a work of some importance of a type which does not yet exist in America. Although from its title we might believe that the book is mainly confined to the breakdown of neutrality initiated in the statutes of 1939 and 1941, the book actually deals with the history of American foreign policy from 1919 to date. The author attributes the wars against Germany to the gradual weakening of Great Britain and the growing strength of her continental competitor and he attributes American entrance in both wars to the fact that the United States could not allow Great Britain and France to be further weakened by the dominance of Germany. The implication in fact is that whenever Great Britain or France get themselves into continental wars the United States will either indirectly or directly stand at their side. This casts the United States in a rather lamentable rôle where we must come to the aid of France and Great Britain when they get into trouble but they will never aid the United States because of inability. This seems a curious fate for the country which fathered the Fourteen Points of Wilson, but sustains the statement of Senator Stone, Chairman of the Foreign Relations Committee, in April, 1917, when he said, "I shall vote against this mistake, to prevent which, God helping me, I would gladly lay down my life."¹

The author examines the various steps taken by the United States to aid the Allies before December 7, 1941. It is a formidable account; he admits that it was a violation of international law as then understood. He justifies it, however, first because it aided the Allies and second because he finds that in discrimination lies the foundation of the new theory of neutrality which revives the principle of the "just war." Great Britain and France he concludes are peace-loving nations by definition, so that any one who attacks them must of necessity be an aggressor, or a nation to be fought by the United States. The author also deals with the post-war aid supplied by this country under the head of lend-lease and other provisions, and finds this all to the good since the aid was given to worthy nations. Not the least valuable part of the book is the introduction by Professor Suzanne Bastid.

If discrimination is to become our line of policy in the future then whim and circumstance will determine the nation's fate and principle is a matter for historians to discuss.

EDWIN BORCHARD

Of the Board of Editors

¹ *Cong. Rec.*, April 4, 1917, p. 154.

Thomas Jefferson: American Tourist. By Edward Dumbauld. Norman, Oklahoma: University of Oklahoma Press; 1946. Pp. xv, 266. Appendix. Index.

Jefferson did not travel far, but he saw much and thought more about what he saw. The book not only follows Jefferson in his travels but relates his intimate deductions. It reflects the history of the day and conditions in the countries and states where the journeys were made. The aim of the book is primarily to present travel experiences though at times additional insight into the diplomatic and governmental problems of the Jefferson era stand out. A valuable chronological itinerary of Jefferson's travels with dates has a fitting place in the Appendix.

Jefferson's writings concerning travel, his appreciation of places and things seen, his rules for the traveler, his constant lookout for something he can take home to improve the economy of his own land leaves him, the apostle of Americanism and citizen of the world, still the "Virginian of Virginians." Statesman, too, and world organizer in concept, for a while at the French Court he sought to form a combination of lesser maritime powers to patrol the Barbary Coast with a fleet of frigates. The United States Congress failed to furnish its quota and the plan fell through. From this experience he undoubtedly learned at least two lessons: First, that one reason for the failure of his plan was that France and England both profited from the piratical system of the North African States and therefore were not sympathetic to his plan; and, second, although it would be more costly and more hazardous, America had better clean up the mess herself. This he did when he became Commander-in-Chief of the American Army and Navy.

Jefferson was anxious to learn wherever he went. He did not reach the poetic ideal for travelers as it is expressed for all Americans on the Union Station at Washington, "He that would bring home the wealth of the Indies must carry the wealth of the Indies with him. So it is in travelling. A man must carry knowledge with him if he would bring home knowledge." But he did advise all to come from a journey with information "charged like a bee with honey."

It was not only from Europe that he learned many things which might improve his homeland. Wherever he went in America he was on the alert, for example, when he noted maple sugar culture in Vermont he immediately sought trees that the maple sugar industry might be started in his home county.

The value of roads in the building of a nation became fundamental to Jefferson from actual experience. This might have become responsible for his being greater as a citizen of a Republic than he was as a statesman. His acceptance of the job of county road supervisor after leaving the Presidency makes Jefferson greater than he is made out to be by many of his eulogists.

And this, too, he saw in Europe: "The doctrines of Europe were, that men in numerous associations cannot be restrained within the limits of order and justice, but by forces physical and moral, wielded over them by authorities independent of their will. Hence their organization of kings, hereditary nobles, and priests. Still further to constrain the brute force of the people, they deem it necessary to keep them down by hard labor, poverty, and ignorance and to take from them, as from bees, so much of their earnings as that unremitting labor shall be necessary to obtain a sufficient surplus barely to sustain a scanty and miserable life" (page 214). Thus Jefferson's knowledge of the meaning of the American Revolution came from actual observation. After travel abroad Jefferson's faith in liberty remained sublime. A citizen, though, to remain free, must accept responsibility and understand duty. The liberty which thinks only of rights and fails in duties and responsibilities will not last. In fact, there is no right without duty and responsibility. These ideas permeate the account given in the present work.

Thomas Jefferson: American Tourist is a worthy contribution to the field of knowledge about Jefferson.

ELBERT D. THOMAS

Vice President of the Society

North Atlantic Triangle: the Interplay of Canada, the United States and Great Britain. By John Bartlet Brebner. New Haven: Yale University Press; 1945. Pp. xxii, 385. Maps and diagrams. Appendix. Index. \$4.00.

The last item in a series of twenty-five volumes entitled "The Relations of Canada and the United States" * is contributed by Canadian born Professor John Brebner, now of Columbia University. His discussion of patterns of Canadian development at a meeting of historians at Ottawa in 1931 inspired Dr. James T. Shotwell to secure the sponsorship of the Carnegie Endowment for International Peace in a cooperative study "designed to cover the whole field of political, economic, and cultural relations between Canada and the United States, and those relations with Great Britain which bear upon this large area of North American History." And it was also Professor Brebner who prepared the manual used since 1934 by the large group of scholars and experts in Canada and the United States who have participated in the project. In a foreword Dr. Shotwell characterizes this volume as "a survey, by a master of the subject, of the greatest single chapter in the history of international intercourse anywhere in the world." In the preface the author modestly remarks that "perhaps it may serve as a general view of the subject until the remaining unexplored areas, as, for instance, education and law, have been surveyed." The twenty-five vol-

* Other volumes of the series were reviewed in this JOURNAL, Vol. 32 (1938), pp. 624, 643.

umes are not serially numbered, and this study, which is complete in itself, may well be read as an introduction to any or all of the others.

"It often seems to be a far cry from high policy to everyday life," but the author skilfully and with sustained scientific objectivity traces, during four and a half centuries, the everyday activities of men in specific regions in North America who were engaged in fishing, farming, mining, and fur trading, and in building wooden cities, canals and railroads, and correlates them with the nuances of policy on both sides of the Atlantic. Abjuring the "dramatic but impossible colors" sometimes employed, and with unusual fidelity to details, Dr. Brebner portrays the development of wooden ships in the Maritime Provinces and New England, of the efficient "upper laker" for freight traffic, of dry farming techniques in the Great Plains, and the uses of the barbed-wire fence and the self-regulating windmill.

Broad perspective and shrewd insight characterize the entire volume. The author displays genuine geographical sense in regional description and interplay. The continental shelf, the good lands between the Canadian Shield and the Ohio, the High Plains, the Northwest, are all homogeneous areas whose development and triumphs have been "international affairs." While emphasizing the interplay of Canada and the United States, "the Siamese Twins of North America who cannot separate and live," the part of Great Britain is always in focus. The three have been "complementary in so many ways that they coöperated in spite of themselves"—in spite of "generations of economic isolationism" and political efforts to play "stubbornly separate parts." "Both attracted and repelled by the other two," Canada has been chiefly responsible for the invention of "dominion status" of the dominions within the evolving British Commonwealth of Nations. Especially for the years 1918-1942 the world background is emphasized.

The 34 maps, seven of them in color (including the endpapers), are exceptionally well executed and informative, and cover railways of one country with extensions into the other (two maps), Canadian-born persons in the United States and American-born in Canada (four maps), boundary, fishing, sealing and other questions. The bibliographical notes comprising the appendix are discriminating, and reveal the present state of knowledge underlying each of the sixteen chapters. In the 43-page index there is no entry under "law" and only one under "international law," although "arbitrations," "gypsum," "civil service," and a whole column under "migration" are included.

The pattern of coöperative study represented by this volume and the series might very advantageously be applied to several groups of countries in the other American republics, Europe and Asia.

S. WHITEMORE BOGGS

Department of State

The Carthaginian Peace or The Economic Consequences of Mr. Keynes. By Etienne Mantoux. New York: Oxford University Press; 1946. Pages xviii, 210. Index. \$4.50.

This study deals with matters which have been of such vital importance during the past three years that the delay in publication for two years after its completion in the summer of 1944 is regrettable. However, the problems of making a peace are still with us, and this book should be read by all who are interested in the settlement. The study was written in America during the war. The author was a brilliant young Frenchman trained at the London School of Economics who later went to his death in the final phase of the war.

The chief burden of the book is to demonstrate that when Mr. John Maynard Keynes wrote *The Economic Consequences of the Peace* in 1919, he launched many grave errors both of fact and of logic, which have become ingrained in our thought and have from that day to this had a deleterious effect upon the course of human events. This book marshalls the research of a generation to prove that the economic provisions of the Treaty of Versailles were in the main just and practical. That these provisions were not successfully applied was due primarily to the lack of a united will on the part of the Allies to enforce them. This lack of firm purpose on the part of the victors was in no small part due to the persuasive yet erroneous allegations of Mr. Keynes to the effect that the new frontiers necessitated economic impoverishment and that the reparations could not be paid.

Mantoux thinks that, due in large part to Mr. Keynes, the world has grossly misjudged the major participants and results of the Versailles Peace Conference. He believes that Keynes was unfair to Wilson, unfair to Clemenceau, and unfair to the entire essence of the process whereby a conclusion was reached at Versailles. He believes that that conclusion, given the state of public opinion then existing in the Allied countries, was as good as could have been expected, and that Mr. Keynes did the world a great disservice by contributing greatly to a contrary impression. He feels that it is high time that a revision of that judgment be made. If this book is widely read, and it should be, it will make a great contribution to restoring President Wilson to the dignity and eminence that he deserves.

Mantoux concludes that the economic defects of the Treaty of Versailles "were, for the most part, illusory or exaggerated," while "the political defects were the really decisive ones." The cardinal vice of the treaty lay in the failure to establish a true balance of power. On the subject of reparations the author believes Keynes' influence has been particularly harmful. His pronouncements on this subject have been thoughtlessly presumed to be substantiated by later history so that they serve as psychological barriers to critical reconsideration of fundamentals. Mantoux concludes that there is no sound reason why Germany should not contribute to the restoration of the countries which she has devastated in the war just ended.

HOMER JONES

Washington, D. C.

BOOK NOTES

Il Riconoscimento nel Diritto Internazionale. By Giancarlo Venturini. Milan: A. Giuffrè; 1946. Pp. 143. 160 Lire. Studies on international law begin again to be published in war-ravaged Europe. The small book under review is an investigation into the problem of recognition, considered as a general legal feature of international law. The constitutive elements of recognition and its legal effects are studied. Recognition takes place not only with regard to new states, *de facto* governments or insurgents, but also with regard to acquisition of territory, establishment of protectorates or mandates, permanent neutrality or neutralization of certain territories, opening of waterways for international transit and so on. All the more detailed problems are integrated by the author's investigation with the content, function, and juridical nature of recognition in international law. Recognition is for the author a unilateral and discretionary act, having as its content the mere ascertainment of juridically relevant facts, and as its function the settlement of international conflicts, which already have arisen or may arise. The great importance of recognition, as to content and function, is explained by the fact that general international law, because of the lack of courts with compulsory jurisdiction, has no special organs for ascertaining legally relevant facts, nor can international conflicts be settled except by the concurring will of the parties. Many attitudes as to detailed problems follow for the author from the nature and function of recognition, such as the binding character of recognition upon the recognizing state, the non-admissibility of resolute conditions or final terms, its non-revocability and so on.

The study, which takes the practice of states fully into consideration, shows the virtues of the Italian School, not changed by a near-quarter century of fascism or by the World War II. But it shows also that the Italian School continues to cling firmly to premises which in this reviewer's judgment are theoretically untenable, particularly to the dualistic construction and the thesis of the purely voluntary character of international law.

JOSEF L. KUNZ

Of the Board of Editors

War Crimes. By Manfred Lachs. London: Stevens & Sons; 1945. Pp. viii, 108. 7s.6d. This small book contains an excellent compact treatment of the subject of war crimes as that term is understood and accepted under customary international law and conventions. Having been written before the surrender of Germany, it does not deal with the question of crimes against peace raised by the agreement of August 8, 1945, setting up and defining the jurisdiction of the International Military Tribunal at Nuremberg. In a chapter entitled "The Case of the United Nations versus War Criminals" are reproduced the texts of the various Allied warnings beginning with President Roosevelt's statement of October 21, 1941, and ending with the Declaration of Moscow on November 1, 1943. In view of the novel provisions concerning crimes against peace for which the defendants were convicted at Nuremberg, it is interesting to note from this chapter that on August 6, 1942, the Government of the United Kingdom in an official *aide*

memoire held the view that "in dealing with War Criminals, whatever the court, it should apply the laws already applicable and no special *ad hoc* law should be enacted." This seems to dispose of the argument at Nuremberg that, because the major Nazi defendants received previous warning from the Allies that they would be punished for war crimes, they were estopped from pleading the retroactive character of the provisions of the Charter creating and charging crimes against peace.

GEORGE A. FINCH

Editor-in-Chief

The Case Against the Nazi War Criminals. Opening Statement for the United States of America by Robert H. Jackson, and Other Documents. New York: Knopf; 1946. Pp. v, 215. Appendixes. \$2.00. This small volume is a convenient repository of three of the important documents in the history of the Nuremberg trials of the chief Nazi war criminals. It includes the opening Statement for the United States by Mr. Justice Jackson, the Inter-Allied Agreement of August 8, 1945, for the Prosecution and Punishment of the Major War Criminals of the European Axis (which includes the Charter of the Tribunal), and the Text of the Indictment. Mr. Gordon Dean, of Counsel for the United States, contributes a Foreword. At this date no analysis of these documents is necessary but the volume will no doubt still be found useful especially by those who do not have ready access to the official publications.

PHILIP C. JESSUP

Of the Board of Editors

New Horizons in Public Administration. A Symposium by Leonard D. White, Marshall E. Dimock, Donald C. Stone, Gordon R. Clapp, John D. Millett, Arthur W. Macmahon. Birmingham: University of Alabama Press; 1945. Pp. 145. \$2.00. The steadily increasing concern of international lawyers with problems of international administration leads to an interest in public administration at the national level. No one has yet revealed the extent to which studies in the latter field may be applied to the former but some index to the degree of interest was afforded by the Public Administration Service's Publication No. 92 (1945), *International Administration—A Bibliography*, compiled by William C. Rogers with a foreword by Quincy Wright. A volume entitled *New Horizons in Public Administration* might well have included an essay on international administration but it does not. Among the essays here published, the international lawyer will be chiefly interested in Arthur Macmahon's study of "Function and Area in International Affairs," in which, with his usual perspicacity, the author examines the perennial problem of the administrative organization of the Department of State and the Foreign Service. The problem turns upon the choice between functional and regional divisions of work and responsibility, or rather upon the proper balance between the two systems. Professor Macmahon points out that the "functional units must inevitably be sources or channels for secondary streams of instructions to the diplomatic establishments. This responsibility must be tactfully asserted in the face of the just claim of the geographical offices to be prime guardians of the gates to the field, while the administration offices of the department provide managerial oversight and assistance. At the same time, the functional units must draw much of the substance of their

suggestions from outside agencies like the Departments of Agriculture, Commerce, and Labor." He also makes brief reference to the problem of gearing the work of the State Department with "the galaxy of specialized international organizations." His conclusion is that the "functional claims for attention are sound" but that their recognition "increases the importance of the synthesis which typically must be provided around the core of area."

PHILIP C. JESSUP

Of the Board of Editors

Problems of the Peace: Interim Proceedings of the Institute of World Affairs. Volume XX. Edited by Charles E. Martin and Rufus B. Von Kleinsmid. California: University of Southern California; 1944-45. Pp. xii, 123. This symposium, like most books of its kind, is of uneven tenor but on the whole maintains a high standard. Having been written in the spring of 1945 or earlier, it has the advantage of enabling us to see how far international organization, which most of the speakers support, has actually achieved the success they had contemplated. The assumption that the history of the country was all wrong, and that the United States reached its eminence by methods not now approved, is to be found in several of the speeches in which a new day is proclaimed. There is a certain danger in discussing problems of peace while wars are still raging, but the authors of this volume are courageous men. The paens of praise heaped upon the head of Woodrow Wilson in the last essay by J. Eugene Harley are not shared by a good many members of this generation. The work has the distinction of selecting those topics which are of outstanding importance in the field. Whether the addresses have added much to the promotion of peace or the analysis of international relations may be more questionable. It is strange that so little attention should be paid to the kind of treaties that end a war and so much attention to the machinery devised to hold down the treaty made.

EDWIN BORCHARD

Of the Board of Editors

The Germans in History. By Prince Hubertus zu Loewenstein. New York: Columbia University Press; 1945. Pp. xii, 584. Index. \$5.00. This is not a German history, although Prince Loewenstein treats his subject in historical sequence from Roman times to the present. The author's aim is to expound what he considers to be the meaning of German history; his approach is determined by his liberal Catholicism and his enthusiastic adherence to Hegelian dialectics. Failing to be a comprehensive history text (economic and social history receive only passing attention), the book on the other hand is unfortunately often too heavily freighted with detail and abstruseness to be what would best have served the author's purpose, that is, a good collection of essays on German history. This is regrettable both for the reader, who finds himself constantly wishing that more space were given to a more adequate and direct development of the salient points, and for the author, whose undoubtedly worthwhile ideas are too often obscured or lost.

Loewenstein finds his historical ideal in the Holy Roman Empire at its best, when it was supranational, non-dynastic, and resting on universal

acceptance of one Christian faith. German history for him is in fact the struggle, in the Hegelian sense, between this thesis and the antithesis of particularism. The synthesis will appear—and he has no doubt about it—, when Germany will be established as an integral part of a supranational, united, “Occidental” Europe from which, as might be expected, all “Asiatic” influence is excluded.

In connection with current thinking about the German problem readers will find of particular interest Loewenstein’s chapters on Bismarck and on the all but forgotten Weimar Republic. The author’s concrete suggestions on the form and structure of the new Germany are stated in five pages of the last chapter, and, considering such brevity, might as well have been omitted.

ALEXANDER F. KIEFER

Washington, D. C.

World Order: Its Intellectual and Cultural Foundations. Edited by F. Ernest Johnson. New York and London: Harper; 1945. Pp. 238. Index. \$2.00. This volume contains a series of eighteen lectures by various speakers before the Institute for Religious Studies where ministers of all faiths “study under the guidance of scholars in various fields. . . .”

The broad scope of the book promised by its title is fulfilled by the contents of the lectures. For example, in the address entitled *A New School Bell: Educating America* James Marshall discusses some interesting laboratory experiments in political science. A number of children were organized into three clubs, all of which worked on the project of making masks. One club was run with a democratic atmosphere, another with an autocratic method, and a third in the good old *laissez-faire* way. The fascinating outcome confirmed the fact that democracy possesses at least some of the virtues proclaimed by Fourth of July speakers.

In *World Citizenship* Norman Cousins maintains that Aristotle was right when he said that the size of a state should be determined by the range of a man’s voice. The radio and the airplane have helped enlarge the modern state into the world itself.

Pitirim A. Sorokin in *The Task of Cultural Rebuilding* analyzes and interprets several centuries of Western history at a sweep. In medieval times the accent was on a “supersensory and superrational God,” while modern culture is built on the “presupposition that the true reality and value is sensory. . . .”

In the various lectures world order is examined in the light of psychology, law, religion, education, economics, and anthropology. The range from the specific to the general leads the reader to many paths for further study and for delving into the very philosophy of world order.

JAMES E. EDWARDS

Washington, D. C.

The Story of Woodrow Wilson. By Ruth Cranston. New York: Simon and Shuster; 1945. Pp. xv, 478. Index. \$3.50. This is a convenient one-volume life of Wilson, well written in a popular style. Mrs. Cranston has drawn upon personal acquaintance with members of the Wilson family as well as upon the voluminous Wilson papers now available to scholars. She has placed greater emphasis upon foreign affairs than upon domestic policies: approximately two-thirds of the book deals with problems of pre-

war foreign relations, Wilson's war leadership, the Paris Conference, and the League. Mrs. Cranston is an ardent partisan. Wilson's enemies are her enemies. She admits few errors of judgment on Wilson's part, and she ignores the debate over Wilson's knowledge of the secret treaties. House appears as a thoroughly inept amateur whose incompetence more than once upset the President's plans. Mrs. Cranston is also a vigorous defender of the League, with which she had direct experience. In a last chapter she develops briefly the thesis that the League was not a failure because through its machinery there developed in the quarter century of its existence a new habit of international consultation. The recent book by another Wilson disciple, H. C. F. Bell, *Woodrow Wilson and the People*, is both more scholarly and more convincing; Mrs. Cranston's undeviating admiration for her subject and the bitterness with which she castigates his opponents are not likely to convert anyone who may still question Wilson's greatness.

JOHN D. LEWIS

Oberlin College

The Four Cornerstones of Peace. By Vera Micheles Dean. New York: McGraw-Hill; 1946. Fp. xxiv, 267. Index. Because the achievement of international security is the primary task of to-day the Research Director of the Foreign Policy Association seeks to provide in this small book a handy and readable primer on post-war international organization for the average intelligent voter. Mrs. Dean succeeds well in this task as she combines solid knowledge and deep understanding of international affairs with a felicity of phrase which enables the layman—and we might add, beginning students—to find his or her way through the labyrinth of world politics and the intricacy of the new and unfamiliar structure of world organization. Its "four cornerstones"—Dumbarton Oaks, Yalta, Mexico City, and San Francisco—are described briefly but sufficiently for the purpose. Their aims and achievements are shown, pertinent comparisons are made with the League of Nations, and criticisms are listed and examined. Mrs. Dean, who, in passing, offers her own value judgments, possesses a healthy and reassuring but not "easy" optimism, combined with the realistic attitude that the "best we can do is to reach workable compromises, knowing full well that any compromise made today will have to be revised tomorrow" (p. xix).

The unavoidable fact in this sort of book that some paragraphs are already out of date does not detract from its main value as a general introduction to the four conferences and the new world structure set up by them. The full text of some dozen documents issuing from, or connected with these conferences, forms a very useful appendix. The Index is sufficient.

JOHN BROWN MASON

Oberlin College

The New Europe. By Walter Fitzgerald. New York: Harper; 1946. Pp. xiii, 298. \$2.75. There are very few books indeed on contemporary political geography in English. Hence this introduction to the political geography of present-day Europe, with special attention given to new developments in Central Europe and the Balkans, is welcome. But the treatment suffers considerably from the tendency of the author to make numerous wild and generalized statements. For instance, we learn that the

Slovak "detachment from Bohemia . . . is, geographically, well-nigh complete" (p. 90); the author persists on spelling the river Moldau as "Ultava" (disregarding the fact that Vltava is the proper spelling); the Romanians are treated as "Rumans" (p. 93); the Altanian language is based on a "pre-Slavonic vernacular" (p. 104); and so on and on. All in all, this is a good work but once which has to be watched in regard to its detailed statements.

JOSEPH S. ROUCEK

Hofstra College

European Population Transfers 1939-1945. By Joseph B. Schechtman. New York: Oxford University Press; 1946. Pp. xi, 532. \$5.00. This is a unique contribution to a field nearly neglected by the students of contemporary world problems due to the speedy changes brought about in minority problems by World War II. In fact the present study is a pioneer in its field. It presents a full factual report of the transfer operations which occurred between 1939 and 1945. Although it is apparent that here and there the author was confronted with lack of data or unreliability in the available material yet he has produced a survey of the problem which has no competition whatever today. The transfers are described with due regard for all the complexity of attendant detail, including the choice of administrative personnel, registration of evacuees, transportation, housing, feeding, medical care, and the many economic considerations, such as compensation of the evacuees for the property they were forced to abandon, and their economic re-establishment in the areas of resettlement. Each of the transfers is interpreted in the light of the minorities problem as it existed in Europe between World War I and World War II, and with special reference to the German Reich repatriation policy inaugurated in October, 1939. Similar treatment is accorded the transfers of Russian, Finnish, Swedish, Bulgarian, Romanian, Hungarian, Croat, and other ethnic groups. Let us hope that the author will find it possible to complete the picture by describing the results after 1945.

JOSEPH S. ROUCEK

Hofstra College

Soviet Russia: An Introduction. By Kathleen Gikberd. London: Royal Institute of International Affairs; 1946. Pp. 124. This is a revised edition of the brochure originally published in February, 1942, with a new chapter on Soviet Foreign Relations. Ostensibly this booklet contains no opinions, or next to none. It has been, nevertheless, written in a sympathetic tone and in spots is quite apologetic on behalf of the Soviet Government, as well as of the Stalin regime. The additional chapter seems to have been prepared as an afterthought, as it does not elucidate the basic core of Soviet foreign policy. There are some significant omissions which should have been included even within the small compass of this booklet. For example, the chapter on "The Struggle for Prosperity and Security" seems to be out of proportion to the scope of the booklet as a whole; on the other hand new trends bearing on private property, the family, religion, and expansionism could have been discussed. However, the booklet will continue to be useful to the intelligent lay reader who wants to acquire a bird's-eye view of the political and economic structure of the Soviet Union, as the facts are presented in a relatively unvarnished fashion.

CHARLES PRINCE

Washington, D. C.

Political Handbook of the World: Parliaments, Parties and Press as of January 1, 1946. Edited by Walter H. Mallory. New York, Council on Foreign Relations. 1946. Pp. 202. The year 1945, which marked the end of World War II, brought with it more profound and widespread changes in the form, structure, and personnel of governments than any year in history. Monarchies had fallen, Allied Control Commissions had been set up to rule defeated nations, and the political leadership in nearly every country has been completely overturned. The present volume is thoroughly revised to take account of these many changes. Yet in these days of fast-moving events the world over even such a book becomes in many respects out of date before it reaches a nation-wide distribution. To illustrate, when this book went to press Soviet Kommissariats had been changed to Ministries and many of the personalities listed are no longer in top policy-making positions. Similarly, a radical change has taken place in the personality structure of the Government in Argentina. While these shortcomings are obviously inevitable due to the nature of the scope and content of the book, it is nevertheless a very reliable and useful reference.

CHARLES PRINCE

Washington, D. C.

Industry in Latin America. By George Wythe. New York: Columbia University; 1945. Pp. viii, 371. Index. \$4.00. For readers of this journal the effects of industrialization on foreign trade and international affairs are of particular interest. In a chapter on "Government and Industry" the author emphasizes the role of tariffs, tax exemptions, import quotas, export duties, manufacturing regulations, government loans, subsidies, monopolies and concessions. Dr. Wythe shows that Latin American industrialization can be expected to produce: larger imports from the United States of machinery, power equipment, and iron and steel for construction; new kinds and probably increasing volume of imports into the United States; considerable shifts in bilateral and multilateral trade channels; expanding standards of living creating still greater export markets for specialized United States goods; increased foreign exchange. It is probably too much to expect all for these results to flow from industrialization alone unless constructive and liberal trade and fiscal policies are widely adopted.

Our government's sympathetic interest was demonstrated by a statement by Assistant Secretary of State Clayton on May 2, 1946: "There is no reason to fear sound industrial development abroad. It may change the nature of our trade in certain places, but on the record it will certainly increase it. Well-developed countries have always been our largest customers. . . ."

Assistant Secretary Braden on September 13, 1946, in referring to investment by our citizens in Latin America declared: "This money has mostly—76 percent—gone into manufacturing, public utilities and the development of natural resources. Our investments have created new, more skilled, and higher paid employment. They have established new industries and increased purchasing power, not to mention substantial tax contributions for the governments concerned. . . ."

This volume is a mine of information on industrial achievements and developments in the other American republics, although some statistical compilations are out of date. It would have gained much by the use of

photographs. The title is somewhat narrow, for in addition to industrialization, there is a study of "National Economic Policy" for each country covering additional topics such as agriculture, forestry, mining, fishing, trade, transportation, immigration, banking labor and social legislation.

WILLARD F. BARBER.

Department of State

Vom Geist der Massen. By Paul Reiwald. Zürich: Pan-Verlag; 1946. Pp. xv, 631. Index. Frs. 20.00. This book, of which the main title in English should read "An Essay on Masses and their Spirit," is most aptly epitomized by its sub-title "A Compendium of Mass Psychology": all the opinions, enunciations, observations, and theories regarding the behavior of animal and human groups which have been published in the last hundred years—and whatever came before that time is hardly worth mentioning—are compiled in this volume; it is a most impressive achievement.

Reiwald classifies the authors whose views have been included in his book into five main categories: (1) Biologists and Animal Sociologists; (2) Psychologists; (3) Sociologists; (4) Personalities in the political field; (5) Poets, Writers and Historians. He justifies the width of this selection in his introduction by explaining that in dealing with so young a science as Mass Psychology, it is necessary first to grasp the entire aggregate of knowledge at its disposal. Thus it is, for instance, "impossible to decide on problems concerning the mass and the principle of leadership exclusively from 'the' biological, 'the' psychological, 'the' sociological or 'the' practical point of view": only when all the various scientific branches have been brought into a close interconnection and under a methodology common to all, may one hope to attain satisfying and adequate over-all results. Therefore, the first concern is to establish a sound foundation for the new science of mass psychology, and there can be no doubt that to this end Reiwald's book offers a first and very substantial contribution.

Apart from this the book is also concerned with another aspect of this new science, namely, the practical objective of mass psychology. The events of the past decades have clearly shown how deeply the principle of democracy is endangered everywhere in the world and how easily populations living under this principle—the common man, who is to be the support of democracy—may be won over to the side of the totalitarian and fascist cause. It should be realized that if this widespread process of de-democratization should not be arrested in time and if it should not be possible to condition the masses into a state of mind acceptable and favorable to democratic ideals, the threat of ever-recurrent wars, the threat of the irrevocable self-annihilation of civilization, will continue to obstruct the evolution of mankind and will become increasingly acute as time goes by. Up to now, and with a few exceptions, only the totalitarian political systems have made use of mass psychology; it is time, indeed it is high time, that democracy do the same for its own ends: a truly scientific mass psychology is called upon to become one of the most potent and important instruments of democracy. Reiwald, in a series of principles (*Le-tsätzen*), which at the same time are the results and conclusions of his research work, sets out the fundamental programmatic directives for such a therapeutical application of this new science.

This book is of great importance not only to all sociologists and students of mass psychology, but also to anyone actively interested in the preserva-

tion of democracy and world peace, and therefore also to all those dealing with problems of international law. The interconnections between international law and mass psychology frequently become manifest in this volume (which, incidentally, found its logical sequence in a second book, "The Conquest of Peace," in which the author draws the juridical conclusions of his theories on mass psychology) and this preoccupation with the legal aspects of the problems at hand may be ascribed, last but not least, to the fact that Reiwald himself is a student of law.

HERMANN BROCH

Princeton, N. J.

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UNITED NATIONS

CONSTITUTION OF THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

*November 4, 1946 **

THE GOVERNMENTS OF THE STATES PARTIES TO THIS CONSTITUTION ON BEHALF OF THEIR PEOPLES DECLARE

that since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed;

that ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war;

that the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races;

that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern;

that a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.

FOR THESE REASONS,

the States parties to this Constitution, believing in full and equal opportunities, for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a truer and more perfect knowledge of each other's lives;

* See note to Article XV, below.

IN CONSEQUENCE WHEREOF

they do hereby create the United Nations Educational, Scientific and Cultural Organisation for the purpose of advancing, through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and of the common welfare of mankind for which the United Nations Organisation was established and which its Charter proclaims.

ARTICLE I

Purposes and Functions

1. The purpose of the Organisation is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

2. To realise this purpose the Organisation will:

(a) collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image;

(b) give fresh impulse to popular education and to the spread of culture;

by collaborating with Members, at their request, in the development of educational activities;

by instituting collaboration among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social;

by suggesting educational methods best suited to prepare the children of the world for the responsibilities of freedom;

(c) maintain, increase and diffuse knowledge;

by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions;

by encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;

by initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.

3. With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of this Organisation, the Organisation is prohibited from intervening in matters which are essentially within their domestic jurisdiction.

ARTICLE II

Membership

1. Membership of the United Nations Organisation shall carry with it the right to membership of the United Nations Educational, Scientific and Cultural Organisation.

2. Subject to the conditions of the agreement between this Organisation and the United Nations Organisation, approved pursuant to Article X of this Constitution, States not members of the United Nations Organisation may be admitted to membership of the Organisation, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.

3. Members of the Organisation which are suspended from the exercise of the rights and privileges of membership of the United Nations Organisation shall, upon the request of the latter, be suspended from the rights and privileges of this Organisation.

4. Members of the Organisation which are expelled from the United Nations Organisation shall automatically cease to be members of this Organisation.

ARTICLE III

Organs

The Organisation shall include a General Conference, an Executive Board and a Secretariat.

ARTICLE IV

The General Conference

A. Composition

1. The General Conference shall consist of the representatives of the States Members of the Organisation. The Government of each Member State shall appoint not more than five delegates, who shall be selected after consultation with the National Commission, if established, or with educational, scientific and cultural bodies.

B. Functions

2. The General Conference shall determine the policies and the main lines of work of the Organisation. It shall take decisions on programmes drawn up by the Executive Board.

3. The General Conference shall, when it deems it desirable, summon international conferences on education, the sciences and humanities and the dissemination of knowledge.

4. The General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval. In the former case a majority vote shall suffice; in the latter case a two-thirds majority shall be required. Each of the Member States shall submit recommendations or conventions to its competent authorities within a period of one year from the close of the session of the General Conference at which they were adopted.

5. The General Conference shall advise the United Nations Organisation on the educational, scientific and cultural aspects of matters of concern to the latter, in accordance with the terms and procedure agreed upon between the appropriate authorities of the two Organisations.

6. The General Conference shall receive and consider the reports submitted periodically by Member States as provided by Article VIII.

7. The General Conference shall elect the members of the Executive Board and, on the recommendation of the Board, shall appoint the Director-General.

C. Voting

8. Each Member State shall have one vote in the General Conference. Decisions shall be made by a simple majority except in cases in which a two-thirds majority is required by the provisions of this Constitution. A majority shall be a majority of the Members present and voting.

D. Procedure

9. The General Conference shall meet annually in ordinary session; it may meet in extraordinary session on the call of the Executive Board. At each session the location of its next session shall be designated by the General Conference and shall vary from year to year.

10. The General Conference shall, at each session, elect a President and other officers and adopt rules of procedure.

11. The General Conference shall set up special and technical committees and such other subordinate bodies as may be necessary for its purposes.

12. The General Conference shall cause arrangements to be made for public access to meetings, subject to such regulations as it shall prescribe.

E. Observers

13. The General Conference, on the recommendation of the Executive Board and by a two-thirds majority may, subject to its rules of procedure,

invite as observers at specified sessions of the Conference or of its commissions representatives of international organisations, such as those referred to in Article XI, paragraph 4.

ARTICLE V

Executive Board

A. Composition

1. The Executive Board shall consist of eighteen members elected by the General Conference from among the delegates appointed by the Member States, together with the President of the Conference who shall sit *ex officio* in an advisory capacity.

2. In electing the members of the Executive Board the General Conference shall endeavour to include persons competent in the arts, the humanities, the sciences, education and the diffusion of ideas, and qualified by their experience and capacity to fulfil the administrative and executive duties of the Board. It shall also have regard to the diversity of cultures and a balanced geographical distribution. Not more than one national of any Member State shall serve on the Board at any one time, the President of the Conference excepted.

3. The elected members of the Executive Board shall serve for a term of three years, and shall be immediately eligible for a second term, but shall not serve consecutively for more than two terms. At the first election eighteen members shall be elected of whom one third shall retire at the end of the first year and one third at the end of the second year, the order of retirement being determined immediately after the election by the drawing of lots. Thereafter six members shall be elected each year.

4. In the event of the death or resignation of one of its members, the Executive Board shall appoint, from among the delegates of the Member State concerned, a substitute, who shall serve until the next session of the General Conference which shall elect a member for the remainder of the term.

B. Functions

5. The Executive Board, acting under the authority of the General Conference, shall be responsible for the execution of the programme adopted by the Conference and shall prepare its agenda and programme of work.

6. The Executive Board shall recommend to the General Conference the admission of new Members to the Organisation.

7. Subject to decisions of the General Conference, the Executive Board shall adopt its own rules of procedure. It shall elect its officers from among its members.

8. The Executive Board shall meet in regular session at least twice a year and may meet in special session if convoked by the Chairman on his own initiative or upon the request of six members of the Board.

9. The Chairman of the Executive Board shall present to the General Conference, with or without comment, the annual report of the Director-General on the activities of the Organisation, which shall have been previously submitted to the Board.

10. The Executive Board shall make all necessary arrangements to consult the representatives of international organisations or qualified persons concerned with questions within its competence.

11. The members of the Executive Board shall exercise the powers delegated to them by the General Conference on behalf of the Conference as a whole and not as representatives of their respective Governments.

ARTICLE VI

Secretariat

1. The Secretariat shall consist of a Director-General and such staff as may be required.

2. The Director-General shall be nominated by the Executive Board and appointed by the General Conference for a period of six years, under such conditions as the Conference may approve, and shall be eligible for re-appointment. He shall be the chief administrative officer of the Organisation.

3. The Director-General, or a deputy designated by him, shall participate, without the right to vote, in all meetings of the General Conference, of the Executive Board, and of the committees of the Organisation. He shall formulate proposals for appropriate action by the Conference and the Board.

4. The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations to be approved by the General Conference. Subject to the paramount consideration of securing the highest standards of integrity, efficiency and technical competence, appointment to the staff shall be on as wide a geographical basis as possible.

5. The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any government or from any authority external to the Organisation. They shall refrain from any action which might prejudice their position as international officials. Each State Member of the Organisation undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties.

6. Nothing in this Article shall preclude the Organisation from entering into special arrangements within the United Nations Organisation for common services and staff and for the interchange of personnel.

ARTICLE VII

National Co-operating Bodies

1. Each Member State shall make such arrangements as suit its particular conditions for the purpose of associating its principal bodies interested in educational, scientific and cultural matters with the work of the Organisation, preferably by the formation of a National Commission broadly representative of the Government and such bodies.

2. National Commissions or national co-operating bodies, where they exist, shall act in an advisory capacity to their respective delegations to the General Conference and to their Governments in matters relating to the Organisation and shall function as agencies of liaison in all matters of interest to it.

3. The Organisation may, on the request of a Member State, delegate, either temporarily or permanently, a member of its Secretariat to serve on the National Commission of that State, in order to assist in the development of its work.

ARTICLE VIII

Reports by Member States

Each Member State shall report periodically to the Organisation, in a manner to be determined by the General Conference, on its laws, regulations and statistics relating to educational, scientific and cultural life and institutions, and on the action taken upon the recommendations and conventions referred to in Article IV, paragraph 4.

ARTICLE IX

Budget

1. The budget shall be administered by the Organisation.

2. The General Conference shall approve and give final effect to the budget and to the apportionment of financial responsibility among the State Members of the Organisation subject to such arrangement with the United Nations as may be provided in the agreement to be entered into pursuant to Article X.

3. The Director-General, with the approval of the Executive Board, may receive gifts, bequests, and subventions directly from governments, public and private institutions, associations and private persons.

ARTICLE X

Relations with the United Nations Organisation

This Organisation shall be brought into relation with the United Nations Organisation, as soon as practicable, as one of the specialised agencies referred to in Article 57 of the Charter of the United Nations. This relationship shall be effected through an agreement with the United Nations Organisation under Article 63 of the Charter, which agreement shall be subject to the approval of the General Conference of this Organisation. The agreement shall provide for effective co-operation between the two Organisations in the pursuit of their common purposes, and at the same time shall recognise the autonomy of this Organisation, within the fields of its competence as defined in this Constitution. Such agreement may, among other matters, provide for the approval and financing of the budget of the Organisation by the General Assembly of the United Nations.

ARTICLE XI

Relations with other specialized international Organisations and agencies

1. This Organisation may co-operate with other specialised inter-governmental organisations and agencies whose interests and activities are related to its purposes. To this end the Director-General, acting under the general authority of the Executive Board, may establish effective working relationships with such organisations and agencies and establish such joint committees as may be necessary to assure effective co-operation. Any formal arrangements entered into with such organisations or agencies shall be subject to the approval of the Executive Board.

2. Whenever the General Conference of this Organisation and the competent authorities of any other specialised inter-governmental organisations or agencies whose purposes and functions lie within the competence of this Organisation, deem it desirable to effect a transfer of their resources and activities to this Organisation, the Director-General, subject to the approval of the Conference, may enter into mutually acceptable arrangements for its purpose.

3. This Organisation may make appropriate arrangements with other inter-governmental organisations for reciprocal representation at meetings.

4. The United Nations Educational, Scientific and Cultural Organisation may make suitable arrangements for consultation and co-operation with non-governmental international organisations concerned with matters within its competence, and may invite them to undertake specific tasks. Such co-operation may also include appropriate participation by representatives of such organisations on advisory committees set up by the General Conference.

ARTICLE XII

Legal status of the Organisation

The provisions of Articles 104 and 105 of the Charter of the United Nations Organisation concerning the legal status of that Organisation, its privileges and immunities shall apply in the same way to this Organisation.

ARTICLE XIII

Amendments

1. Proposals for admendments to this Constitution shall become effective upon receiving the approval of the General Conference by a two-thirds majority; provided, however, that those amendments which involve fundamental alterations in the aims of the Organisation or new obligations for the Member States shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force. The draft texts of proposed amendmerts shall be communicated by the Director-General to the Member States at least six months in advance of their consideration by the General Conference.

2. The General Conference shall have power to adopt by a two-thirds majority rules of procedure for carrying out the provisions of this Article.

ARTICLE XIV

Interpretation

1. The English and French texts of this Constitution shall be regarded as equally authoritative.

2. Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure.

ARTICLE XV

Entry into force

1. This Constitution shall be subject to acceptance. The instruments of acceptance shall be deposited with the Government of the United Kingdom.

2. This Constitution shall remain open for signature in the archives of the Government of the United Kingdom. Signature may take place either before or after the deposit of the instrument of acceptance. No acceptance shall be valid unless preceded or followed by signature.

3. This Constitution shall come into force when it has been accepted by twenty of its signatories.* Subsequent acceptances shall take effect immediately.

4. The Government of the United Kingdom will inform all members of the United Nations of the receipt of all instruments of acceptance and of the date on which the Constitution comes into force in accordance with the preceding paragraph.

In faith whereof, the undersigned, duly authorised to that effect, have signed this Constitution in the English and French languages, both texts being equally authentic.

Done in London the sixteenth day of November, 1945 in a single copy, in the English and French languages, of which certified copies will be communicated by the Government of the United Kingdom to the Governments of all the Members of the United Nations.

* The British Embassy informed the Department of State by a note dated December 10, 1946, that the Constitution of the United Nations Educational, Scientific and Cultural Organization, opened for signature at London November 16, 1945, came into force on November 4, 1946, upon its acceptance by 20 signatories, as provided in Article XV, paragraph 3, of the Constitution.

Countries which have accepted the Constitution, with the dates upon which the acceptances were deposited, are as follows:

Australia	June 11, 1946
Brazil	October 14, 1946
Canada	September 6, 1946
China	September 13, 1946
Czechoslovakia	October 5, 1946
Denmark	September 20, 1946
Dominican Republic	July 2, 1946
Egypt	July 13, 1946
France	June 29, 1946
Greece	November 4, 1946
India	June 12, 1946
Lebanon	October 28, 1946
Mexico	June 12, 1946
New Zealand	March 6, 1946
Norway	August 8, 1946
Poland	November 6, 1946
Saudi Arabia	April 30, 1946
Turkey	July 6, 1946
Union of South Africa	June 3, 1946
United Kingdom	February 20, 1946
United States	September 30, 1946

Department of State Bulletin, Vol. XV, No. 391 (December 29, 1946), p. 1192.

ARGENTINA

DECLARATION PROCLAIMING SOVEREIGNTY OVER THE EPICONTINENTAL
SEA AND THE CONTINENTAL SHELF**October 9, 1946*

Whereas:

The submarine platform, known also as the submarine plateau or continental shelf, is closely united to the mainland both in a morphological and in a geological sense;

The waters covering the submarine platform constitute the epicontinental seas, characterized by extraordinary biological activity, owing to the influence of the sunlight, which stimulates plant life (as exemplified in algae, mosses, etc.) and the life of innumerable species of animals, both susceptible of industrial utilization;

The Executive Power, in Article 2 of Decree No. 1,386, dated January 24, 1944, issued a categorical proclamation of sovereignty over the "Argentine Continental Shelf" and the "Argentine Epicontinental Sea," declaring them to be "transitory zones of mineral reserves";

The State, through the medium of the *Yacimientos Petrolíferos Fiscales* [Public Petroleum Deposits Administration], is exploiting the petroleum deposits discovered along the "Argentine Continental Shelf," thereby confirming the Argentine nation's right of ownership over all deposits situated in the aforesaid continental shelf;

It is the purpose of the Executive Power to continue, more and more intensively, its scientific and technical investigations relative to all phases of the exploration and exploitation of the animal, vegetable and mineral wealth, which offer such vast potentialities, contained in the Argentine continental shelf and in the corresponding epicontinental sea.

In the international sphere conditional recognition is accorded to the right of every nation to consider as national territory the entire extent of its epicontinental sea and of the adjacent continental shelf;

Relying upon this principle, the Governments of the United States of America and of Mexico have issued declarations asserting the sovereignty of each of the two countries over the respective peripheral epicontinental seas and continental shelves (Proclamation of President Truman, dated September 28, 1945, and Declaration of President Avila Camacho, dated October 29, 1945);

The doctrine in question, aside from the fact that it is implicitly accepted in modern international law, is now deriving support from the realm of science in the form of serious and valuable contributions, according to the

* Decree No. 14,708, 1946. Text from *Bolletino Oficial* of Argentina, by courtesy of the Law Library of the Library of Congress; translation.

testimony offered by numerous national and foreign publications and even by official educational programs; and

The manifest validity of the thesis invoked above, as well as the determination of the Argentine Government to perfect and preserve all the attributes inherently bound up with the exercise of national sovereignty, make it advisable to formulate the declaration pertinent to this matter, thereby amplifying the effects of the aforesaid Decree No. 1,386.

The President of the Argentine Nation,
supported by a General Accord of the Ministers

DECREES:

Article 1.—It is hereby declared that the Argentine Epicontinental Sea and Continental Shelf are subject to the sovereign power of the Nation;

Article 2.—For purposes of free navigation, the character of the waters situated in the Argentine Epicontinental Sea and above the Argentine Continental Shelf, remains unaffected by the present Declaration;

Article 3.—The said Declaration shall be brought to the attention of the Honorable Congress, published, transmitted to the National Registry and filed.

"... All the rules of International Law which were ever invoked by the United States, or against it, are here."

Louis B. Sohn
Am. Bar Assoc. J.

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AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 41

April, 1947

NO. 2

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THE PUBLICATION OF THE DIPLOMATIC PAPERS OF OTHER GOVERNMENTS

By E. WILDER SPAULDING *

The General Principle

An expert on foreign affairs has summarized the limitation upon the right of a government to make public the diplomatic papers which it has received from another government as follows: "... one party to a negotiation cannot, in honor and in courtesy, publish the negotiation without the consent of the other party, on pain of forfeiting that good-will upon which ... 'the peace of the world ultimately depends.'"¹ This principle of consent to publication is accepted, with some reservations and exceptions, by American practice. But American practice in this matter is not generally accepted by all foreign offices and it is not precisely and definitely written into international law. It has been generally observed in normal times by the Great Powers, which have had most to gain by its application, and it has frequently been disregarded by small powers and by Great Powers in times of stress. It rests upon comity and reciprocity, not upon international legislation.

According to a memorandum of November 21, 1927, of the Solicitor of the Department of State: "There appears to be no principle of international law which would prevent a government from publishing its own notes, in fact international law does not prevent the publication of any diplomatic correspondence. The practice in such cases, which is more or less general, is to reach an understanding regarding the matter, but this is done as a matter of courtesy. . . ."² A prominent American diplomatic historian refers to "the somewhat legendary comity which prevents, at least in the routine of diplomacy, the Government of the United States from publishing diplomatic papers from foreign governments without their consent."³

The principle of permission to publish the diplomatic papers of other governments has never been broadly defined. As written into Secretary Kellogg's order of March 26, 1925⁴ regarding the use of foreign diplomatic

* Division of Publications, United States Department of State. The opinions expressed in this article are those of the author and are not necessarily shared by the Department of State.

¹ Paul Scott Mowrer, *Our Foreign Affairs*, 1924, p. 227.

² State Department file no. 710.02/265-1/5.

³ Samuel Flagg Bemis, in *American Historical Review*, Jan., 1941, p. 439.

⁴ Printed in *Foreign Relations* 1914, Supp., p. iii. The relevant provision reads: "The Chief of the Division of Publications is expected to initiate, through the appropriate channels, the correspondence necessary to secure from a foreign government per-

papers in *Foreign Relations of the United States*, into Departmental Order 796 of June 19, 1939⁵ regarding the use of Department of State files by non-officials, and into the practice of the Department of State, it applies only to papers which emanated from, and were signed or initiated by the representatives of, other governments. It does not apply to this Government's own papers or records of negotiations with other governments, or even to memoranda of our officers describing conversations with foreign diplomats. It is not applied to such American papers because those papers represent only the reporting of our own officers in terms which the other foreign offices might not be able to verify or with which they might not even agree, and because we can not, in the public interest, alienate our right to release reports by our own official observers.

The principle of permission to publish does not apply with respect to governments which this Government did not recognize even though they were recognized at a later date and before publication.⁶ It does not of course apply in time of war with respect to enemy powers and it may not apply to notes addressed to an enemy by a neutral government which are regarded as being unfriendly.⁷

The time element is less clearly defined. Governments are chiefly concerned about current papers and they are obviously very little concerned about papers of a remote historical period. For the papers of how early a period, then, does this so-called obligation to request permission apply? The Department of State, through the Division of Research and Publica-

mission to publish any document received from it and which it is desired to publish as a part of the diplomatic correspondence of the United States. Without such permission, the document in question must not be used." The order of March 26, 1925, formalized but did not initiate the practice of asking permission in such matters. For instance a memorandum of February 13, 1923, from the Division of Publications to the Diplomatic Bureau (in file 026 Foreign Relations) stated that: "Following the usual custom of requesting consent to print correspondence from other governments in 'Foreign Relations' it is requested that 'consent to print' the following correspondence be obtained and that suitable instructions be sent to our diplomatic representatives in the respective countries." Earlier files are inconclusive as to the practice. Of interest is a chit attached to a telegram of March 14, 1918 (422.11 C9E/947) which states that: "We ask big nations permission to publish their notes in our 'Foreign Relations.' We haven't asked little countries but we don't publish for at least a year." On the other hand Judge John Bassett Moore has criticized the Department for requesting permission in any cases at all and has indicated that the practice was not resorted to when he was in the Department. Judge Moore has stated that he requested permission of no foreign governments when he used their papers in his *Digest of International Law* (8 vols. G.P.O., 1906).

⁵ "Regulations Governing Use of the Records of the Dept. of State," June 19, 1939. Departmental Regulations 420.1, effective March 15, 1946.

⁶ Soviet permission has not been requested for the publication of papers which predated U. S. recognition of the U.S.S.R.

⁷ E.g., the Spanish papers published by the State Department in *The Spanish Government and the Axis* (March, 1946).

tion, has set the line at January 1, 1914. Consequently the Department has sought the permission of other powers before publishing the Paris Peace Conference files of 1919 insofar as those files are the joint records of participating friendly governments. It is doubtful whether many other governments would be this meticulous in requesting permission. For example, Dr. Déak and the Hungarian Foreign Office did not ask permission before publication of numerous foreign documents in the Hungarian *Foreign Relations* volume which treated of events at the end of World War I.

Under American practice, request for permission to publish is made by our diplomatic representatives at the appropriate foreign capital. This practice is modified only occasionally as in the case of the so-called "governments in exile" during World War II. It is also frequently modified when negotiations are in progress currently and agreement is reached with the other government's mission in Washington to release current texts. The texts of numerous formal exchanges of notes to be published in the United States Treaties and Other International Acts Series are released in this fashion.

Release in this country of diplomatic correspondence exchanged with the American Government by the agents of other states may be mentioned here even though the principle involved differs considerably from the one under primary discussion. Such release should be effected through the Department of State, or this Government, only. A foreign minister or ambassador should in no circumstances release statements or notes in order to influence American public opinion. "A foreign minister has a right to remonstrate with the Executive to whom he is accredited upon any of those measures affecting his country. But it will ever be denied as a right of a foreign minister that he should endeavor, by an address to the people, oral or written, to forestall a depending measure, or to defeat one which has been decided."⁸ This principle is as true today as when it was stated by Secretary of State Randolph.

President Wilson expressed the basic principle on this point in 1916 when the German Ambassador asked Secretary Lansing whether he might publish his memorandum reciting alleged British infractions of international law and justifying German policy. The Ambassador's memorandum contained an appeal that the "people of the United States" should "appreciate the German viewpoint." The President resented the Ambassador's action pointing out that the memorandum was obviously intended not "for the information of this Government but as an appeal to the American public opinion. . . ."⁹

⁸ Secretary Randolph to the French Minister, June 13, 1795. Cf. Atty. Gen. Lee as cited in Moore's *Digest*, IV, p. 682. Moore's *Digest*, IV, p. 718, quotes from an instruction.

⁹ *Foreign Relations*, 1916, Supp., pp. 198-200; Tansill, *America Goes to War*, p. 488.

Precedents Illustrating Consultation Before Publication

The principle of the obligation of governments to obtain permission to release or publish other governments' diplomatic papers has a long history of precedent which deserves mention here. The following cases are of course not all-inclusive; they are merely illustrative.

The practice was foreshadowed as early as 1778 when this Government was rebuked, before it even had a foreign office, because the French Minister had not been consulted before Congress, on November 4, 1778, ordered the first American treaties with France to be printed.¹⁰ New treaty texts are not, however, generally subject to the principles which we are now discussing. Each party to a treaty should be free to publish the final text unless there is definite agreement to the contrary. Treaties to which this country is a party are of course made public when the Senate removes the injunction of secrecy, if not before.

The practice of consulting foreign governments was becoming common in Europe toward the end of the 19th century. "By about the year 1880 publication [of British Blue Books] had become formalized and governed by rules. The growth of a regular system of consulting foreign powers before documents were published prevented Blue Books from being used, as in the days of Canning and Palmerston, as instruments of policy."¹¹

On December 23, 1881, Lord Granville told the American Minister at London that the publication by this Government of correspondence on the subject of the proposed interoceanic canal before he had had an opportunity to reply to it "seemed to him, to say the least, unusual."¹²

Secretary Bayard reported to President Cleveland in 1888 that "In conformity with the invariable course pursued in previous negotiations, when the conference [on fisheries] met it was agreed that an honorable confidence should be maintained in its deliberations, and that only results should be announced, and such other matters as the joint protocolists should sign under the direction of the plenipotentiaries." After the conference the British Minister requested assent to the publication of a certain proposal that had been made by the British and declined by the Americans, and that assent was given.¹³

Secretary Bayard, in a report to the President on February 7, 1889, pointed out that the British and German Governments had consented to the publication of the joint protocols of the conference on Samoa held in Washington in 1887. Those governments had previously refused their consent

¹⁰ Hunter Miller, *Treaties*, II, pp. 30-31; cf. *Journals of the Continental Congress*, XIV, 830, 832.

¹¹ Harold Temperley and Lillian M. Penson, *A Century of Diplomatic Blue Books*, p. xii.

¹² Despatch of December 27, 1881, from Minister to Great Britain to Secretary Blaine; *Correspondence in Relation to the Proposed Interoceanic Canal*, p. 339.

¹³ *Senate Exec. Doc.*, No. 127, 50th Cong., 1st Sess., pp. 1-2.

and had given it only after passage of a resolution by the House of Representatives asking that the protocols and memoranda of the conference be submitted by the Secretary of State "if not incompatible with the public interest."¹⁴

The principle persisted under the "new diplomacy" of the 20th Century. When Acting Secretary Polk sent to the President for transmission to the Senate a convention with Denmark regarding the Danish West Indies it was accompanied by a statement that Denmark did not wish to have any publicity given to its terms and it was therefore recommended that the Senate be asked to observe the injunction of secrecy until Denmark should agree to publication.¹⁵

The Lansing-Ishii agreement was released on November 6, 1917 by the mutual agreement of the American and Japanese Governments.¹⁶ Secretary Lansing considered its earlier release to the Chinese as a betrayal of confidence by the Japanese.

In 1918 the Ecuadorean Government published a number of notes from the American Legation on the subject of the Quito railway. The American Legation protested to the Foreign Office and the Department approved its action. Despite the foreign minister's contention that the notes were routine and juridical and not diplomatic in character, thus justifying release without consultation, he had his Minister in Washington express his regrets to the Counselor of the Department.¹⁷

In 1922 the British Government noted the publication in a Congressional document of a note of July 23, 1908, from Sir Edward Gray to the American Ambassador and complained that the "consent of His Majesty's Government to the publication of this letter has not been requested and they therefore desire to call attention to this irregularity." The Secretary of State expressed his regret but pointed out that the communication had already been published in 1909.¹⁸

In the fall of 1925 the government of a Central American country brought out two volumes of its *Boletín del Ministerio de Relaciones Exteriores* for the first two quarters of that year. These books included correspondence between the American Legation and the Foreign Office which had been published without consultation. The American Charge was instructed to inform the Minister for Foreign Affairs that the State Department "invariably observes the international custom of not publishing verbatim the text of official diplomatic correspondence without the previous comment of the government with which such correspondence has been

¹⁴ *Senate Exec. Doc. No. 102, 50th Cong., 2nd Sess.*, pp. 1-2.

¹⁵ *Foreign Relations, 1917*, pp. 645-46.

¹⁶ Lansing, *War Memoirs*, pp. 302-03.

¹⁷ *Foreign Relations, 1918*, pp. 406-08, 409, 415. See also p. 593 for a case involving unauthorized publication by Mexico.

¹⁸ Dept. of State file No. 882.51/1459.

exchanged," and asked that no papers from the State Department or the American Legation be published in the future without this Government's consent.¹⁹

In a note of May 19, 1930, the British Ambassador asked permission to publish "L.W.C. No. 11—Position at conference of various delegations" in a forthcoming British publication of naval conference documents.

When in 1935 the government of a South American republic brought out an edition of its *Boletín del Ministerio de Relaciones Exteriores* containing United States diplomatic papers without having requested the permission of this Government, the American Ambassador was instructed to inform that government of our practice and to ask that it follow a similar course before making any of our diplomatic papers public. The instruction pointed out that the principle did not apply to "routine or ceremonial correspondence, papers already published, or communications and memoranda of officials of this Government even though they may contain reports of conversations with foreign officials." This instruction of November 4, 1935, very clearly states the Department's present practice.²⁰ It seems, however, to have had no effect since two more *Boletins* appeared in 1936 containing American papers of 1935. Again this Government had not been consulted,²¹ and again the American mission was instructed to protest.²² The Department's files for 1937 show that the protest had no effect but the Department decided against a further protest.²³

In 1936 there was some criticism of the Department for not opening certain of its files for the use of members of Congress. Secretary Hull made a public statement to the effect that "the Department undertakes to cooperate with Congressional committees to the fullest extent possible." He added, however, that the Department has many confidential communications from other governments which manifestly can not be made public "without the permission of the government which reposed confidence in this Government . . . if we are to have the respect and confidence of other governments, so essential to the conduct of international relations." The Secretary's reference to "this long-established rule of universal application" was somewhat of an overstatement.²⁴

In 1937 the Minister of Finland requested permission to publish the protocol of a meeting of 1919 at which the United States had been represented even though that protocol had been previously published in David Hunter Miller's *My Diary at the Peace Conference*.²⁵ This Government does not

¹⁹ Dept. of State file No. 816.021/24.

²⁰ Dept. of State file No. 823.021/7.

²¹ Dept. of State file No. 800.2.

²² Nov. 3, 1937, Dept. of State file No. 823.021/10.

²³ Dept. of State file No. 823.021.

²⁴ Press Release, Jan. 25, 1936, pp. 99-100. The statement is dated Jan. 20, 1936.

²⁵ Note of March 24, 1937, from Minister of Finland.

ordinarily request permission to release already published papers. Such release might properly be requested if publication had been unauthorized and hence lacked the earmarks of authenticity.

In announcing in June 1939 that the Charge at Tokyo was negotiating the release of a Japanese communication, Secretary Hull added that it was customary to obtain the consent of a foreign government before publishing one of its documents.²⁶ In stating to the press in 1941 that he would have to consult the German and Italian Embassies before giving out their notes on taking certain German and Italian vessels into United States custody, Secretary Hull remarked that ordinarily these embassies have no hesitation about releasing such notes.²⁷

In a note of December 9, 1943, the Embassy of the Dominican Republic courteously requested the consent of this Government to the publication of a note of October 12, 1931, from the Department to the Dominican Minister. It was transmitted to the Department in galley proof,²⁸ a procedure used by this Government in the case of the *Foreign Relations* volumes.

As recently as September 4, 1945, the British Embassy requested permission to print a number of papers more or less related to the London Naval Conference of 1930 in the volumes to be published on British foreign policy of 1919-1939. With one exception the papers in question were either papers already published in *Foreign Relations of the United States* or memoranda of conversations and notes of meetings written by British officials. In replying to the British Embassy the Department stated that it had no objection to the publication of any of the papers. It did not point out that it is not the Department's own practice to ask permission to publish its own officials' memoranda of conversations with foreign officials, or its own notes to foreign officials, or previously published notes.

This Government has generally maintained its right to publish its own diplomatic papers without asking permission of others. It has insisted upon that right even when the papers in question were memoranda by our officials of conversations with foreign officials, always keeping in mind that genuine confidences must not be betrayed.

Secretary Seward wrote to the American Minister at London, Mr. Adams, on March 23, 1864, that Congress and the country "had a right to be put fully in possession of a complete history of conflicting claims which had arisen between the United States and Great Britain . . ." and they had the same right to see his instruction to Adams of July 11, 1862, since that "document was a communication from this Government, not to Her Majesty's Government, but to its agent." Minister Adams was instructed to insist on this right to publish Seward's own instruction.²⁹

²⁶ *Radio Bulletin*, June 20, 1939.

²⁷ *Radio Bulletin*, April 1, 1941.

²⁸ Department of State file No. 116.72/19.

²⁹ Quoted in Moore, *Digest*, IV, pp. 720-21.

In July, 1895, the German Ambassador protested that some of the official reports of American representatives in Samoa, which were published pursuant to a Senate resolution, contained critical statements which reflected upon the German Government.³⁰ The Ambassador added that in such cases the German Government had always adhered to the system of previously notifying the United States Government. Acting Secretary Adee replied to the German Ambassador that this Government was fully aware of "the practice to submit to foreign governments official correspondence exchanged with it requiring confidence and reserve, . . ." but "it has not generally regarded this courteous practice as inviting the submission to a foreign government of the despatches and instructions exchanged between this Department and its agents in the foreign country before publishing the same. . . ." Mr. Adee added that he did not recall instances where such papers affecting matters in the United States had been submitted to this Government before publication.

Secretary Blaine in 1890 expressed his regrets that a consular report incorporating unnecessary and unjust references to the Greek people had been published by this Government but he pointed out that such reports are prepared for the use of this Government and their usefulness can not be circumscribed by prohibitions as to the inclusion of matter critical of other governments.³¹

This principle was ignored in 1933 when two instructions were sent to Peiping stating that the Department does not as a rule give out the texts of its notes to other governments without their consent.³² The Department has, however, generally insisted and should insist on its right to release its own notes and should refrain from doing so only when it is in agreement with the other government that disclosure of the subject-matter of those notes is not advisable at the time. Secretary Hull acted upon this principle in 1938 when he informed the press that we were not asking Japanese permission for the release of an American note of October 6 and that it was not necessary to do so.³³

An exception to this rule regarding American papers was allowed in preparing the *Foreign Relations* volume for 1923.³⁴ The Department asked permission of the Japanese Foreign Office for the publication of the American memorandum of a formal oral statement delivered to Secretary of State Hughes by Ambassador Hanihara under precise instructions from his government. The editor of the *Foreign Relations* volume cited this case in a memorandum dated October 20, 1937, in which he ably defended the Department's practice and pointed out that that practice had been care-

³⁰ Moore, *Digest*, IV, pp. 724-25.

³¹ *Foreign Relations*, 1889, pp. 483-84.

³² Dept. of State file No. 893.74/976 and 893.74/978.

³³ *Radio Bulletin*, Oct. 28, 1938.

³⁴ State Dept. file 026 *Foreign Relations*/1146.

fully reconsidered and restated as recently as 1935 in response to a Japanese request that Japan be consulted "even in the case of documents originating with the United States when they contain views or information specifically forwarded by the Japanese Government as confidential. . . ." The Department declined to "give the Foreign Office the impression that there can be any departure from the general principles regarding the publication of documents not originating with any foreign government. . . ." ³⁵

Exceptions to the General Rule

The principle of requesting permission to publish is by no means universally accepted. Precedents favor that principle but there are many exceptions to the rule. The following cases are illustrative.

On August 28, 1883, Secretary Frelinghuysen sent an instruction to the American Minister to Mexico approving the latter's action in declining to attend a diplomatic corps meeting for discussing the propriety of Mexico's action in publishing correspondence initiated by a foreign minister without previously consulting that minister. The Secretary said that "in the absence of any express reserve or pledge of confidence, correspondence between governments was the property of either, to be published if the interest of either required, . . ." ³⁶ This liberal interpretation has not been generally accepted by other governments.

The Department's attention was called in 1925 to two volumes of the bulletin of the Salvadorean Ministry of Foreign Affairs which contained American papers published without American consent ³⁷ and in 1929 the Embassy at Quito reported the publication, without its consent, of certain of its notes to the foreign office of Ecuador in that agency's printed report. ³⁸

The Department of State itself published a German note of November 17, 1938, without notifying the German Government. In reply to the protest of the German Foreign Office the Department recognized the "right of every government to withhold from publication the texts of its diplomatic communications" but stated that the information it contained had long been sought by the American Government and public. ³⁹

An interesting case occurred in 1939 with respect to Panama. The Foreign Office replied to the American Ambassador's request for permission to publish certain Panamanian documents as follows: "I may inform Your Excellency that my Government has always understood that the official

³⁵ Instructions to Embassy at Tokyo, Jan. 30 and July 15, 1935, State Dept. file 026 Foreign Relations/781 and 878.

³⁶ Referred to in Moore, *Digest*, IV, p. 722. Quotation is from Moore.

³⁷ State Dept. file No. 816.021/24.

³⁸ State Dept. file No. 822.021/12.

³⁹ Tel. 706, Dec. 9, 1938, from Embassy at Berlin and tel. 250, Dec. 29, 1938, to the Embassy.

notes of that Embassy, previously Legation, with the exception of confidential ones, could be published without the necessity of prior consultation with the other party, according to an exchange of ideas had in this respect with various predecessors of Your Excellency. . . .⁴⁰ The Department has never attempted to distinguish between confidential papers and non-confidential ones since such classification practice has not been consistent as among different governments and since classification often ceases to have its original significance after the passage of time. It is interesting to note that Panama continued to publish the *Memoria* of its Foreign Ministry without consulting other governments regarding their papers. In 1943 the American Minister, when given discretion in the matter, decided not to register any protest with the Panamanian authorities.⁴¹

In 1940 the Spanish Government failed to make any reply to requests for permission to print certain of its papers in *Foreign Relations* and to release others to a private researcher.⁴²

The Hungarian Government published its first and only *Foreign Relations* volume in 1940. It covered the period from August 1919 to December 1920 and was projected as the first in a continuing series. Contrary to American practice the Hungarian Government did not ask permission of any foreign governments before printing their papers.⁴³

In 1940 the Argentine Ministry of Foreign Relations published a large report on the Chaco Peace Conference. Included in it was a confidential committee report prepared by an American official, Mr. Spruille Braden. The latter had never agreed to publication.⁴⁴

In March, 1941, the Foreign Minister of Bolivia read to the Senate of Bolivia a number of hitherto unpublished papers of 1937 received from this Government, and all were published in the newspaper press. No formal protest was made by the Department but the matter was discussed with the Bolivian Minister at Washington.⁴⁵

The practice followed by Mr. Green H. Hackworth, then the Legal Adviser of the Department of State, in publishing foreign documents in his monumental *Digest of International Law* (1940-1944) is of considerable interest. A number of foreign notes appear in the volumes⁴⁶ but Mr. Hackworth has stated that requests were not made to any foreign governments. This action by a high officer of the Department who was later to become a judge of the International Court of Justice is most significant.

⁴⁰ Airmail despatch 34, Aug. 7, 1939, from the Embassy at Panama.

⁴¹ Despatch 4016, April 27, 1943, from American Embassy at Panama.

⁴² Instruction to Madrid, March 21, 1940.

⁴³ American Society of International Law, Report of Committee on Publications of the Department of State, 1940.

⁴⁴ Dept. of State file No. 724.34119/1833.

⁴⁵ Dept. of State file No. 824.6363 ST 2/518.

⁴⁶ E.g., in Vol. I, pp. 70, 192, 212, 219, 232, 273, 297, 400, 455, 625, 627, 640. Some of these may have been previously published.

It would indicate his belief that the principle of permission should be used very sparingly and should not be resorted to when only papers of legal or historical importance were involved. In this matter Judge Hackworth was following in the footsteps of his noted predecessor, Dr. John Bassett Moore, who quoted from many foreign documents in his *Digest of International Law* (1906) without permission from abroad.⁴⁷

Release by Diplomats and Former Officials

American Foreign Service officers do not have authority to give permission to release diplomatic papers since the Foreign Service Regulations forbid publication of any official paper "without the express consent of the Department of State."⁴⁸ Similarly the Department has held that publication of his correspondence with the Department by a foreign minister to the United States "without the authority of his government, is . . . not decorous to the Government of the United States."⁴⁹ In 1936 the Department instructed the Minister to Haiti to make a mild protest to the Haitian Foreign Office regarding the publication by a former Haitian Foreign Minister without authorization of American notes.⁵⁰ A similar protest was made by the Japanese Government to this Government in 1936 when it learned that the secret protocol to the Lansing-Ishii Agreement of 1917 had been revealed by former Secretary Lansing in his *War Memoirs* (1935) and subsequently discussed by Professor Bemis in his *Diplomatic History of the United States* (1936).⁵¹

Private Individuals, Firms, and Organizations

Another aspect of the practice of requesting permission to print or make public certain categories of papers is found in the question of the Department's responsibility toward unofficial persons and organizations or firms which have corresponded with the Department. Here the practice is set forth in the case of the Noah's Ark Exploration Association which wrote to the Department on August 19, 1929, to secure a permit from Turkey to explore for Noah's Ark. The Department's action in releasing the association's letter to the press was protested by one of its trustees. He was informed in a letter of October 25, 1929, that "it is the practice of the Department, in consequence of the interest in its activities manifested by the press and the public in general, to make public from time to time information which is not of an obviously confidential nature."⁵² Papers of a

⁴⁷ Moore, *Collected Papers*, Vol. VII, p. 139.

⁴⁸ Instructions to Diplomatic Officers of the U. S., 1897, sec. 107, p. 40.

⁴⁹ Instruction of Dec. 9, 1836, from Sec. Forsyth to the American Chargé in Mexico, quoted in Moore's *Digest*, Vol. III, p. 718.

⁵⁰ Dept. of State file No. 711.38/282.

⁵¹ Dept. of State file No. 026-Foreign Relations/1125.

⁵² Dept. of State file No. NE 867.927/46.

personal nature, like applications for passports, would not be publicized, but the Department insists upon the right to release correspondence with American citizens of general or public interest. Consequently letters from corporations requesting diplomatic intercession or protection are published in the *Foreign Relations* volumes without the permission of the corporations.

Conclusions

The consequences of the application of the principle of permission to publish have not been serious in the case of the *Foreign Relations* volumes. The percentage of refusals has in the past run rather high. For instance 12 papers were omitted from the 1923 volumes and 10 from the 1924 volumes in deference to foreign objections. For 1923 171 papers had been submitted to foreign governments and 187 in 1924. For 1926 only two papers out of 168 were omitted in deference to other countries. In recent years the number of refusals has in general been small. Except in one case, which involved the very important minutes of the Council of Three and the Council of Four at Paris, the story could be told and was told, in spite of foreign objections, by substituting American papers which recounted substantially the same facts.

The Chief of the Division of Research and Publication in 1938 discussed the effect of the principle of permission and ascribed the 15-year delay in publishing the *Foreign Relations* volumes to that practice. He very properly stressed the importance of full publication and he also suggested that the 15-year gap could never be much reduced without sacrificing completeness.⁵³ Some of his colleagues disagreed and pointed out that the refusals of foreign governments had in general been of small importance. Certainly it may be maintained that the time element is not always determining. For instance, papers on the Imbrie case in Persia which could not be printed in *Foreign Relations* in 1927 had already been officially printed by this Government in 1922 and the only British objections in 15 years have involved Paris Conference papers well over 20 years old.

As a matter of fact the practice of consulting foreign governments has doubtless detracted nothing from the completeness of the *Foreign Relations* volumes. Foreign papers would probably be deleted, just as a matter of precaution, by American policy officers reviewing the galley proof, were it not possible and customary to submit them to the governments from which they emanated. Foreign governments have objected in only a few cases and, as mentioned above, those few cases have detracted very little from the completeness of the volumes. The practice of seeking permission to print has been attacked as being undemocratic, but its practical effect has not been serious. On the other hand, it has contributed to frankness in

⁵³ Dept. of State Publication No. 1170, pp. 5-8.

diplomatic negotiation and reporting, and that frankness is worth a great deal in this age of vital international relationships.

Recommendations

That the practice of consultation before publication has been on the whole reasonable and useful does not prove that it is completely logical as now practiced by this Government. The rule as presently applied is too inflexible. It needs two modifications: first, it should not be applied to routine and ceremonial papers or to papers whose subject matter is obviously non-confidential and of such a nature as not to embarrass any government if published, and, secondly, it should operate under a statute of limitations. It should not be necessary to request permission after 25 years. With these two modifications it might be usefully adopted by all nations.

MODERNIZATION OF THE LAW OF INTERNATIONAL CONTRACTUAL AGREEMENTS

By PHILIP C. JESSUP

Of the Board of Editors

Diplomacy has developed a large amount of formalistic ritual much of which is reflected in international law. The titles and ranking of diplomats constitute the most striking example. Curiously enough this tendency is not wholly reflected in the modern law and practice of treaty-making. It is of no legal consequence, for example, whether an agreement between or among states is called a treaty, a convention, a statute, an agreement, a protocol or a covenant or charter.¹ Certain labels are used with a degree of consistency to signify the informal or temporary character of an agreement such as *modus vivendi* and "exchange of notes," while others, such as "covenant" and "charter," have been utilized to suggest the basic and over-all importance of the instrument. The labels do not, however, indicate whether the agreement registers a boundary settlement, the conclusion of peace, a political and military alliance, provisions for the extradition of fugitive criminals, arrangements for the distribution of radio frequencies, adjustment of double taxation, respect for copyrights, or facilities for travelling salesmen. The applicable substantive law similarly fails to distinguish among such diverse subjects and covers them all with the same rules concerning conclusion, interpretation, and termination. Such uniformity is convenient for the student, the statesman, and the judge, but it is not responsive to the needs of the international community in some important respects which will be discussed in this chapter.

Agreements between and among states also reveal other important basic differences. To use the analogous terminology of private or national law, some agreements are essentially contracts, as, for example, agreements for the sale of surplus war supplies, loan agreements, and agreements for the maintenance of national monuments or memorials. In a sense all international agreements are contractual in that they derive their validity from the agreement of the parties, but Judge Hudson has properly emphasized—as Lord Salisbury suggested in 1897²—the fact that many such agreements are more closely analogous to legislation, despite the non-existence of any international legislature.³ This is true of many of the great multi-partite instruments which are becoming more and more characteristic of

¹ Harvard Research in International Law, *Draft Convention on the Law of Treaties*, Introductory Comment, p. 667.

² J. Westlake, *International Law*, 1910 (2nd ed.), Vol. I, p. §22.

³ M. O. Hudson, *International Legislation*, Vol I, p. xiii.

the international legal order such as those setting up permanent machinery and procedures for managing the world's affairs in matters of communications, health, morals, and the like. Still other instruments are of a quasi-constitutional nature as the Covenant of the League of the Nations and the Charter of the United Nations.

The traditional discussions in the books about treaties are usually concerned only with agreements to which states are parties. This is the natural consequence of the accepted doctrine that only states are subjects of international law. It is not intended to continue here the classic debate as to whether or not individuals are subjects of international law. The affirmative answer to that question is assumed by way of hypothesis for the purposes of examining the effect which the adoption of that doctrine would have upon the international law of treaties—to consider which of the traditional rules would then stand in need of modification. The acceptance of this hypothesis necessitates consideration of agreements between states and individuals. The rapid development of international organizations with farflung interests and activities, and with relationships to states and to each other as well as to individuals, requires corresponding consideration of all types of agreements concluded by and with such international agencies. It will be recalled that colonies and other political dependencies have already been accorded membership in international unions.⁴

It is a common lay error to draw a sharp distinction between treaties and international law in general. Many who are not familiar with the operation of the international legal process are wont to assert that "there isn't any international law" but that treaties are something different. Perhaps subconsciously certain advocates of world government, who maintain that there can be no international law until international government is established, proceed to suggest that states should agree by treaty to establish such a government. This reasoning overlooks the fact that no agreement has legal significance except against the background of a system of law which attaches legal consequences to the contractual act. In international law some jurists have maintained that the basic rule or principle of that law is the maxim *pacta sunt servanda*.⁵ But this primary duty to observe the obligations assumed in agreements would be difficult of operation if the law did not also indicate when an agreement becomes binding, how it is to be interpreted during its effective life, and how it may be terminated. The confusion in the lay mind has not been dissipated by the common practice in the United States of referring to international law as embracing only customary law, which, to be sure, includes the law of treaties but not

⁴ Only some aspects of the law of treaties, selected with a view to illustrating modern problems are treated here. Other aspects of the modernization of the law of nations are reserved for subsequent treatment.

⁵ See H. F. Briggs, *The Law of Nations*, 1938, p. 24; Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, this JOURNAL, Vol. 39 (1945), p. 180.

the treaties themselves. Thus it is frequently said that international conduct is regulated by international law and treaties.⁶ The European practice of distinguishing between customary and contractual international law, and including both types when the term international law is used alone, is more helpful. Similarly clarifying is the European practice of referring to "general" or universal international law, partly customary and binding the international community as a whole, and "particular" international law which binds only certain members of the international community.

The Conclusion of International Agreements

It is common practice to conclude treaties subject to ratification by the contracting parties. Ratification "is the formal confirmation and approval of the written instrument."⁷ Such confirmation and approval is given in accordance with the constitutional processes and requirements of each state. In the United States, for example, ratification of treaties is an executive function; the Senate "advises and consents" to ratification where the agreement takes the formal treaty character.⁸ The popular statement that the Senate "ratifies" treaties may be ascribed to the fact that, particularly in the newspapers, the longer constitutional phrase is found too awkward for general use.

Ratification is not the final step requisite to bring a treaty into force. The final step is the reciprocal communication of the fact of ratification which is generally termed the exchange of ratifications, or, as is common in the case of multipartite instruments, the deposit of ratifications with an agreed depository which may be the chancellery of a single state or an international official such as the Secretary-General of the United Nations.

Although it is usual to conclude agreements subject to ratification, this is not the universal practice and international law interposes no obstacle to bringing an agreement into force upon signature by a duly authorized agent of the state.⁹ It is a matter of the constitutional law of the state whether any particular international agreement or type of agreement may be thus concluded.

No change in the existing law regarding the ratification of agreements or the exchange or deposit of ratifications seems to be necessary in connec-

⁶ The title of an able article by Prof. Quincy Wright illustrates the common use of the terms: "Conflicts between International Law and Treaties," this JOURNAL, Vol. 11 (1917), p. 566.

⁷ C. C. Hyde, *International Law*, 1945 (2nd ed.), p. 1429.

⁸ For discussion of various methods which may constitutionally be utilized by the United States in order to conclude an international agreement, see McDougal and Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," in *Yale Law Journal*, Vol. 54 (1945), pp. 181 and 534.

⁹ See J. Mervyn Jones, "International Agreements Other Than 'Interstate Treaties,' Modern Developments," in *British Yearbook of International Law*, 1944, p. iii.

tion with agreements to which all the parties are states. It may be pertinent to note, however, the provisions of Article 102 of the Charter of the United Nations which reads as follows:

1. Every treaty and every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

At the San Francisco Conference the above phraseology was preferred to that found in Article 18 of the Covenant of the League of Nations which declared that unregistered treaties should not be binding. The exact legal effect of that provision had not been made clear in practice and the Charter text avoids making registration a prerequisite to the coming into force of the agreement.¹⁰ It may be noted that Article 102 of the Charter applies to "every international agreement entered into by any Member of the United Nations"; it does not specify that both or all parties to the agreement should be states. It is doubtful whether the framers paid particular attention to agreements between a state on the one hand and an individual on the other, or to agreements to which an international agency is a party, but the language would cover such cases if one party were a Member, assuming that the agreement in question could properly be considered to fall within the term "international agreement." One case which was considered at San Francisco was one in which a treaty or agreement was concluded between a Member and a non-Member; in such a case the Member is under an obligation to register. The same rule should be applied in the case of international agreements between a Member and an individual or an international organization.

In the case of an agreement between a state and an international organization the text might provide that it should be subject to ratification by the state and to "approval" by some designated body in the international organization. Under Article 43 of the Charter of the United Nations all Members are required to conclude agreements with the Security Council relative to the armed forces, assistance, and facilities which the Member will supply when required. According to paragraph 3 of that Article such agreements "shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be

¹⁰ See *Report to the President on the Results of the San Francisco Conference* by The Chairman of the United States Delegation, p. 154. On Art. 18 of the Covenant see Hudson in (this JOURNAL, Vol. 19 (1925), p. 275, and Vol. 28 (1937), p. 546; L. Oppenheim, *International Law* 1937 (5th ed.), p. 721. See also claim of Pablo Najera, French-Mexican Mixed Claims Commission, 1927-28 Annual Digest Case No. 271.

subject to ratification by the signatory states in accordance with their respective constitutional processes." In the case of Trusteeship Agreements Article 79 provides that the agreements shall be concluded among "the states directly concerned" and, under Articles 83 and 85, the agreements are to be "approved" by the Security Council or by the General Assembly, depending on designation in the agreement of a strategic area.

The Working Draft of an agreement between the United Nations and the United States relative to the arrangements for the site of the United Nations headquarters is in typical treaty form and provides in Section 42 that the convention (or agreement) "shall be brought into force by an exchange of notes between the Secretary-General, duly authorized by a resolution of the General Assembly of the United Nations, and the United States of America."¹¹ UNRRA has concluded agreements with various states regarding the distribution of relief supplies. According to the text of one of these agreements which has been seen by the author the agreement took effect upon signature by a Deputy Director General of UNRRA and a cabinet minister of the government concerned; no ratification was required. The *modus vivendi* of September 18, 1926, concerning diplomatic immunities of League of Nations officials, was agreed to be the Swiss Federal Government, the Secretary-General of the League, and the Director of the International Labour office; it was taken note of by the League Council but was not subject to ratification.¹² Agreements between two or more international organizations are contemplated by recent instruments. According to Article 63 of the Charter, the Economic and Social Council "may enter into agreements" with the various specialized agencies; these agreements are "subject to approval by the General Assembly." Under Article XII of the Constitution of the Food and Agriculture Organization agreements may be made with other public international organizations to define distribution of responsibilities and methods of cooperation. The agreements are to be made by the Conference, which is the general assembly of the FAO, with "the competent authorities" of the other organization. Subject to control by a decision of the Conference the Director-General of FAO may "enter into agreements with other public international organizations for the maintenance of common services, for common arrangements in regard to recruitment, training, conditions of service, and other related matters, and for interchanges of staff." The FAO constitution was drafted before the United Nations came into existence but Article XIII contemplates that a relationship will be established between the two organizations. In this connection the Article speaks not of "agreements" but of "arrangements"; these are subject to approval by the Conference.¹³ The World Health Organization may enter into agreements with the United

¹¹ Un Doc. A/67.

¹² Hudson as cited above, note 3, p. 224.

¹³ Food and Agriculture Organization, *Report of the First Session of the Conference*, 1946, p. 87.

Nations or other inter-governmental organizations; according to Articles 69 and 70 of the Constitution such agreements are subject to approval by a two-thirds vote of the Health Assembly. Presumably the agreement would be negotiated and signed by the Secretary-General. Under Article 71 "The Organization may, on matters within its competence, make suitable arrangements for consultation and coöperation with non-governmental international organizations and, with the consent of the government concerned, with national organizations, governmental or non-governmental." There is no indication of the procedure for concluding such "arrangements."¹⁴ UNESCO's Constitution similarly provides in Article XI for agreements with other organizations; the Director-General makes the agreement subject to the approval of the Executive Board. "Arrangements" may also be made with non-governmental international organizations.¹⁵ The Suggested Charter for an International Trade Organization of the United Nations in Article 71 contains similar provisions; the agreement on relationship to the UN "shall be concluded by the Director General and approved by the Conference." Relations with other international organizations may be established by the Director General while "formal arrangements for coöperation" may be entered into by the Executive Board. If the Conference and the competent authorities of another organization believe that the ITO should absorb functions of the other body the Director General "may enter into mutually acceptable arrangements" "subject to the approval of the Conference."¹⁶ Under Article 64 of the Convention creating the International Civil Aviation Organization "the Organization" may enter into appropriate arrangements with the UN "by vote of the Assembly." Article 65 reads: "The Council, on behalf of the Organization, may enter into agreements with other international bodies for the maintenance of common services and for common arrangements concerning personnel, and, with the approval of the Assembly, may enter into such other arrangements as may facilitate the work of the Organization."¹⁷

It is apparent that when an organization enters into an agreement it will be necessary for the other contracting party to examine the constitutional basis of the agreement-making power. It could not properly be asserted, as it has been with reference to inter-state agreements, that the Director General or Secretary General had "apparent authority" to conclude the agreement and that the organization was accordingly bound by his act

¹⁴ *Final Acts of the International Health Conference (1946)*, UN Doc. E/155.

¹⁵ *The Defenses of Peace, Documents Relating to Unesco, Part I, Department of State, Publication 2457 (1946)*, p. 20.

¹⁶ *Suggested Charter for an International Trade Organization of the United Nations, Department of State, Publication 2598 (1946)*, p. 43.

¹⁷ *International Civil Aviation Conference, Chicago, 1944, Final Act and Related Documents, Department of State, Publication 2282 (1945)*, p. 78.

though the Constitution might require ratification or approval by one of the other organs. It would be convenient to develop a practice of reciprocal confirmation that approval has been given—the equivalent of the exchange of ratifications. It might be appropriate to provide generally in such agreements that notice of approval should be deposited with the Secretary-General of the United Nations and should take effect upon his receipt of the last required notice of approval. As Professor Finer has pointed out, collaboration between international agencies will be of great importance and it is to be anticipated that there will be a considerable volume of agreements among them.¹⁸

The Regulations for the registration of treaties under Article 102 of the Charter, as adopted by the General Assembly on December 14, 1946, take account of the developments relative to the conclusion of international agreements by international organizations. Treaties and international agreements are to be registered only when a state is a party to the agreement and under Article 4 of the Regulations one of the cases in which such a document is to be "registered *ex officio* by the United Nations" is that in which "the United Nations is a party to the treaty or agreement." Such a treaty or international agreement "may be registered with the Secretariat by a specialized agency in the following cases:

- (a) Where the constituent instrument of the specialized agency provides for such registration;
- (b) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;
- (c) Where the specialized agency has been authorized by the treaty or agreement to effect registration.

Article 10 of the Regulations provides a special procedure for treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies where a Member of the United Nations is not a party; the Secretariat "shall file and record" such documents. Both the registered treaties and those filed and recorded are to be published in a single series.¹⁹

International agreements between states and individuals may take a variety of forms and cover a variety of subjects. As will be explained later, such agreements may be contracted with reference to international law or to national law; only the former situation needs to be considered at this point. Agreements made by the great chartered companies with native chiefs and princes have been recognized as important international documents even though not treaties in the formal sense.²⁰ An individual,

¹⁸ H. Finer, *The United Nations Economic and Social Council*, 1946.

¹⁹ UN Doc. A/266.

²⁰ See the opinion of Judge Huber, sole arbitrator in the *Palmas Island Case, the UNITED STATES v. the NETHERLANDS* (1928), J. B. Scott, *The Hague Court Reports* (Second series, 1932), p. 83, 115.

or a private group such as a corporation, may enter into an agreement with a state on a highly important political question. Thus in 1940 an agreement was entered into by the Dominican Government and the Dominican Republic Settlement Association, Inc., a New York corporation, relative to the settlement of refugees in Santo Domingo.²¹ At the time the agreement was concluded the corporation had no individual status under international law and it must be assumed that the agreement was a contract concluded under Dominican law. With the acceptance of the hypothesis that an individual (or corporation) is a subject of international law such an agreement could, if the parties so desired, be an international law agreement. The agreement or contract actually provided in Article VI that it should be ratified by a resolution of the Board of Directors of the Association and approved by the Congress of the Dominican Republic. The signatures were affixed by the President and Vice-President of the Association and two ministers of the Dominican Republic. It might be more convenient in such cases to determine in advance the authority of the negotiators, let us say the cabinet minister and the president or general counsel of the company, and to provide that the agreement should come into force upon signature. The agents presumably would not affix their signatures until they had consulted their superiors in case of necessity.

Agreements may also be made between international organizations and individuals, again including groups such as corporations within the term "individuals." An obvious case would be that of an employment contract between the United Nations and a member of the Secretariat.²² Such contracts might be made with reference to the law of a particular state, such as that of the state in which the headquarters of the United Nations was located. It would seem more appropriate, given the acceptance of the position of the individual as a subject of international law, to conclude such agreements under international law and make that law applicable to disputes concerning interpretation and the like. On the procedural side it is to be presumed that special tribunals will be established for the solution of such controversies, but the law to be applied and developed by such special tribunals should be a branch of international law, not of some national law. Similarly the World Health Organization might enter into an agreement with the Rockefeller Foundation concerning some joint enterprise. In all such cases there may be developed formulas and procedures for bringing the agreement into force upon signature or upon reciprocal confirmation of approval by designated authorities.

²¹ See *Refugee Settlement in the Dominican Republic, A Survey Conducted Under the Auspices of the Brookings Institution*, 1942.

²² M. O. Hudson, *International Tribunals, Past and Future*, 1944, pp. 220-222; G. Schwarzenberger, *International Law*, Vol. I, p. 477.

Third Party Beneficiaries

Under existing international law a treaty is a source of rights and obligations only for the parties to it; *pacta tertiis nec nocent nec prosunt*.²³ However, as the Permanent Court of International Justice suggested in the Free Zones case,²⁴ it is legally possible for contracting states to create a right in favor of a third state not a party to the treaty. The practice is so unusual that such a result, or the intention to achieve such a result, "cannot be lightly presumed." Professor Hyde cites an excellent example in the case of the Hay-Pauncefote treaty of 1901 between the United States and Great Britain, stipulating that the Panama Canal "shall be free and open to the vessels of commerce and war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise." In 1921 Secretary of State Hughes wrote that "other nations . . . not being parties to the treaty have no rights under it."²⁵ In other words, the obligation of the United States was an obligation to Great Britain only and those two states remained at all times free to change their agreement so as to eliminate the clause in question. But the whole question of the rights of third parties under treaties establishing the status of international waterways is by no means free from controversy under international law.²⁶ Usually, when two or more contracting states desire to make the rights or privileges of a treaty available to other states, they include a provision for the adhesion or accession of other states, whereby they may become parties to the treaty and thus share its rights and obligations.

This type of subject matter illustrates the utility of the adoption in a modern law of nations of a doctrine of "community interest." The acceptance of such a doctrine is taken here by way of hypothesis without attempting to argue the extent to which it is already manifested in the traditional international law. In general, international law has developed on a bilateral basis in the sense that a breach of the law was deemed to concern only the state whose rights were directly affected. A doctrine of

²³ Hyde, Sec. 529A and Oppenheim, Sec. 522 and authorities there cited.

²⁴ P. C. I. J., Series A/B, No. 46, p. 147.

²⁵ See Hyde, p. 1167, n. 9; Senator Root had taken the same position in 1914: G. Hackworth, *Digest*, Sec. 492.

²⁶ Diena, *Der Plan eines neuen interozeanischen Kanals in Nicaragua*, in *Zeitschrift für Internationales Recht*, Vol. 25 (1915), p. 19. The Convention of Oct. 29, 1888, between eight powers specified the freedom of the Suez Canal (79 *Br. and For. State Papers* 18), but the United States was unwilling to take the position that it derived rights or duties from the convention: Secretary of State Day to Ambassador Hay, July 14, 1898, 3 Moore's *Digest*, p. 267. Compare such treaties as that between Bolivia and Brazil, Aug. 12, 1910, 7 Martens *Nouveau Recueil Général*, 3rd Series (1913), p. 632, for the free navigation of the Paraguay River; the Argentine-Chilean treaty of July 23, 1881, relative to the Straits of Magellan (3 Moore's *Digest*, p. 268), and the Treaty of London of March 13, 1871, on the Black Sea, 61 *Br. and For. State Papers* 7.

community interest would be posited on the assumption that all states have a legal interest in any breach of international law. In some instances the consequence of the acceptance of the doctrine would be the substitution of the concept of criminal law for the present tort law basis. In other instances, as in connection with navigation of international rivers and rights under multipartite treaties, the difference would be manifested particularly in procedural ways in the sense that states not directly involved in a particular breach of the law might take the case to an international tribunal.

There is a growing tendency in international practice to acknowledge the existence of "law-making treaties." According to the traditional view the term is misleading since in general it is used to suggest merely the stipulation of general rules of conduct for the parties to the treaty, but the trend in the use of the term supports the view that in this respect there is a growing acknowledgment of a basic community interest which contrasts with the traditional strict bilateralism of the law. Article 17 of the Covenant of the League of Nations suggested something of an innovation. It provided that in case of a dispute between a member and a non-member, the latter should be invited to accept the obligations of membership for the purpose of the dispute. In case of refusal, Article 16, providing for sanctions, might become applicable. Some writers have thought to find here a juridical novelty and conclude that the Covenant imposes a legal obligation on non-members, while others reconcile the provision with the traditional law by asserting that Article 17 represents merely a political program of the League.²⁷ In practice, due largely to the political fact of the non-membership of the United States, no attempt was made to develop the idea that non-members were bound by the Covenant. Nevertheless the principle back of Article 17 was different from that behind some of the older "law-making" treaties such as the great maritime conventions. These agreements may be said to have created law in the sense that they laid down rules which were found acceptable to the majority of states and which, as a matter of practice, became embodied in the customary law of nations.²⁸

²⁷ See Hoijer, *Le Pacte de la Société des Nations, Commentaire théoriques et pratique*, 1926, pp. 319 and ff.; G. Schwartzenberger, *The League of Nations and World Order*, 1936, Chapter VI; Anzilotti, *Corso di Diritto Internazionale*, 1927, (3rd ed.), p. 380; Schücking and Wehberg, *Die Satzung des Völkerbundes*, 1927, (3rd ed.), p. 370; Harvard Research in International Law, *Draft Convention on the Law of Treaties*, this JOURNAL, Vol. 29 (1935), Supplement, p. 921. German criticism of any League claim to universality of legal power is expressed by von Freytagh-Loringhoven, *Die Satzung des Völkerbundes*, 1926, pp. 16-17, and 202 and ff., and von Bülow, *Der Versallier Völkerbund*, 1923, pp. 183 and ff. The restrictive view is supported by citing the opinion of the Permanent Court of International Justice in the Eastern Carelia case, P. C. I. J., Ser. B, No. 5.

²⁸ Cf. Hyde, p. 1466, and see the reasoning of the Supreme Court of the United States in *The Scotia*, 14 Wall. 170 (1871), and of the Mixed Tribunal of Port Said in *Crichton v. Samos Navigation Co. and others*, 1925-26 Annual Digest, Case No. 1.

A combination of arguments has been used to support the view that the Briand-Kellogg Pact of 1928 for the Renunciation of War as an Instrument of National Policy created general law binding upon signatories and non-signatories alike.²⁹

Paragraph 6 of Article 2 of the Charter of the United Nations is the most recent basic statement of the kind contained in Article 17 of the Covenant. It provides: "The Organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." It is to be noted that the language employed does not suggest that non-Member states are under obligation to comply with the Charter, but rather indicates a warning to non-Members that under certain circumstances, the Organization will use the combined power of its Members to exact compliance with the Charter in the interest of the world community as a whole. Surely the Members intend to assert their legal right to take such measures but to admit also that the right flows from their assumption of the role of guardian of the world's peace rather than from any theory of an obligation upon non-Members derived from a treaty to which they are not parties. In a sense, therefore, the United Nations assumes a legislative role but the frank assertion of the fact must wait upon the creation of an actual world legislature.³⁰

The instances in which states have agreed to be bound by majority decisions in which they do not participate, or which they oppose, suggests no change in the traditional rule that only parties to a treaty derive rights or obligations from it.³¹ The legal theory of the binding force of a majority decision of an international body is that the parties to the treaty have agreed in advance to be bound by certain decisions even if at the time they do not acquiesce in them.

The acceptance of the hypothesis of community interest would pave the way for the development of an actual system of international legislation under which an international body would have the legal authority to prescribe rules binding the community as a whole. Presumably the system

²⁹ "This pact altered the legal status of a war of aggression": Opening Statement for the United States of America by Mr. Justice Jackson, *The Case Against the Nazi War Criminals* (1946), p. 75. See Q. Wright, "The Meaning of the Pact of Paris," this JOURNAL, Vol. 27 (1933), p. 39. See also G. Schwarzenberger, as cited; Note from the Minister for Foreign Affairs of Egypt, L. of N., *Off. J.*, Sp. Suppl. 150 (1936), p. 328; Budapest Articles of Interpretation, 38 *Report of the Int. Law Assn.* (1935), p. 66, and comments thereon by Lauterpacht in 20 *Transactions of the Grotius Society* (1935), p. 178, and in Harvard Research in International Law, *Draft Convention on Rights and Duties of States in Case of Aggression*, this JOURNAL, Vol. 33 (1939), Supplement, p. 826.

³⁰ See H. Kelsen, *Membership in the United Nations*, 46 Col. Law Rev. (1946) 391, 394.

³¹ See Riches, *Majority Rule In International Organization*, 1940.

would be created by an exercise of the will of states in becoming parties to some basic agreement but if such a development takes place it would not be long, as time is measured in the lives of nations, before the original basis of mutual consent was submerged in the exercise of what was originally a delegated authority. Law-making by the Congress of the United States is theoretically based upon the consent of the governed because the members of the Congress are elected by the free franchise of the people but in the experience of daily life the citizen thinks of the law as laid down by a superior authority and not as flowing from an exercise of his will or as being binding upon him by his consent.

It is perhaps somewhat easier to contemplate the development of the law of nations so as to assure to individuals or groups of individuals not constituting states, rights and duties under agreements to which they are not parties. Despite the traditional concept that individuals are not subjects of international law there has been acknowledgment of their rights under treaties.³² The result is illogical and has been advanced as evidence of the unsoundness of the basic concept of international law as a law solely between states. Thus in its Advisory Opinion concerning the Jurisdiction of the Courts of Danzig, the Permanent Court of International Justice said that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts."³³ In the case of *Steiner and Gross v. Polish State*, the Upper Silesian Arbitral Tribunal in 1928 held that a citizen of Czechoslovakia, which was not a party to the treaty establishing the tribunal, could bring an action there against one of the parties to the treaty.³⁴

The acceptance of the hypothesis that individuals are also subjects of international law would not require the extension of the doctrine of equality of states so as to give parity of legal rights to individuals. It is thus possible to take the position that while in general international law will not recognize the notion that duties may be imposed upon third states by parties to a treaty and that beneficiary rights of third states will not lightly be presumed, the law will be receptive to rights and duties of individuals created through agreements concluded by states or through decisions of international organizations. It should at the outset be agreed that the Charter of the United Nations creates rights for individuals, rights which are stated in the basic instrument in general terms and which

³² See Kaufmann, *Die Rechtskraft des Internationalen Rechtes und die Verhältnisse der Staatsgesetzgebungen und der Staatsorgane zu Denselben*, 1399, pp. 23-27.

³³ P. C. I. J., Series B, No. 15, p. 17, and Lauterpacht, *The Development of International Law by the Permanent Court of International Justice*, 1934, pp. 50 ff. But compare Schwarzenberger, *International Law*, p. 69.

³⁴ 1927-1928 Annual Digest, Case No. 587.

are to be defined more precisely in an International Bill of Rights. Similarly, non-self-governing territories, and dependent peoples placed under trusteeships, should be considered to possess rights under the Charter and under the trusteeship agreements which are to be concluded. At this writing it seems that an International Atomic Energy Authority may be given power to establish rules binding upon individuals. The precedent of the war-criminal trials in Germany and Japan suggests that new international law relative to the use of force in violation of the Charter or in violation of the rules of an Atomic Energy Commission will be clearly stated in terms of the duties of individuals.³⁵

With the acknowledgment of the individual as a person of international law it will no longer be necessary to speak solely in terms of rights of states when dealing with privileges and rights conferred by commercial treaties and other treaties dealing with economic and social rights. States may still conclude treaties on behalf of their nationals; these may be, so to speak, convenient instruments for collective bargaining. The state may retain its own right to proceed against another state in case of a treaty breach but the individual citizen may likewise have his own procedures for vindication of his own rights. Thus the infringement of a trade mark or patent under the protection of an international convention may be the basis for a cause of action in an appropriate forum by the individual possessor of the right which he would derive immediately from the convention and not mediately through some national law passed for the implementation of the treaty. Procedurally speaking it may prove advantageous to have suits instituted first in national courts, but there might be subsequent review by an international tribunal.³⁶ Likewise the individual, black or white, would have a cause of action in case he or she were the victim of a breach of an international slavery convention. More prosaically, the individual business man, airline or steamship company would not have to wait upon the slow wheels of diplomacy to secure damages for a violation of rights under a bipartite treaty of commerce or a multipartite convention concerning commerce and navigation. It would still be true, however, that, subject to respect for fundamental provisions of the International Bill of Rights, a state might by national law restrict the freedom of the individual in the national interest, just as the world community may restrict the freedom of states in the international interest. The international interests may require that states shall not interpose any obstacles to the filing of petitions by a national in a non-self-governing territory, a territory under trusteeship, or a territory to which minority treaties apply if such agreements are again utilized as part of the European peace settlements, for example. So

³⁵ See Jessup, "Force under a Modern Law of Nations," in *Foreign Affairs*, Vol. 25, (1946), p. 90.

³⁶ See Jessup, "The Responsibility of States for Injuries to Individuals," 46 *Columbia Law Rev.* (1946), 903.

far the United Nations Charter provides for the hearing of individual petitions only in the case of territories under trusteeship.³⁷ But the international interest might not require a state to refrain from ordering its nationals to follow a designated procedure, such as notice to the foreign office, in pressing a claim against another state. A state might equally be free to insist that the national interest takes precedence over the individual interest and that in certain situations of international tension, no national should press a claim without prior permission from his government.

Interpretation of Agreements

The international law relative to the interpretation of treaties is an example of the evils of excessive formalism. So-called "canons of construction" have been utilized by foreign offices and international and national courts. Professor Hyde has rendered a distinguished service to international law in his outstanding contributions to the clarification of this subject. He has pointed out that the function of interpretation is to ascertain the design of the parties, always bearing in mind that they are free to employ words in any sense they choose.³⁸ A large amount of controversy, mainly based upon the fundamental lack of appreciation of the simple basic principles to which Professor Hyde draws attention, has revolved around the question of the propriety of using preliminary materials, *travaux préparatoires*, to aid in the task of interpretation. The difficulty may derive in large part from a lawyerlike obsession with more familiar norms of domestic law which have been developed for reasons which may have been historically sound in the circumstances which led to their formulation. Thus the familiar rule of the common law that extraneous data may not be invoked to vary the terms of a written instrument, may be quite necessary to guard the character of a negotiable instrument but wholly inappropriate to a political treaty. Treaty law is a good example of the point that international law was originally developed largely by jurists trained in the civil law and some civil law concepts which seem strange to anyone trained in the common law have been incorporated into international law. By this time the international community has had enough experience of its own to justify the development of the law on the basis of its own needs and not with reference to some system of domestic law.

The question may be asked whether there should be different rules of interpretation for those agreements which are essentially of the nature of bilateral contracts and those which have been called international legislation. In national law there are familiar distinctions between the interpre-

³⁷ See Article 87 of the Charter and Lauterpacht (on right of petition of private persons), *An International Bill of the Rights of Man*, 1945, pp. 199 and ff.

³⁸ See in general Hyde, Title E, pp. 1468 and ff.

tation of contracts and the construction of statutes. Except that the relevant evidence to be marshalled may differ in character, there is no reason why two sets of rules and principles should be utilized in international law with this distinction in mind.

Choice of Law

When the term international agreement is used, as it is here, to embrace not only agreements between states but also agreements between states and individuals, between states or individuals and international organizations, and between two international organizations, it is important to ascertain what law governs the agreement, since such agreements may be governed by international law or by national law.³⁹ No general rule determines the choice of law by the parties in such cases. State A, entering into a concession contract with Corporation X from State B, may specify in the text of the document that the contract is to be governed by the law of A. It may, on the other hand, specify that the contract shall be governed by international law. The importance of the point may be illustrated by suggesting a case in which, after the contract has been concluded, certain fundamental conditions undergo a change not contemplated by the parties when they signed the agreement. Under such circumstances the law of State A may provide an equitable procedure for the reformation of the contract by the court but may declare that the court can not declare the contract at an end. On the other hand it may be assumed, for the purpose of argument, that international law contains no such procedure for the reformation of the contract but that, under the doctrine of *rebus sic stantibus*, a court of competent jurisdiction may declare the obligations of the contract terminated.

If the parties did not explicitly state which law was to govern, the court would need to decide this point. In the field of national law such decision would be reached by the application of private international law or conflict of laws. The rules of private international law are essentially part of the law of the state whose courts apply them; they have no force derived from any external authority.⁴⁰ The reluctance felt in the past to consider private international law as part of or similar to public international law was due, at least in large measure, to the fact that private international law dealt principally with the rights and duties of individuals, and not of states. In the federal system of the United States it is now under-

³⁹ See the excellent article by F. A. Mann, "The Law Governing State Contracts," in *British Year Book of International Law*, 1944. See also E. Feilchenfeld in *Proceedings of the American Society of International Law*, 1932, p. 175.

⁴⁰ See the Serbian and Brazilian loans cases: *Publications of the P. C. I. J.*, Series A, No. 20/21 (1929), p. 41. See also Lepaulle, *Nature et méthode du droit international privé*, 63 *Journal du Droit International* (1936), 234; Sarner-Hall, *Les règles générales des conflits de lois*, 43 *Die Friedens warte*, (1943), 35.

stood that a large part of what was formerly considered conflicts of laws is in reality part of constitutional law. In other words the conflicts rules derive their validity from a constitutional norm.⁴¹ Likewise in the international field many states have become parties to multi-partite conventions which lay down rules of private international law and thus transform them into, or make the duty to observe them, an obligation of public international law. Such are the several Hague Conventions concluded by numbers of European states at a series of conferences ranging from 1893 to 1928, the Montevideo Convention of 1899 among the South American States, the Bustamante Code adopted at Havana in 1928, and the Montevideo treaty of 1940.⁴²

The rapid growth of commercial arbitration, with the establishment of many private arbitration tribunals which have already achieved widespread international recognition and authority, suggests the procedural line which may be followed in dealing with agreements between individuals and states. The conclusion of international conventions whereby states have agreed to recognize the binding force of such arbitral awards is further evidence of their increasing international stature.⁴³ The special case of loan contracts between states and private parties has received much attention with varying suggestions regarding an appropriate forum for the determination of applicable law and the solution of controversies.⁴⁴ Since states, as parties to agreements with alien individuals, are reluctant to submit disputes to the courts of the alien's country, and since the alien contractor may be unwilling to leave adjudication to the courts of the contracting state, some international forum is clearly requisite. Original submission to private arbitration in some form, or to a special international loans tribunal with the possibility of appeal to the International Court of Justice on general questions, might well afford a satisfactory solution and tend to develop rather rapidly a most useful body of jurisprudence.

It would be useful for the future to reach agreement that private international law is a part of public international law. The result might be achieved through the wide signature of a general convention embodying

⁴¹ See Cheatham, "Sources of Rules for Conflict of Laws," in 89 *Univ. of Pa. L. Rev.* (1941), pp. 430, 437-439.

⁴² On Inter-American developments in this field, see Carneiro, *O Direito Internacional e a Democracia* (1945), pp. 381 and ff.

⁴³ For a concise summary of the development see Sir Lynden Macassey, "International Commercial Arbitration: Its Origin, Development, and Importance," in 24 *Transactions of the Grotius Society* (1938), p. 179. See also Report of the French Sub-Committee on Commercial Arbitration, Report of the Fortieth Conference of the International Law Association, (1938), p. 275; Rundstein, *L'Arbitrage International en Matière Privée*, in 23 *Hague Recueil des Cours* (1928), p. 332.

⁴⁴ See Hudson as cited in note 22, pp. 297 and ff.; Report of the League of Nations Committee for the Study of International Loan Contracts, League Doc. C. 145, M. 93. 1939 II A., II Economic and Financial. 1939. II A. 10.

at least a minimum of agreed principles on the subjects which would most frequently be involved in cases involving some public international interest. Principles determining the choice of law in the absence of explicit agreement by the parties might well be placed in this category.

When an agreement has been concluded between two or more states on a subject which has traditionally been recognized as a proper subject for a treaty a court would be justified, in the absence of other evidence, in assuming that the parties intended to contract with reference to international law. On the other hand, if an agreement between two states regarding the lease of embassy property is couched in the language and form of a contract under the law of the state where the property is situated, that fact would be some evidence that the parties intended to contract with reference to that law. If therefore the law of the *situs* required any contract relating to real property to be sealed or notarized or registered as a prerequisite to its validity, the omission of the necessary formality would be held to invalidate the contract and neither party would be heard to argue that under international law such formalities are not required.⁴⁵

To give another example, it may be recalled that the international tribunal in the North Atlantic Coast Fisheries Arbitration rejected the contention of the United States that an international servitude had been constituted over British territory. This conclusion was reached partly on the ground that the British and American negotiators in 1818 were apparently not conversant with the doctrine of international servitudes and partly through an analysis of the nature of an international servitude. If two states, or a state and an individual, or a state and an international organization such as an International Atomic Energy Commission, chose to contract with reference to the law of the state of the *situs* which had a clearly developed law concerning servitudes, the problem before a tribunal in case of a disputed interpretation would be simplified.

An agreement between two or more international organizations would in most instances be concluded with reference to international law since neither of the contracting parties would have a national law of its own. But nothing would prevent one organization from leasing office space to another organization through an instrument intended to be governed by the law of the *situs*.

Amendment and Termination of Agreements

In considering the amendment of agreements, it may be advantageous to approach the subject from the procedural point of view. Two procedures for change need to be contemplated, the one by vote of the properly authorized organ of some international agency, and the other by judicial decision. The ordinary process of amendment by negotiation of the

⁴⁵ See Feilchenfeld, p. 177.

parties and the special problem of reservations, particularly to multiparty treaties, are not included in this discussion.

Generally speaking, any amendment to an agreement creates a new or different obligation to which the consent of the parties must be obtained in the same way in which their original consent was yielded. It has been the practice, however, for a considerable period of time, for the parties to an agreement which establishes some international agency or organization as a continuing instrument of their purpose, to agree that some designated organ of the agency may adopt specified types of changes by majority vote and that decisions so reached shall be binding upon all the parties to the treaty. Such decisions may result in actual modifications of the original treaty or they may take the form of new rules supplementary to the treaty. Authorization for this type of legislative process in international affairs has generally been confined to technical details.

A striking development in ideas and national attitudes is to be found in the provisions for the amendment of the Covenant of the League of Nations and the Charter of the United Nations. According to Article 26 of the Covenant amendments were to take effect when ratified by the states represented in the Council and by a majority of the states represented in the Assembly. If, however, a state signified its dissent from the amendment, it would not be bound but it would cease to be a Member of the League. This system imposed strong pressure on states to accept the will of the majority but fundamentally retained the traditional rule that a state could not be bound without its consent. At the same time it marked a departure from the rule that a treaty could not be amended without the consent of all the parties; states members of the League had no vested right to block a change in the treaty. The exception to this last proposition is found in the special position accorded the states members of the Council. Non-permanent members had, as it were, a transitory right to block amendments, a right which would be lost when their terms of office expired. Permanent members of the Council on the other hand always enjoyed this additional feature of the recognition of their special position as Great Powers. This special position of the Great Powers received in the Covenant a legal recognition which actually merely put the stamp of general acquiescence upon a practice which had long been familiar. As Tobin showed in tracing the history of the great treaties of Vienna and of subsequent European conferences of major political consequence, the supposed rule that treaties could not be amended without the consent of all parties was honored more in the breach than in the observance.⁴⁸ Under the system of the Covenant, the Great Powers were no longer free to make changes on their own initiative and responsibility, but they retained what

⁴⁸ Tobin, *The Termination of Multiparty Treaties*, 1933; compare Stephens, *Revisions of the Treaty of Versailles*, 1939.

became the exceptional power to block any change of which they disapproved.

The issue was sharply drawn at the San Francisco Conference in the drafting of the Charter of the United Nations. To the United States Delegation the problem appeared in the following light:

Those who seek to develop procedures for the peaceful settlement of international disputes always confront the hard task of striking a balance between the necessity of assuring stability and security on the one hand and of providing room for growth and adaptation on the other. This difficulty was present at San Francisco. If the possibility of Charter amendment was to be one method of satisfying those who feared lest the *status quo* be permanently frozen, how make sure that the rights and duties of Members would not, in the process of amendment, be brought into a different balance from that which members had originally accepted? This was of serious concern to the powers which were preparing to undertake primary responsibility for the maintenance of peace and security, even, if need be, by force of arms. It was also of concern to all states whose constitutions require that amendments to any treaty must secure parliamentary ratification. In a third category of interested states were those which feared that amendments might change the original relationship set up among the Great Powers, or between them and the smaller powers, and that such a change might adversely affect their own interests.⁴⁷

The outcome of the long negotiations was the adoption of the text of Article 108 of the Charter which provides:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109 was also adopted as part of the compromise solution; it gives assurance to the states which are not permanent members of the Security Council that those Great Powers can not block the consideration of amendments to the Charter if they are favored by a two-thirds majority of the members of the General Assembly and by any seven members of the Security Council.

No provision for the withdrawal or termination of the membership of a state opposing an amendment was inserted in the Charter, but the Conference adopted a Committee report which included the following paragraph:

Nor would a Member be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the As-

⁴⁷ *Report to the President*, p. 166.

sembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.⁴⁸

It would therefore appear to be the view of the Members of the United Nations that they can not be bound by an amendment in which they have not concurred although, as in the League system, the penalty for dissent is termination of membership in the United Nations. Again the Great Powers which have permanent seats on the Security Council enjoy a privileged position in that any one of them may exercise the veto power to prevent the adoption of an amendment. The progress marked by Article 26 of the Covenant, in terminating the system whereunder the Great Powers could as a matter of political reality bring about changes in multipartite treaties without securing the consent of the lesser powers, is preserved by the Charter text.

Notwithstanding these formal provisions concerning amendments, it is true under the United Nations Charter, as under the League Covenant, that interpretative resolutions adopted by a majority vote of the General Assembly may have or come to have such compelling force as to constitute in effect changes which will bind all members. Compliance may be secured by political considerations and the interpretative "changes" may find legal justification in the contention that they merely clarify the nature of the obligations which states have already assumed by ratifying the Charter.⁴⁹ The entire development is of interest in relation to the progress toward a system of international legislation by majority rule. When such a system is sufficiently familiar and has sufficiently justified itself in practice the old obstacle of absolute sovereignty, which is at the basis of the traditional rule that a treaty may not be modified without the consent of all the original parties, may gradually disappear.

Another aspect of this same development of a legislative process in international affairs is to be traced in connection with decisions of an international organization such as the United Nations which affect states not Members. During the League of Nations period the political importance of the non-membership of the United States prevented such a process from attaining great significance. As the United Nations approaches universality of membership there may well be a growing tendency for the Organization to assert its right to speak on behalf of the world community and to exact the compliance of non-Members with its decisions. Some aspects of this problem have already been noted in this article in discussing the question of the rights of third parties. The issue was raised at San Francisco in considering the Statute of the International Court of Justice. There was much sentiment in favor of continuing the Permanent Court of

⁴⁸ United Nations Information Organizations, *Documents of the United Nations Conference on International Organization*, p. 267. See *Report to the President*, p. 49.

⁴⁹ Compare Lauterpacht's note 3 in Oppenheim, p. 311.

International Justice but there was general acknowledgment of the need for making certain changes in its Statute to bring the Court into gear with the other organs of the United Nations. There were sixteen states which were parties to the old Statute which were not represented at San Francisco. It was believed that so far as the enemy states were concerned, their approval of changes in the Statute could be secured through the peace treaties,⁵⁰ but such a solution would have left unsolved the situation of the neutral states. Had the Conference decided to "legislate" changes in the old Statute the practical result probably would have been that the amended statute would have been freely accepted by all the states parties to the old Statute. For various reasons such a procedure did not appear to be advantageous and accordingly a new Statute was drawn up.⁵¹

The same practical considerations did not prevent the Members of the United Nations from terminating the existence of the Permanent Court of International Justice. This is technically what has occurred although "the chain of continuity with the past" has not been broken and the International Court of Justice is in a very real sense the continuation of the Permanent Court of International Justice. Nevertheless the case illustrates a technical legal termination, and therefore change, in the Protocol of Signature of 1920 to which the old Statute was annexed, without the participation of all states which were parties to that agreement.

The termination of the existence of the League of Nations did not require any such legislative step. The states which were Members of the League and which are also Members of the United Nations, formed a link between the two organizations. The matter was handled as a negotiation between the United Nations and the League regarding the transfer of assets and functions.⁵² The actual dissolution of the League will take place in accordance with a resolution of the special League Assembly which was held in Geneva in April 1946.⁵³

Again in solving the difficult problem of the "assumption" by the United Nations or its appropriate organs of various functions attributed to the League and its organs by a variety of treaties, no attempt was made to legislate on behalf of states not Members of the United Nations. The Report of the League of Nations Committee to the General Assembly of the

⁵⁰ Art. 39 of the Peace Treaty with Italy provides as follows: "Italy undertakes to accept any arrangements which have been or may be agreed for the liquidation of the League of Nations, the Permanent Court of International Justice, and also the International Financial Commission in Greece." Dept. of State Pub. 2743, p. 16.

⁵¹ See *Report to the President*, pp. 140-141.

⁵² See Reiff, "Transition from League of Nations to United Nations," in *Department of State Bulletin*, Vol. XIV, (1946), pp. 691, 739, and *The League Hands Over*, League of Nations Publications, Geneva. 1946. 1.

⁵³ *The League Hands Over*, p. 97; also League of Nations Document A.32 (1) 1946. X, p. 12.

United Nations⁵⁴ includes the following paragraphs which reveal the principle utilized:

Under various treaties and international conventions, agreements, and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which after the dissolution of the League, it is, or may be, desirable that the United Nations should provide. . . .

The General Assembly records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the coöperation of the other parties to the instruments so far as this may be necessary.

It may well prove to be true as this process is followed that some state or states, not Members of the United Nations, may decline to acquiesce in the substitution of the United Nations for the League of Nations in one or more of the international agreements involved. Should this prove to be the case it is to be anticipated that the rest of the states of the world which are also parties to such agreements will proceed to act under the revised or amended instruments regardless of the dissents. Dissenting states would thereupon be justified in declaring that they were no longer bound by such amended agreements, but the practical fact of amendment would have taken place without their participation, thus affording another example of what may properly be styled legislative action by the United Nations in the interest of the world community as a whole.

The Sixth (Legal) Committee of the General Assembly considered this general problem in connection with the proposals for the transfer to the United Nations of powers exercised by the League of Nations under the six agreements, conventions or protocols providing for the international control of narcotic drugs. A Protocol containing provisions for the necessary amendments was reviewed by the Sixth Committee in order to determine the legal position of those parties to the original instruments which do not become parties to the new Protocol. The proposals submitted to the General Assembly specifically provided that Spain, which was a party to the earlier agreements, should not be invited to become a party to the Protocol; other states not members of the United Nations had no voice in the proposed changes. The Sixth Committee concluded that any group of states parties to the earlier agreements could clearly make amendments which would be binding as between themselves. As to other states not becoming parties to the new Protocol, the Committee concluded that they would remain bound by various obligations in the original instruments although the actual machinery for international control set up by the original instruments "will be altogether dissolved" and the corresponding

⁵⁴ Doc. A/28, Feb. 4, 1946, adopted Feb. 12, *Journal*, No. 30, pp. 526-7, No. 34, pp. 706-709.

parts of those instruments "will thus be a dead letter." The effect of these actions and interpretations is that while the states in the United Nations have not asserted the right to impose new obligations on states not freely accepting the new agreement, they have asserted the right to make important changes in multipartite agreements without the consent of all the parties and with the consequence of materially altering the nature of the obligations by which those other states remain bound.⁵⁵

The second procedure for change which has been suggested is that which takes place by judicial decision. Here the difficulties which confront the development of a modern law of nations are far greater since states are still reluctant to confide broad powers to international courts. The factual difficulty to be solved is the existence of a situation in which a state, party to a treaty, feels that its non-compliance with the treaty obligation is justified for one or another reason. Under the traditional international system there was no established court of general jurisdiction competent to pass upon such pleas justificatory of nonfulfilment of an obligation. On the contrary, each sovereign state would assert for itself the legal right upon which it relied and the other party to the treaty could merely fall back upon procedures registering displeasure which ranged all the way from a note of protest through the rupture of diplomatic relations and retaliation to war itself. True, the states might agree to arbitration, and during the inter-war period a large number of states vested compulsory jurisdiction in the Permanent Court of International Justice. The difficulty, as Lauterpacht has pointed out, was in large measure procedural; the international community had not attained that ripeness of legal development which enabled national systems of law to entrust greater authority to courts. "The rule that compacts must be kept" writes Lauterpacht, "is certainly one of the bases of the legal relations between the members of any community. But at the same time the notion that in certain cases the law will refuse to continue to give effect to originally valid contracts is common to all systems of jurisprudence."⁵⁶ He proceeds to cite the rule *ad impossibilia nemo tenetur* in Roman law, the doctrines of frustration and impossibility of performance in English law, and comparable provisions in a number of European civil codes and the jurisprudence of France and Germany.

In international law the doctrine *rebus sic stantibus* is the equivalent exception to the maxim *pacta sunt servanda*. The doctrine constitutes an attempt to formulate a legal principle which would justify non-performance of a treaty obligation if the conditions with relation to which the parties contracted have changed so materially and so unexpectedly as to create a situation in which the exaction of performance would be unreasonable.

⁵⁵ UN Doc. A/194, 15 Nov. 1946; *Un Journal* No. 33, 21. Nov. 1946, *Supp.* A-A/P. V./49, p. 328.

⁵⁶ H. Lauterpacht, *The Function of Law in the International Community*, 1935, p. 273.

Invoked unilaterally without the opportunity for impartial review, the doctrine is anarchic; in some form it is an essential part of any well-developed legal system.

The doctrine *rebus sic stantibus* illustrates, perhaps better than any other part of the law of treaties, the need for adopting distinctions between different types of treaties. For political treaties, and for the invocation of political changes in the balance of power, the doctrine is pernicious. In such situations it would amount to the proposition that no peace treaty accepted by a defeated state remained valid after that state recovered sufficiently or the victors weakened sufficiently to make it politically possible for the defeated state to throw off the burden without danger of another defeat. No more unsettling legal principle could be imagined although it would in fact, if accepted, reflect what has frequently transpired. For this very reason the doctrine *rebus sic stantibus* has been discredited. On the other hand let us suppose the conclusion of a commercial treaty in which special privileges in the use of valuable port facilities are reciprocally exchanged by States A and B; let us assume that in State B there was only one important port and that this port is later ceded by B to State C. It would be unreasonable to require State A to continue to accord the treaty privileges to B after it became impossible for B to perform its reciprocal obligation.⁵⁷ In an organized world society any question of the revision of a peace treaty should be resolved by the political wisdom of a body such as the Security Council or the General Assembly. Article 19 of the Covenant was a recognition of this fact as are the vaguer provisions of the Charter such as those in Articles 11, 14, and 34. It is not the type of question which should be resolved by a court. On the other hand, a case such as that suggested, involving reciprocal use of port facilities, might properly be weighed and decided by the International Court of Justice.⁵⁸ If in the gradual evolution of the law of nations it is necessary to make haste slowly, it may be suggested that a first step might be agreement upon a rule of law which could be applied by an international court so as to relieve a state from a continuing obligation to perform the duties imposed by a treaty under certain defined circumstances, with the consequence that the other party to the treaty would be simultaneously freed. The result would be a judicial declaration that the treaty was no longer binding on either party to it. This step would be far short of one which would entrust to international tribunals the power of equitable reformation of a contract so as to require the performance by a state of some obligation different from that which it had originally assumed.

⁵⁷ Compare *Bremen v. Prussia*, 1925-1926 Annual Digest, Case No. 266, cited by Lauterpacht, pp. 277-8; also the distinction made by Hyde, Sec. 544A.

⁵⁸ See Sir John Fischer Williams, "The Permanence of Treaties," in this JOURNAL, Vol. 22 (1928), pp. 89, 103, and P. B. Potter, *Article XIX of the Covenant of the League of Nations*, 12 *Geneva Studies* No. 2 (1941).

The suggested principle could be applied without great difficulty to international agreements between states and individuals, as for example in the case of a concession contract concluded by the parties as an international law agreement. In such a case the judgment of an international court might appropriately assess the financial recompense to be paid by one or the other party to avoid unjust enrichment, in addition to declaring the contract terminated.

Another principle of traditional international law justifies a state in denouncing a treaty in the event of a material breach by the other party.⁵⁹ But the Harvard Research in International Law pertinently points out in its Comment to Article 27 of its Draft Convention on the Law of Treaties that unilateral determination of what constitutes a material breach makes for lawless conduct.⁶⁰ In such cases it is highly suitable for an international tribunal to pass judgment on the merits of the claim of the state which seeks to free itself from its obligation. Again it is suggested that a distinction should be drawn between political and other types of treaties, because the breach of a political treaty so frequently involves considerations affecting the peace of the world. In this respect the Charter fully recognizes the idea of community interest inasmuch as any state or the Secretary General may bring such a situation to the attention of the General Assembly or of the Security Council under Article 11, 35 or 99.

Another principle of international law which is susceptible of application by an international court is that which relates to the effect of war upon treaties. There has been some dispute as to whether war terminates or merely suspends the operation of treaties but the basis for judicial decision is clearly available.⁶¹ Professor Hyde and Sir Cecil Hurst have properly pointed out that in many instances the problem is merely one of treaty interpretation, which is essentially a judicial function.⁶² In a well-organized world system, operating under a modernized law of nations, war in its old sense will no longer escape legal regulation and the consequences of war upon treaties as well as upon other legal relationships would stand in need of redefinition. But force may still be used in case of necessity on behalf of the international community and the legal consequences of the use of force will need to be determined.⁶³ For example, under Article 41 of the Charter of the United Nations, the Security Council may call upon the Members to apply such measures as complete or partial interruption of economic relations and of international communications, and the Members are under a duty to comply. It can not be doubted that action

⁵⁹ See Hyde, Sec. 546.

⁶⁰ This JOURNAL, as cited above, note 27, p. 1077.

⁶¹ Judge Cardozo in *Techt v. Hughes*, 229 N. Y. (1920) 222.

⁶² Hyde, Sec. 547; Hurst, "The Effect of War on Treaties," in *British Year Book, 1921-1922*, pp. 37, 39-40. This approach seems to have been adopted by the Circuit Court of Appeals, Ninth Circuit, in *Allen v. Markham*, 156 F. (2d) (1946), 653.

⁶³ See Jessup, as cited, note 35, above.

taken by a Member in compliance with such directions of the Security Council would constitute justification for any incidental breach of a treaty obligation calling for freedom of commercial intercourse or of communications. This would be true not only *vis-à-vis* the state against which the measures are taken, but also against any third state, whether Member of the United Nations or not, which might because of its geographical position be incidentally affected. Such a result might ensue, for example, in case of the imposition of a blockade which for its effectiveness required limitation on free access to a state bordering upon the state against which the measure was applied.

The need for some development of international law in such cases is indicated by the conservative position which the Secretary-General of the League of Nations felt obliged to take in his Report in 1927 concerning the legal positions arising from the application of sanctions. He concluded that the Covenant could not be interpreted "as imposing on the Members of the League an obligation to violate the rights" of a non-Member state.⁶⁴ He used the language of hope in regard to the possible acquiescence of third states which would be conscious that the Members of the League were acting on behalf of the peace of the world; further than this he was not prepared to go. The view was sound under the existing international law. A modernized law of nations should provide, not an obligation on Members of the United Nations to violate the "rights" of non-Members, but the right of the Organization to take action under the Charter in the interest of world peace, and the duty of non-Members to acquiesce. In other words, the old principle which the Secretary-General of the League of Nations felt obliged to cite, *pacta tertiis neque nocent neque prosunt*, needs revision.

Community Interest and Breaches of Agreements

The acceptance of the hypothesis of community interest would require an acknowledgment of the right of any state to take cognizance of a breach of a treaty even if not directly affected by the breach. This is probably true under existing international law with reference to a multipartite treaty, any party to which would be justified in protesting against a breach of the agreement, because of its interest in the maintenance of the system which the treaty establishes. This would be clearly true in regard to a breach of the Charter and would be equally so in regard to a breach of an international sanitary convention, a postal convention, a convention on radio or, particularly, a treaty codifying some part of international law. If the party directly affected should submit the case to the International Court of Justice any other party to the treaty might appropriately apply to the Court under Article 62 of the Statute for permission to inter-

⁶⁴ League Doc. A. 14. 1927. V. p. 36. See also the circular letter of the Secretary-General of June 14, 1933, concerning measures proposed relative to the non-recognition of "Manchukuo," *Official Journal*, 1933, Special Supplement, No. 113.

vene on the ground that "it has an interest of a legal nature which may be affected by the decision in the case." If the state directly affected should take no step to vindicate its rights, another party to the treaty might itself apply to the Court or might bring the matter to the attention of the General Assembly or the Security Council with a view to inducing one of those bodies to make a request to the Court for an advisory opinion.

More broadly, the acceptance of the hypothesis of community interest should be considered to vest in all members of the international community a legal interest in respect for treaties.⁶⁵ Despite the development of general international law it is to be anticipated that much of the world's affairs will continue to be governed by agreements concluded by two or more states. Respect for the maxim *pacta sunt servanda* and the development of treaty law will be matters of concern to all states and an infringement of the law will affect the interest of all.

A modernized law of nations would also accord enlarged recognition of the right of international organizations to take legal steps in any case in which the constitution of the organization or any convention concluded under its auspices is breached. This principle is already in part recognized in the Charter through the provisions in Article 96 which authorize the General Assembly or the Security Council to request an advisory opinion from the Court. At San Francisco attempts were made to accord a like privilege to other international organizations such as the International Labor Office. The Conference was not prepared to go so far but the point was met by the second paragraph of Article 96 which states: "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."⁶⁶ As part of the same discussion in the Conference there were included in Article 34 of the Statute of the International Court of Justice the following two paragraphs, which follow the statement that "Only states may be parties in cases before the Court":

2. The Court, subject to and in conformity with its rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

⁶⁵ Q. Wright, "Collective Rights and Duties for the Enforcement of Treaty Obligations" in *American Society of International Law, Proceedings*, 1932, p. 101.

⁶⁶ Under the authority of Art. 96 of the Charter the General Assembly, on December 11, 1946, adopted a resolution authorizing the Economic and Social Council to request advisory opinions: UN Doc. A/201.

It should not be long before the personality of international organizations is fully recognized and they are accorded, through an amendment to the Statute, the full right to be parties in cases before the Court.⁶⁷

The acceptance of the hypothesis that individuals are also subjects of international law would not necessarily involve according the right to individuals to appear as parties before the International Court of Justice. It will become necessary to limit the types of cases which will be taken to that high tribunal, at least in the first instance, and other tribunals will be needed for the handling of cases in which one of the parties is an individual. In treaty cases such international tribunals will be needed since, as stated earlier in this article, under the hypothesis, individuals themselves may have rights under treaties and in the case of breach of such rights, they should not be left to find satisfaction only in the courts of the state which would be the other party to the litigation. The same considerations would apply to cases involving agreements between individuals and states or between individuals and international organizations.

⁶⁷ See Jessup, "The Subjects of a Modern Law of Nations," in *Michigan Law Review*, forthcoming issue.

THE UNITED STATES AND INTERNATIONAL COPYRIGHT

BY MAX M. KAMPELMAN *

The word "copyright" comes from the Latin *copiā*, which is translated as "plenty" and which means, in general, the right to make plenty or to copy. In its specific application it means the right to multiply copies of those products of the human brain known as literature and art. It has also been defined as "the power to determine whether the work shall be published at all, the manner in which, if published, it shall be done, and to whom."¹

International copyright is concerned with treaties and conventions between nations requiring the signatories to respect in their own territories the copyright of nationals of the other subscribing nations.²

The early historian, poet or dramatist, we are told, found his pecuniary compensation for his labors in the contributions of his audience who listened to his recital or witnessed his performance. In early Rome the practice developed whereby an author could sell his work to a book dealer, who would then have the right to duplicate and sell the manuscript; custom in that day protected the bookseller in that transfer. There was, however, no law of literary property. What did exist was the development of guild or trade copyright whereby usage estopped the infringement of a bookseller's right in a work transferred to him.³

The coming of the Middle Ages brought the next phase of copyright development, the practice of institutional copyright. Most of the literature of that era was religious in character and was produced in Catholic monasteries and schools. Profit or property rights were far from the minds of

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¹ Philip Wittenberg, *The Protection and Marketing of Literary Property*, New York, 1937, p. 11.

A more modern and legally accurate definition of copyright can be found in Leon H. Amdur, *Copyright Law and Practice*, New York, 1936, p. 5: "The exclusive right, conferred by statute, to publish, multiply, and sell copies of a work; to make transformations and modifications thereof, and to perform and otherwise represent it in public, after it has been first published; except that these 'exclusive' rights do not prevent others from enjoying equivalent rights in works originated by them although closely identical, and except that these rights do not prohibit 'fair use' to be made of the copyrighted work."

² F. E. Skone James, *Copinger on the Law of Copyright*. London, 1936 (7th ed.), p. 255.

³ William K. Townsend, "Copyrights," in *Two Centuries Growth of American Law*, New York, 1901, p. 422.

the creators of such literature. Their interest lay rather in the wide diffusion of "religious truth" for the "greater glory of God." The Church was deeply interested, however, in rare or authentic manuscripts, and, therefore, established the practice of charging fees for the use of those works, which fees, in turn, went to the monasteries. It is this practice which is referred to by institutional copyright.⁴

Our modern concept of copyright did not arise until about 1450, with the invention of printing and the realization by authors that their reading audience would now be enlarged and that they now had a real financial interest in their works. Apparently the first copyright ever granted by law was that conferred by a decree of the Senate of Venice in 1469, declaring that one John of Spira should have the exclusive privilege for a period of seven years of printing the letters of Cicero and Pliny. The decree was operative only in the territory of the Venetian republic and, it is well for us to note, did not prevent others, elsewhere in Italy, from copying the works of the original editor-publisher and making profit at his expense.⁵

In the course of the three centuries that followed, the protection granted to a special individual soon broadened into a right which any citizen could obtain by complying with certain formalities prescribed by custom or statute; the territory in which the protection was valid was extended from a city to a whole nation and the time period of protection expanded.

Finally, in 1710, we have the actual roots of modern copyright legislation with the passage of the (British) Act of Anne, the first copyright law the world has known.⁶ The provisions of the statute granted copyright for 21 years for works then in existence and 14 years for works published after April 10, 1710, with a right of renewal for 14 years during the lifetime of the author; before the copyright could be recognized registration at Stationer's Hall in London was required, a printed notice of the copyright in the book as a public notification, and the deposit of certain copies of the book in the Royal Library and in certain universities. Other nations in Europe and, as we shall see, in the United States, soon passed similar legislation.

The first copyright statute to be enacted in the United States was adopted in Connecticut in January, 1783, "An Act for the Encouragement of Literature and Genius." There had been a growing demand in the Colonies for such legislation and, in the previous year, a memorial had been presented to Congress petitioning it to recommend the enactment of copyright law in the several States. Such a resolution was passed on May 7, 1783, but before then, Dr. Noah Webster, who "had just completed his well-

⁴ Leon Whipple, "Copyright," in *Encyclopaedia of the Social Sciences*, New York, 1931, Vol. 4, p. 401.

⁵ Brander Matthews, "Twenty Years of International Copyright," in *The American Review of Reviews*, Vol. 43 (1911), p. 721.

⁶ 8 Anne c. 19.

known spelling book and was concerned to secure protection for this work throughout the various States of the Union," was directly instrumental in securing action by the General Court of Connecticut.⁷

Interestingly enough, the nationalism which has served to characterize American copyright legislation down to the present day manifested itself in that early statute with the provision that statutory protection to "every author" included only authors who were citizens of Connecticut and not an author "residing in or inhabitant of any other of the United States."⁸ Other states quickly followed suit and by 1786 all the States but Delaware had passed copyright legislation.⁹

The crystallization of American copyright law finally occurred in 1789 with the adoption of the Constitution and the provision that "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁰ This provision was necessary because the laws of the several States were limited in operation to their respective boundaries, with the result that if an author in one State desired protection for his work throughout the other States he was obliged to comply with a multitude of laws.

On the basis of that provision, Congress passed the first Copyright Act on May 31, 1790,¹¹ based on similar formalities and restrictions as that of the English Statute of Anne. The statute is especially significant because in fundamentals the law remains much the same today, in spite of subsequent expanding legislation enacted in 1802, 1831, 1856, 1865, and 1870.¹² The protection, however, was afforded only to American authors or residents, for books printed on American-made paper from type set by American printers. Today there are no State statutes in the field of copyright and the courts have interpreted federal power to be exclusive. "Copyright is the creature of the Federal State passed in the exercise of the powers vested in Congress."¹³

The English Statute of Anne of 1710 and subsequent legislation in this country led to quite an intense difference of opinion in legal circles as to whether copyright was protected under common law. Did the right to

⁷ Thorvald Solberg, "Copyright Law Reform," in *Yale Law Journal*, Vol. 35, No. 1 (November 1925), p. 43.

⁸ Thorvald Solberg, "Copyright Reform," in *Notre Dame Lawyer*, Vol. 14, No. 4 (May 1939), p. 354.

⁹ Massachusetts: March 17, 1783; Maryland: April 21, 1783; New Jersey: May 27, 1783; New Hampshire: November 7, 1783; Rhode Island: December, 1783; Pennsylvania: March 15, 1784; South Carolina: March 26, 1784; Virginia: October, 1785; North Carolina: November 19, 1785; Georgia: February 3, 1783; New York: April 29, 1786.

¹⁰ Article I, Section 8, Clause 8.

¹¹ 1 Statutes at Large 124.

¹² 2 St. L. 171; 4 St. L. 436; 11 St. L. 138; 13 St. L. 540; 15 St. L. 212.

¹³ *Fox Film Co. vs. Doyal*, 286 U. S. 123, 127; 52 Sup. Ct. 546. (1932).

literary property depend on statutory protection and hence was it limited to the confines of the statute? Or was the author's right in his property guaranteed by common law custom and precedent and hence did it exist beyond the limitations of statute?

In the earliest case to deal with the question, *Millar v. Taylor*,¹⁴ 1769, an English court held that common law gave authors a perpetual and sole right to their works. Furthermore, the court held that the right was not lost by publication nor by the passage of the Statute of Anne, which was merely cumulative in effect, and not destructive.¹⁵

It seems fairly clear, however, that this judicial concept did not extend to these shores. When the Constitution provided that Congress might grant the exclusive privilege of publication for "limited Times," it thereby rejected the theory of perpetual copyright and the Supreme Court, in *Wheaton v. Peters*, 1834, refused to follow the *Millar* decision.¹⁶ "Congress did not sanction an existing right, but created a new one," said the Supreme Court again in 1907.¹⁷

Neither did this view remain in effect in England for very long. As early as 1774 the House of Lords held that, instead of giving additional sanction to rights already held, the Statute of Anne substituted a new and lesser right, with the result, according to one scholar, that "Literary and like property . . . lost the character of copy-right, and became the subject of copy-privilege, depending on legal enactment for the security of the private owner."¹⁸ This interpretation was firmly established by the House of Lords again in the case of *Jefferys v. Boosey*, 1854.¹⁹

This statutory theory helps us understand the purpose of protecting literary property. Statutes are passed to protect the author upon publication, for it was thought that "the act of publication when voluntarily done by the author himself is virtually and necessarily a gift to the public."²⁰ But the welfare of the author, it must be understood, is not necessarily the desired end; rather it is that the public should thereby benefit. "A monopoly in the author was regarded as a means to that end; it was emphatically not an end in itself."²¹

Support for this view was given by a Congressional committee which investigated the problem of copyright in 1909:

The Constitution . . . provides that Congress shall have the power to grant such rights . . . (it is) not primarily for the benefit of the

¹⁴ 4 Burr. 2303.

¹⁵ W. P. Holcombe, "International Copyright," in *Law Students Monthly*, Vol. 1 (1890), p. 251.

¹⁶ 8 Peters 591.

¹⁷ *American Tobacco Co. vs. Werkmeister*, 207 U. S. 284, 291; 28 Sup. Ct. 72, 77.

¹⁸ Richard Rogers Bowker, *Copyright: Its History and Law*, Boston, 1912, p. 7.

¹⁹ 4 H. L. C. 815.

²⁰ Holcombe, p. 252.

²¹ Wallace McClure, "Copyright in War and Peace," in this JOURNAL, Vol. 36 (1942), p. 383.

authors, but primarily for the benefit of the public (that), such rights are given. Not that any particular class of citizen, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.²²

With each nation going its own way in copyright legislation and with an increase of intercourse and communication between nations, the practice of "international piracy" developed. Publishers reprinted and translated works of authors of other nationalities without permission or financial remuneration.

The first country to see the need of rejecting the concept of national boundaries in the consideration of literary creativity was France, which, in 1793, when it was imbued with the revolutionary fervor of human brotherhood, gave equal protection in its laws to residents and non-residents alike. In the reaction to the Revolution this liberal legislation was abandoned only to be somewhat revived again in 1852. Denmark acted in 1828, Prussia in 1836, and England in 1837, with legislation which extended copyright protection to the nationals of those countries which entered into reciprocal arrangements. Such reciprocal treaties characterised international copyright during the 19th century, down to 1886.²³

Such a method of international agreement soon proved to be quite unsatisfactory, however. Among other things, it resulted in confusion because each treaty or convention had to be considered not only with reference to the two negotiating countries but with reference as well to the other nations in existing treaty agreement with either one of the contracting parties.

Many such treaties also contained complicated registration and time requirements which had to be observed before recognition would be extended, with the result that, to all practical effects, there was little recognition. Commenting on one such treaty between England and Spain, signed on August 11, 1880, an English law journal observed: "It is a treaty on the regular Foreign Office lines, and, like the generality of conventions between England and foreign countries, will be more or less a dead letter."²⁴

Meanwhile the literary men themselves, led by Victor Hugo, had transcended national boundaries and, at 1878, in Paris, organized themselves into an International Literary Association (*Association Littéraire et Artistique Internationale*) to meet annually at various European capitals in

²² House Report No. 2222, 60th Congress, 2nd Session, February 29, 1909.

²³ G. Herbert Thring, "United States Copyright Law and International Relations," in *The North American Review*, Vol. 181 (1905), p. 72. During this period France entered into 29 such treaties, Great Britain 15, Italy 10, Spain 7, Belgium 6, Bolivia 6, Germany 6, Switzerland 5, Portugal 4, Holland 3, Luxembourg 2, Norway and Sweden 2, Russia 2, Ecuador 1, Mexico 1, and Salvador 1.

²⁴ "The Anglo-Spanish Copyright Convention," *The Law Times*, London, Vol. 70 (1881), p. 166.

order to discuss domestic and international legislation for protection of their works.

At their 1882 meeting, held in Rome, they agreed to convene a conference to be held at Bern in the following year, for the purpose of adopting a program which would serve as a basis for an international conference of states. At the Bern conference, which met in September, 1883, a draft convention was drawn up to serve as an international agreement on copyright.

To bring the draft convention to the attention of the nations of the world the Swiss Federal Council was prevailed upon to act as an intermediary. On December 3, 1883, the Council addressed a circular note to all governments, signed by the President of the Swiss Confederation, inviting them to take part in a diplomatic conference on international copyright, and enclosing a report of the Bern proceedings and a draft of their proposed convention.

The note was generally well received, although the English Board of Trade first rather curtly advised the Foreign Office that "in the present state of the copyright question it would not be advisable for her Majesty's government to be represented at the proposed Conference." Upon reconsideration, however, it agreed that England's minister at Bern might attend the Conference "in a consultative capacity, and with no power to vote or to bind her Majesty's government."²⁵

In any event the conference met on September 8-19, 1884, after President Wett of Switzerland had sent out a second appeal on June 28. A draft convention of twenty-one articles was evolved which proposed an International Copyright Union and included the text of an additional final protocol to be submitted to each country for consideration and approval.

The Swiss Government thereupon called another conference, which met at Bern on September 7, 1885, but since not all delegates were authorized to sign for their governments, it agreed to meet again the following year. Finally, on September 9, 1886, the formal document creating the International Copyright Union was signed by ten countries: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunis. The United States and Japan participated in the proceedings by having observers present, but did not sign. The agreement was ratified the following year. Eventually 16 states signed this first convention.

The delegates to the various conferences had two courses open to them. They could have adopted the system of a uniform code for all countries joining the Union or the system of national treatment which would permit each country to apply its own laws to the works of foreigners. The German delegates proposed that the conference aim at once at a "codification

²⁵ H. D. Traill, "International Copyright," in *Macmillan Magazine*, Vol. 54 (1886), p. 152.

regulating in a uniform manner for the whole of the proposed union."²⁶ Such an approach, however, was rejected by the delegates in view of the divergent copyright laws within the countries represented at the conference.

A mixed system was, therefore, adopted. Every state joining the Union agreed to accord to authors who were citizens of another country belonging to the Union, and who published their works in that country, the same treatment and protection as that accorded to their own citizens, subject to the condition that the protection afforded need not exceed that given in the country where it was first published. The delegates did observe in a supplementary statement, however, that an "international codification is in the nature of things and will be effected sooner or later."

Toward that end also they laid the foundation for future international copyright law in establishing certain minimum rights to be enjoyed by the authors which would prevail over national legislation. These provisions dealt with translations, reproduction of periodical articles, public presentation of dramatic and musical works, reproduction in works intended for instruction, and with formalities in registration.

Finally a novel feature of the agreement was the creation of an international office, the Office of the International Union for the Protection of Literary and Artistic Works, to be placed under the administration of the Swiss Confederation. The duties of the office included the editing of a periodical to treat questions concerning the Union and for this purpose it was to "collect all kinds of information relative to the protection of the rights of authors over their literary and artistic works."²⁷

The Union, of course, was by no means a finished body in 1887. The International Literary Association continued to meet and to make suggestions for improvement. One of the more significant suggestions that came out of a meeting at Dresden in 1895 was the proposal that a diplomatic congress be called to revise the Bern convention as a means of bringing about unified legislation. They asked that the Bern office be authorized to produce an international vocabulary of the equivalent juridical terms used in the legislation texts of each country and that official translations of those laws be made available by the Office.²⁸

A congress of the Union was held at Paris in 1896. One of the most important changes coming out of the sessions was the provision that authors from non-member nations who secured first or simultaneous publication in any member country enjoyed thereby in all countries of the Union the same rights as nationals of member states. This provision, of course, was applicable to Americans.

²⁶ Same.

²⁷ "The International Copyright Convention," in *The Irish Law Times and Solicitor's Journal*, Vol. 23 (1888), pp. 8-9.

²⁸ "The 1895 Copyright Congress," in *The Nation*, Vol. 61 (1895), p. 343.

American authors, as a result of the Paris provision, now had an advantage. To copyright their works abroad they could arrange for the simultaneous publication of those works in England and their rights would thereby be protected throughout the Union. The law in the United States, on the other hand, as we have seen, extended protection only to citizens or residents of this country, and the latter required an intention to make the United States the applicant's permanent abode.

The result was great agitation both here and abroad. Many American publishers disregarded all codes of ethics in their search for profits by freely reprinting standard English works without paying for the right to do so. We can better picture the furor thereby created by noting that though there are few periods in the history of English literature which are as rich as the Victorian, the chief Victorian authors reaped little or no financial reward from the fame their works achieved in this country. The essays of Macaulay, the poems of Tennyson, and the novels of Dickens were multiplied in American reprints without the consent of their authors and with little or no recognition of their right to payment.

This practice hurt American authors too for their works had to meet the unfair competition of British books which were cheaper because they were not paid for. American readers were less inclined to read the novels of Cooper or Hawthorne for a dollar when they could buy a novel of Scott or Dickens for a quarter. The same American writers also, before the changes of 1896, mentioned above, were similarly not protected in England. Longfellow asserted a few years before his death that he had twenty-two publishers in England and Scotland, but that "only four of them took the slightest notice of my existence, even so far as to send me a copy of the book." Harriet Beecher Stowe too is reported to have received no return whatever, even though her *Uncle Tom's Cabin* sold more than ½ million copies in Great Britain during its first year alone.²⁹

American men of letters were, therefore, apart from any other considerations, unable to rely on literature for a livelihood. Longfellow and Lowell were college professors; Hawthorne was in the government service; Emerson engaged in lecturing. And American readers were weaned on a literature not their own.

Many people on both sides of the ocean protested this state of affairs. Maine wrote in his *Popular Government*: "... the neglect to exercise this power for the advantage of foreign writers has condemned the whole American community to a literary servitude unparalleled in the history of thought."³⁰ A Congressional committee, reporting on the copyright law of 1831 commented: "It is only in the most barbarous and savage coun-

²⁹ Brander Matthews, "Twenty Years of International Copyright," in *The American Review of Reviews*, Vol. 43 (1911), p. 721.

³⁰ Brander Matthews, "The Evolution of Copyright," in *Political Science Quarterly* Vol. 5, No. 4 (December, 1890), p. 602.

tries that the inhabitants rob and plunder indiscriminately all foreigners who come upon their shores." ³¹

The movement in the United States for international copyright protection was, therefore, not entirely lifeless, although it can hardly be said to have begun before 1835. Even prior to that date, however, there were sporadic appeals for the copyright protection of foreign authors. Tom Paine appears to have advocated international copyright as early as 1782. The *New York Post* protested the piracy of English works by American publishers in 1810, while *The Knickerbocker* claimed it was the first to champion the cause. ³²

Be that as it may, the first serious attempt to get the United States to join in an international copyright agreement came in 1837 when Great Britain suggested the conclusion of a treaty on the matter. Parliament had just enacted legislation placing foreigners on the same footing as native authors in the event of reciprocity by the nation to which the foreigner belonged and Lord Palmerston, who was negotiating for England, was anxious to include the United States in an agreement.

A committee of Congress, headed by Henry Clay and supported by Mr. Justice Story, presented a report urging that such an international convention be concluded, but strong opposition to it by book publishers led Congress to ignore the report and other attempts at legislation made by Clay in 1842, by Rufus Choate in 1843, and by John Jay in 1848, to name only a few.

To assist the advocates of international copyright legislation in this country Charles Dickens came to America in 1837. At the expense of alienating many interests who resented his interference, he actively campaigned along the eastern seaboard and wherever he was feted. In February, 1842, he assisted Washington Irving in drawing up and presenting a petition to Congress through Henry Clay. But his activities were in vain and critics today maintain that his unflattering picture of America in *Martin Chuzzlewit* can be credited to his spleen in not obtaining an international copyright law. ³³

With legislative attempts failing, the period between 1852-60 was marked by renewed efforts to secure international copyright by treaty with England. At the urging of the Copyright League, headed by G. P. Putnam, one of the few publishers at the time in harmony with this view, Secretary of State Edward Everett, acting through John F. Crampton, the American Minister in London, negotiated a treaty in 1853 providing for reciprocal copyright protection between this country and England. The

³¹ "International Copyright," *The North American Review*, Vol. 48 (1839), p. 266.

³² Andrew J. Eaton, "The American Movement for International Copyright, 1837-60," in *The Library Quarterly*, Vol. 15, No. 2 (April, 1945), p. 101.

³³ Laurence H. Houtchens, "Charles Dickens and International Copyright," in *American Literature*, Vol. 13 (1941), p. 28.

treaty was laid before the Senate in a message from President Fillmore on February 18, 1853, but opposition, arguing that Congress should not enhance the price of books by "taxing them for the benefit of foreign authors," was again too powerful and the Senate tabled the proposed treaty without a vote.⁸⁴

In 1883 the advocates of international copyright reorganized themselves into a new American Copyright League and enrolled in its ranks the majority of American writers. Lowell became President and composed the quatrain which the League took as its motto:

In vain we call old notions fudge,
And bend our conscience to our dealing;
The Ten Commandments will not budge,
And stealing will continue stealing.

That same year, it may be recalled, the President of the Swiss Confederation invited the governments of the world to be represented at the Bern conference on copyright. Replying to the circular, Secretary of State Frederick T. Frelinghuysen wrote that while the United States was "disposed in principle toward the proposition . . . this Government sees grave difficulties in the way of a general arrangement to embrace all countries in one scheme of copyright protection."

The reply did not express a definite intention, however, and hence elicited a program of the 1884 conference, whereupon the United States informed the Swiss President that it had not construed his letter as an invitation to send delegates and none had been appointed. In his annual message to Congress on December 1, 1884, President Arthur explained that

The question of securing to authors, composers and artists copyright privileges in this country in return for reciprocal rights abroad is one that may justly challenge your attention. It is true that conventions will be necessary for fully accomplishing this result, but until Congress shall by statute fix the extent to which foreign holders of copyright shall be here privileged, it has been deemed inadvisable to negotiate such conventions. For this reason the United States were not represented at the present conference at Bern.

A copy of the Bern conference findings and suggestions for an International Copyright Union were nevertheless sent to the United States with a further invitation to attend the 1885 conference. Secretary of State Bayard on May 21 replied that it would be very gratifying for the United States to take part in the consultative deliberations and on September 17, Boyd Winchester, American Minister to Switzerland, went as a delegate and explained the American position to the delegates present.

A report of the conference was again sent to the Secretary of State by the Swiss on November 6, together with an invitation to the conference of

⁸⁴ Matthews, "Twenty Years," p. 723.

1886, already mentioned, and a request that we name a delegate and "furnish him with the powers necessary to sign the Convention." Secretary Bayard, on June 29, announced that Mr. Winchester would again attend as a delegate, but that he will not be "empowered to sign the international convention," because under the United States Constitution, copyright was a legislative rather than a treaty making function of government and Congress alone could act. Meanwhile, on December 8, 1885, in his annual message to Congress President Cleveland wrote: "The interesting and important subject of international copyright has been before you for several years. Action is certainly desirable to effect the object in view; and while there may be question as to the relative advantage of treating it by legislation or by specific treaty, the matured views of the Bern Conference cannot fail to aid your consideration of the subject."³⁵

Heartened by the new turn of developments, the movement for international copyright grew. In 1887 a group of publishers formed the American Publishers' Copyright League and joined with the authors in a campaign to enlighten public opinion and persuade Congress. They were aided by Mr. Winchester's report which recommended that Congress pass legislation to permit the United States to join the Union.

The first attempt came in the form of the Chace Copyright Bill which passed the Senate on May 8, 1888, but failed in the House. Finally, on March 3, 1891, Congress passed a law to go into effect on July 1 which, under certain specified conditions, extended the privilege of copyright to subjects of states which permitted United States citizens to enjoy copyright benefits on substantially the same basis as its own citizens, or "when such foreign state or nation is a party to an international agreement which provides for reciprocity in the grant of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement."³⁶ The President, under the Statute, was given the authority to issue proclamations naming those states which could be considered to be embraced by the two stipulated conditions.

It soon became clear, however, that the passage of the legislation in 1891 came far from settling the question of international copyright. Congress, consistent with the dominant protectionist way of thinking of the day as exemplified by our tariff laws, included a provision in the statute that for a book by a foreign author to be protected, it had to be printed from type set within the United States. Publication in this country also had to be simultaneous with its foreign publication.

This typesetting provision was compared by *The Nation* to a provision that no foreigner landing in the United States should be entitled to the pro-

³⁵ "The Problem of Copyright Revision," in *Congressional Digest*, Vol. 6, No. 10 (October, 1927), pp. 263-264.

³⁶ 26 Stat. 1106, 1110, Section 13

tection of the police and the courts until he had purchased and was actually wearing a suit of clothes made by an American tailor.³⁷

Regardless of the wisdom of the provision, however, its effect was to emasculate greatly the intent of the law.

The State Department, in spite of the apparent fact that Congress had the International Copyright Union in mind, held that the "manufacturing clause" prevented membership by the United States in the Union. We could not at our "pleasure become a party" to the Union because it gave protection in all member countries "whether such works are or are not published in one of these countries." We could not, therefore, enter into reciprocal agreements with members of the Union on the strength of that membership alone. We were thus limited in our international copyright relations to the alternate stipulations of the statute.³⁸

On that basis, between July 1, 1891, and August 11, 1908, Presidential proclamations granted reciprocity to: Belgium, France, Great Britain and its possessions, Switzerland, Germany, Italy, Denmark, Portugal, Spain, Mexico, Chile, Costa Rica, the Netherlands and its possessions, Cuba, Norway, and Austria. Special treaties were also entered into with Spain, China, Japan, Guatemala, Salvador, Costa Rica, Honduras, and Nicaragua.³⁹

The arrangement, however, was not too happy a one for all the parties concerned. Opposition in Germany pointed out that we demanded a whole in exchange for a part. Rather than the usual provision that the privileges guaranteed by a copyright convention should not exceed in one country the rights secured by that other country to its own citizens, we insisted on equal application of the respective laws. German legislators said our law gave one of the shortest periods of protection in modern legislation and had onerous technical requirements, while their law was very liberal and required only registration as a formality.⁴⁰

There was bitter criticism in England too. One British commentator declared that the Anglo-American Treaty of 1893 imposed restrictions on England in the interests of the United States and pointed to our laws which made the securing of copyright by English periodicals "practically insurmountable." Commenting on the Chicago *Graphic* which reprinted selected articles from English periodicals weekly without permission or payment, he quoted from Montaigne: "The law of honor seems to me far stronger and more weighty than that of legal obligation. I am throttled less tight by a lawyer than by myself"; and then pithily concluded on his own: "This is how all men of honour feel."⁴¹

³⁷ "An Apologie for Piracie," in *The Dial*, Vol. 38 (1905), p. 4.

³⁸ "Our Foreign Copyright Relations," in *The Nation*, Vol. 59 (1894), p. 168.

³⁹ *Congressional Digest*, as cited.

⁴⁰ *The Nation*, Vol. 39, as cited.

⁴¹ George Bentley, "The Anglo-American Copyright Act," in *The Athenaeum*, Vol. 102 (1893), p. 590.

In response to much of the criticism from within and without, Congress yielded slightly and in 1895 passed an amendment under which proprietors of foreign language books printed abroad could obtain a preliminary copyright good for a year during which they could begin printing or translating the work in the United States if they wished to secure American copyright.

On March 4, 1909, further slight modifications were enacted in legislation which revised our copyright law and basically remains in effect today. In its chief international respects it was similar to the 1891 act except for the provision that aliens domiciled in the United States at the time of the first publication of their work could obtain copyright here even if their native countries did not grant reciprocity to Americans.⁴² For the purposes of the statute, "domicile" was interpreted by the courts to retain its common law meaning of residence in the United States with the intention of remaining there for an unlimited period of time.⁴³

Meanwhile the Bern Union was continuing its slow but steady growth until, by 1901, only Russia and Austria-Hungary of the important European nations stood outside of it.

After a meeting held at Paris in 1896 to consider certain modifications of the original agreement, at which Henry Alexander, the counsellor of our Embassy at Paris, represented the United States but did not take part in the proceedings, a conference was held at Berlin in 1908 at the invitation of the German government. The purpose of this conference, according to a report of British commissioners, was

to secure, if possible, a general agreement to such a revision of the Berne Convention and the Additional Act of Paris as would enable the contracting States to sign a single new instrument containing stipulations of a more complete and simple character, with a view not only to afford a more effectual protection to the author, but also to remove the more salient difficulties which had been encountered in the working of the existing arrangements.⁴⁴

Non-members of the Union were also invited by the German Government and were among the 35 countries represented by 85 delegates. Thorvald Solberg, Register of Copyrights of the Library of Congress and leading exponent of international copyright, was designated as the American delegate by Elihu Root, Secretary of State, with the understanding that he was to attend the conference solely for the purpose of observing the proceedings and making such notes and report as would be useful to this Government.

⁴² 35 Stat. 1075-1078.

⁴³ *G. Ricordi & Co. Inc. vs. Columbia Gramophone Co.* (1920), 263 Fed. 354.

⁴⁴ *Copinger*, p. 256.

The resultant Berlin Convention of 1908 made two important advances: the elimination of all formalities as prerequisites for protection; and the adoption of the principle making protection of a work in a member country independent of whether it was protected at its origin. Appreciating the difficulty of having all countries accept such comparatively radical suggestions, the signatories stipulated that nations in ratifying the Berlin convention could specify that they chose to be bound by the original convention rather than by the revised one.

The Berlin Convention served rather as a guide or goal than a definite legal agreement. It was significant both in this way, however, and because a number of countries ratified without reservations: Austria, Belgium, Brazil, Bulgaria, Czechoslovakia, Danzig, Germany, Haiti, Hungary, Liberia, Luxemburg, Morocco, Monaco, Poland, Portugal, Spain, and Switzerland. Other countries (Denmark, France, Great Britain, Greece, Italy, Japan, the Netherlands, Norway, Rumania, Sweden, and Tunis) accepted with specific reservations.

America, however, continued to remain aloof. Twenty-eight nations nevertheless did the unusual and permitted Americans to obtain "courtesy" copyright within their borders by "simultaneous" publication and solely upon the payment of Register's fees.⁴⁵ Such, for example, was the import of the British Copyright Act of 1911.⁴⁶

Canada, however, alone of the British Dominions, refused to go along with the British law. Peculiarly affected as a neighboring country with a similar literature, it considered it unwise to give the United States privileges which were not reciprocated. Seeing too that Americans were receiving the benefits of the Bern Union without membership, Canada announced that it could adhere to the Union only with the provision that it need not give protection to nationals of other countries who obtained copyright in member countries of the Union.⁴⁷

To deal with this problem, and by now presumably resigned and perhaps perturbed at America's non-participation, Great Britain, on March 20, 1914, obtained the unanimous consent of the Union to a protocol permitting members of the Union to refuse protection to citizens of non-members who are not domiciled in a country belonging to the Union where the laws of their native state do not protect "in a sufficient manner" the works of other authors.

Such was the status of international copyright when World War I broke out in 1914 and so it substantially remained until 1928, except for repeated attempts in Congress to enact legislation authorizing the United States to

⁴⁵ L. J. DeBekker, "World Copyright," in *The Nation*, Vol. 127 (1928), p. 253.

⁴⁶ 1 and 2 George V, ch. 46.

⁴⁷ Herbert A. Howell, "International Copyright Relations of the United States," in *Yale Law Journal*, Vol. 27, No. 3 (January, 1918), p. 349.

enter the Union.⁴⁸ The United States was out of the Union, but it had reciprocal copyright relations, under the 1909 statute, with 41 nations.⁴⁹

The next conference of the International Copyright Union took place in Rome in 1928. The most significant accomplishment of the meeting from our point of view, except for the reaffirmation of the 1914 protocol, was the partial abandonment by the member states of their right to ratify the Convention with reservations. The Convention was to take effect upon the receipt of 6 ratifications and was to apply in full force on July 1, 1931. The only exception,—again, no doubt, with an eye to American participation,—was the provision that

Those countries foreign to the union will be permitted to join the union by way of adhesion until August 1, 1931, under the convention signed in Berlin, November 13, 1908, or the present convention. After August 1, 1931, they will only be able to adhere to the present convention.⁵⁰

A total of 40 countries ratified the convention.⁵¹

On December 15, 1933, the drive from within the United States was renewed with a petition addressed to the Secretary of State and signed by the presidents of 12 universities, namely, California, Columbia, Chicago, Harvard, Iowa, Johns Hopkins, Minnesota, North Carolina, Princeton, Texas, Wisconsin, and Yale, pointing out the "discreditable position occupied by the United States with reference to international copyright" and stating that our law "constitutes a standing affront to friendly powers and can not be defended on moral grounds."⁵²

As a result of this and similar pressure the stage was prepared in 1935 for the governmental action which would make the United States a signatory to the International Copyright Union. Since this would involve not only our rejection of the "manufacturing clause" but also the release of foreign authors from compliance with American copyright formalities of notice, deposit of copies, and registration fees, the Authors' League of America protested that American authors were thus to be discriminated

⁴⁸ 1922—HR 11476; 1924—HR 9137; 1925—HR 5841, 11258; 1926—HR 10434.

⁴⁹ Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, China, Costa Rica, Czechoslovakia, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Guatemala, Haiti, Honduras, Hungary, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Nicaragua, Panama, Paraguay, Poland, Portugal, Salvador, Siam, South Africa, Spain, Sweden, Switzerland, Tunis, and Uruguay.

⁵⁰ DeBekker, *as cited*.

⁵¹ Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Czechoslovakia, Danzig, Denmark, Estonia, Finland, France and her colonies, Germany, Great Britain and its possessions, Greece, Haiti, Hungary, India, Irish Free State, Italy, Japan, Lichtenstein, Luxembourg, Morocco, Monaco, the Netherlands and its possessions, New Zealand, Norway, Poland, Portugal and its colonies, Rumania, Siam, Spain and its colonies, Sweden, Switzerland, Tunis, Union of South Africa, the Vatican, Yugoslavia.

⁵² Solberg, "Copyright Reform," p. 357.

against inasmuch as they were compelled to comply with these formalities.⁵³

An agreement was, therefore, made between Senator Duffy, of the Foreign Relations Committee, whereby domestic legislation putting American copyright law into harmony with the international provisions would be considered together with the proposed treaty. But as a result of premature action the treaty making the United States a signatory to the Union was approved by the Senate on April 19, 1935, before the domestic legislation had even received committee consideration. Keeping to his agreement, Senator Duffy immediately prevailed upon the Senate to reconsider and await domestic legislation. But agreement on domestic legislation never came about because of differences among the various lobby groups and the United States remained out of the Union.

At about this time a number of Dutch publishers began to "pirate" prominent American works by publishing translations without permission. Two outstanding incidents involved *The Yecrling* by Marjorie Kinnan Rawlings and *Gone With The Wind* by Margaret Mitchell. At the trial in the Netherlands involving the latter book, it is interesting to note, the Dutch publishers, in the words of the presiding judge,

stated that they would have been quite prepared to pay for the right of translation if it were not for the fact that works copyrighted in the Netherlands are published in the United States time and again without any compensation. The only way to compel the United States to accede to the Bern Convention is to disregard, in the countries which have acceded to that Convention, the copyrights of the citizens of that country.⁵⁴

These incidents disturbed American authors and publishers and brought renewed efforts on their part for affiliation with the Union. In January, 1938, the National Committee of the United States of America on International Intellectual Coöperation appointed a Committee for the Study of Copyright, under Dr. James T. Sutherland, to draft domestic reform legislation and prepare the way for the treaty. Nearly a score of interested groups coöperated with the work of the committee. As a result of that study legislation was introduced by Senator Thomas of Utah in 1940 and hearings were held before a subcommittee of the Senate Committee on Foreign Relations on April 14, 1941.⁵⁵

Before much could be done, however, the United States was again embroiled in a worldwide war which demanded all of its energies and copyright legislation was put aside "for the duration."

The recent war brought very little changes in the international copyright situation. At its outbreak the United States had reciprocal copyright

⁵³ "International Copyright," in *The Library Journal*, Vol. 60 (1935), p. 389.

⁵⁴ Wallace McClure, *International Law of Copyright*, Washington, 1938, p. 19.

⁵⁵ Senate Report No. 3043, 70th Congress, 5d Session.

agreements with all the important countries of the world except Bulgaria, Egypt, Ethiopia, Latvia, Lichtenstein, Lithuania, Persia, Russia, Turkey, Venezuela and Yugoslavia. A new Treaty of Friendship, Commerce and Navigation, Article IX of which dealt with copyright and provided for most favored nation treatment, was signed between the United States and the Republic of China on November 2, 1946.^{55a} Our relations with Canada continued to be unsatisfactory and the Canadian law provided that unless an American copyright owner produced a Canadian edition within two months, any Canadian could apply for a license to reprint any book not actually produced and published in Canada. All the leading countries of the world except the United States, Russia, China, Turkey, and all the Latin-American countries (omitting Brazil and Haiti, which are members) were members of the Union.⁵⁵

One of the most interesting byproducts of the international crisis of 1939, and yet one not directly attributable to it, was a court decision involving the rights to the American edition of Adolf Hitler's *Mein Kampf*. The principle was there established that a "stateless" author had as much protection under our copyright laws as the "national" of any country with which we have a treaty. The decision was of extreme importance to refugee authors.⁵⁷

Directly a result of the war was the power of the Office of Alien Property Custodian to take over the copyright of those works owned by nationals of enemy countries which were of a scientific or technical nature and of use to the war program. Trade publications, such as *Publishers' Weekly*, carried the following notice:

Any person interested in reproducing any scientific or technical text or treatise the copyright to which is owned by an enemy, or who knows of any such work which should be made available in the interests of the war program, should get in touch with the Alien Property Custodian at Washington, D. C.⁵⁸

This practice, incidentally, is to be contrasted with that of the previous war. Legislation approved on October 6, 1917, excepted copyright from the laws prohibiting trading with the enemy and expressly permitted an enemy or an ally of an enemy to file an application for registration of copyright in the United States, provided that the nation of the enemy applicant granted substantially similar privileges to United States citizens. Applicants were also given an extension of 15 months after the war if necessary to complete copyright formalities. Commenting on this provision Mr.

^{55a} *Publishers' Weekly*, November 16, 1946, p. 2813.

⁵⁶ Margaret Nicholson, *A Manual of Copyright Practice*, New York, 1945, p. 100.

⁵⁷ *Houghton Mifflin Co. vs. Stackpole Sons, Inc.*, decided by the Circuit Court of Appeals in New York on June 22, 1939. The U. S. Supreme Court on October 23, 1939 denied a plea for review: 104 F.2d 306, 60 S. Ct. 131.

⁵⁸ October 10, 1942, p. 1579.

Herbert A. Howell of the Register of Copyrights in the Library of Congress said:

That such reciprocal treatment will be accorded as a matter of course seems highly probable, as from the beginning there has been manifested in all the belligerent countries a strong disposition to respect all international copyright relations.⁵⁹

Another byproduct of World War II was an act passed by Congress and approved on September 25, 1941,⁶⁰ which provided that when authors or their assigns are "temporarily unable to comply with the conditions and formalities" of our copyright law "because of the disruption or suspension of facilities essential for such compliance," the President may grant an extension of time where the country of which the claimant is a national grants reciprocity to American citizens. Such an agreement was entered into between the United States and England to go into effect March 10, 1944.⁶¹ President Truman's proclamation of December 31, 1946, declaring an official "end of hostilities" did not end the agreement with England. Cancellation of that agreement awaits special proclamation by the two countries.^{61a}

Our tax laws also were affected and special legislation, effective November 1, 1942, provided that unless there is a special treaty to the contrary royalty payments to non-resident aliens are to be withheld by publishers to the extent of 30%. The previous figure was 27½%. Special agreements were entered into with France, royalty to whose citizens was made exempt from taxation, with Sweden, for whose citizens a 10% withholding tax was agreed upon, and a 15% rate was adopted for Canadian citizens.⁶²

So far we have been concerned primarily with American copyright relations as related to the International Copyright Union. For a complete picture, however, it is necessary that we take notice of the various copyright agreements concluded under Pan-American auspices.

Although not, strictly speaking, a Pan-American agreement, the Treaty on Literary and Artistic Property signed at Montevideo on January 11, 1889, at the South American Congress on Private International Law, is generally considered the first instrument in the development of the Pan-American copyright system. Unlike later agreements it was open to non-American states. Consequently in addition to being ratified by Argentina (1891), Bolivia (1903), Paraguay (1889), Peru (1889), and Uruguay (1892) it was agreed to by France, Spain, Belgium, Italy, Germany, and Austria.

Like the Bern Union it contained the beginnings of common international

⁵⁹ Howell, p. 348.

⁶⁰ 55 Stat. 732.

⁶¹ *Publishers' Weekly*, March 18, 1944, p. 1211.

^{61a} *Publishers' Weekly*, January 11, 1947, p. 169.

⁶² *Publishers' Weekly*, November 7, 1942, p. 1957.

legislation by establishing certain minimum rights irrespective of national law. Unlike the Bern Union, however, it adhered to the principle of *lex loci* rather than *lex fori*, which means that the rights of an author are determined by the laws of the country of origin where the work is first published and not where the infringement takes place.

The first truly Pan-American copyright convention was signed at the Second International Conference of American States held at Mexico City in 1902. It provides for a Union to protect nationals of the contracting parties, but here followed *lex fori* in that the nature and extent of protection was determined by the laws of the country where protection was sought. The convention was ratified by Guatemala, Salvador, Costa Rica, Honduras, Nicaragua, and the United States.

The Third International Conference of American States, held at Rio de Janeiro in 1906, affirmed the provisions of the 1902 convention and provided further for the establishment of two copyright bureaus for international registration at Rio de Janeiro and at Havana. Not a sufficient number of countries ratified the agreement, however, and the bureau was never established.

Finally, on August 11, 1910, a basic Pan-American copyright instrument was signed at Buenos Aires at the Fourth International Conference of American States.

Here too, as in the Bern Union, the principle of *lex fori* as to the nature and extent of protection was established. A work published in a member country was thereby protected in all of the countries agreeing to the convention. The United States adhered to the convention on July 13, 1914.⁶³ Other ratifying countries were: Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay.⁶⁴

The Buenos Aires convention of 1910 remains the basic Pan-American copyright instrument, even though an attempt was made in Havana in 1928 at the Sixth International Conference of American States to revise the agreement. Only Colombia, Costa Rica, Guatemala, Nicaragua, and Panama ratified the latter.

Since not all Latin American countries are parties to any one agreement, therefore, much international protection is ineffective and confusing. United States authors, by treaties and reciprocal agreements nominally can secure protection in all Latin American countries except Bolivia and Venezuela, but the extent and terms of the protection differ widely. The Mexico City agreement of 1902 governs our relations with El Salvador; and we have seen above the list of countries ratifying the 1910 agreement.

⁶³ 38 Stat., pt. 2, 1785.

⁶⁴ William Sanders, "International Copyright Protection," in *Bulletin of the Pan-American Union*, Vol. 73 (1939), pp. 418-428.

Reciprocity with Argentina, Chile, Cuba, and Mexico is governed by various Presidential proclamations as provided for in our laws, described above. Finally, Brazil and Haiti are also members of the Bern Union and our citizens can secure their protection by publishing in a member state.

The extent of the ineffectiveness of the above agreements, in the absence of uniform regulations, may be gleaned from an account in the July 31, 1942, issue of Mexico's *Tiempo*. Ernest Hemingway agreed with a Mexican publisher for an edition of his works, *Death in the Afternoon* and *For Whom the Bell Tolls*. While the Mexican book was in preparation, a pirated Argentine edition appeared. Said the Mexican periodical:

Mexico, the Latin American country which has shown most respect for legal practices in publishing, has been deprived of the privilege of publishing two books, rights to which had been acquired by an editor of this country. And Ernest Hemingway will wage a futile battle against a pirate publishing house.⁶⁵

An example of another type of chaos was well described by a Latin American author who printed an English translation of his work and because of our laws could not obtain protection in the United States. He said:

Considering all the wonderful declarations we hear about Pan-Americanism it seems peculiar that my efforts in trying to make my country better known in the United States should be circumvented by the United States copyright law.⁶⁶

To meet this situation the Governing Board of the Pan-American Union, on December 5, 1945, approved the calling of a conference of special delegates from all American Republics to exchange views on copyright and draw up a treaty on this subject. Such a conference met in Washington, D. C., in June, 1946, and, after exploring differences of opinion which prevailed on questions of copyright registration and the inalienability of an author's rights, member representatives of the American Republics signed a convention for uniform copyright protection on June 22.

The agreement, which is intended to replace the 1910 convention of Buenos Aires and its 1928 Havana revision and all earlier inter-American conventions on copyright, must be ratified by the signatory states. Rights granted under the earlier conventions would not be affected by the agreement.

The convention provides that an author obtaining protection in one country shall automatically be granted protection in the other republics

⁶⁵ "Chaos in Copyright," in *The Inter-American Monthly*, Vol. 1 (1945), p. 45.

⁶⁶ Stephen P. Ladas, "Inter-American Copyright," *University of Pittsburgh Law Review*, Vol. 7, No. 4 (June, 1941), p. 289.

without submitting to any formalities, such as registering or depositing his work. Duration of copyright protection is governed by the law of the country in which obtained, but may not exceed the duration fixed in the country where protection is claimed.

It further recognizes the exclusive right of an author of a literary, scientific, or artistic work to use and transfer his work in any manner and to transmit it by will or by operation of interstate laws. In selling, assigning, or otherwise disposing of his work the copyright author nevertheless retains the right to claim paternity of his work and oppose any modification or use of it prejudicial to his reputation as an author, unless he consents to waive this right in accordance with the law of the country in which the contract is made.

Provision is made for allowing the press to reproduce articles on current events from other newspapers and from magazines, unless reproduction is prohibited by a special or general reservation. In any case, however, the source of a reproduced article must be clearly cited. No protection is given to the factual content of news published in newspapers.

The scope of the convention is indicated by Article 3 which says:

The literary, scientific and artistic works protected by the present convention comprise books, writings and pamphlets of all kinds, whatever the number of their pages; written or recorded versions of lectures, addresses, lessons, sermons, and other works of a similar nature; dramatic or dramatico-musical works; coreographic works and pantomimes the stage directions of which are fixed in writing or other form; musical compositions with or without words; drawings illustrations, paintings, sculptures, engravings, lithographs; photographic and cinematographic works; astronomical and geographical globes; maps, plans, sketches or plastic works relating to geography, topography, architecture, or any science; and, in short, any literary, scientific, or artistic work that can be published or reproduced.

Translations, adaptations or other versions of literary, scientific, or artistic works, including photographic and cinematic adaptations, are also protected as original works.⁶⁷

Public discussion of the convention to precede Senate action on ratification has begun. The American Bar Association has already held a special hearing on the subject, at which support for the treaty was voiced by Dr. Luther H. Evans, librarian of Congress, who headed this country's delegation to the conference. Opposition to ratification has been expressed by representatives of the National Association of Broadcasters, the American Book Publishers Association and several large recording companies.^{67a} Final action has not yet been taken.

Realizing that there are and should be no frontiers to the sphere of the

⁶⁷ *The Department of State Bulletin*, Vol. XV (July 7, 1946), p. 29.

^{67a} *The New York Times*, February 2, 1947, p. 27.

intellect, efforts have been made within the past decade to unite the two international systems of copyright in existence today, the Inter-American treaties and the original Bern Union. The 1928 Rome conference which revised the Bern and Berlin agreements accepted resolutions introduced by Brazil and France suggesting a study designed to draw the two systems together. On September 24, 1928, the Ninth Assembly of the League of Nations resolved that the Council of the League:

have its component organs make all the necessary investigations and consultations regarding the desirability of a general agreement having for its object the unification, on an international basis, and in full conformity with the wish expressed at the Rome Conference . . . of all laws and measures for the protection of intellectual property.

As a result of these efforts, a committee of experts was appointed jointly by the International Institute for the Unification of Private Law, at Rome, and the International Institute for Intellectual Coöperation, at Paris; and they drew up a proposed draft convention for preliminary discussion. On the strength of this work the Belgian Government, in 1936, after first calling for a meeting of Bern signatories, agreed to call a conference to be held at Brussels in 1938 or 1939, to which all the states of the world would be invited, to explore the possibility of a Universal Copyright Convention.⁶⁸

On this side of the ocean, meanwhile, the Seventh International Conference of American States, meeting at Montevideo in 1933, created a commission of five to consider the necessary legislation to unify the two systems. At the same time the Governing Board of the Pan-American Union invited the Executive Committee of the American Institute of International Law to study the matter and the two committees coöperated in this effort.⁶⁹ As a result of this preliminary study, the Eighth International Conference of American States, held at Lima, in 1938, recommended to members of the Pan-American Union that they send delegates to the proposed Brussels conference.

In view of the outbreak of the war, however, the Brussels conference never took place.

We have seen the development of copyright law from its infancy, when it became established as a principle in the law of nations, down to the present time when the states begin to accept the inevitability of internationalization.

Isolation is impossible. Whether the governments of the world come to see and act upon that truth in time to avoid further conflict, only time will tell. So long as the United States, Russia, and China, however, remain out of the International Copyright Union and so long as the bulk of

⁶⁸ Committee for the Study of Copyright, *Report on the Status of International Copyright Protection and on the Brussels Meeting of the Committee of Experts*, New York, 1938.

⁶⁹ *Bulletin of the Pan-American Union*, as cited.

the American states choose to remain by themselves, it would appear that the lesson has not been adequately learned.

Secretary of State Cordell Hull, commenting on proposed action whereby the United States would join the Union said that it

fits definitely into the program of endeavoring to build up, step by step, better international relations in general. I am convinced that thus to take advantage of opportunities for the betterment of details is a particularly appropriate way for democratic peoples to make their influence effective, and that, in a world torn by destructive efforts, we should let pass no occasion which offers a chance to achieve constructive results.⁷⁰

Although no action was taken on the proposal, the United States has become a part of the United Nations, the attempt of our day to meet the needs of internationalism. Whatever defects exist in the United Nations organization, and there are many, one of its most effective elements certainly meriting our endorsement is the encouragement it gives, through the Economic and Social Council, for functional cooperation among nations and peoples. Out of this came the meeting in London establishing the United Nations Educational, Scientific and Culture Organization, within whose sphere will fall the problem of international copyright. The UNESCO Constitution, signed by 44 nations in November, 1945, includes among its purposes and functions, in Article 1, to "recommend such international agreements as may be necessary to promote the free flow of ideas by word and image" and also to "maintain, increase, and diffuse knowledge . . . by initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them."⁷¹

In preparing for the first UNESCO conference held in December, 1946, at Paris, the United States National Commission for UNESCO, acting in accordance with a Congressional resolution⁷² met in Washington, D. C. in September, 1946, and made the following recommendation: "The American Delegation should advance and support proposals for action to free the channels of international communication of obstacles created by discriminatory or unduly restrictive copyright legislation."⁷³

Similar thinking prevailed in UNESCO's Preparatory Commission, which placed the necessity to correct the present system of international copyright protection near the top of its work project list and recommended the calling of an international conference on copyright.⁷⁴ In view of more

⁷⁰ McClure, as cited in this JOURNAL, p. 395.

⁷¹ *International Conciliation*, October 1946, p. 449.

⁷² H. J. Res. 305, Public Law 565, 79th Congress, Chapter 700, 2nd Series.

⁷³ *The Department of State Bulletin*, Vol. XV (October 13, 1946), p. 687.

⁷⁴ "Record of First UNESCO Conference," in *United Nations Weekly Bulletin*, Vol. 1 (December 31, 1946), pp. 28-36.

pressing problems in the minds of the delegates, such as world education, radio, population and nutrition studies, however, such action was postponed at the December conference and an announcement was made that UNESCO would cooperate with the United Nations in a report which would deal with copyright restrictions.⁷⁵

Again we look with hope. It may well be borne out in the field of international copyright too that the equity of one age becomes the law of the next.

⁷⁵ *The Department of State Bulletin*, Vol. XVI (January 5, 1947), pp. 20-22.

EDITORIAL COMMENT

INTERNATIONAL CRIMINAL JURISDICTION

The constitution and functioning of tribunals for the trial and punishment of war criminals and of crimes directed against the international community as a whole have become subjects of primary interest in the development of world organization under the reign of law. The International Military Tribunal before which the Nuremberg trials were conducted and the charter of powers and principles under which it operated constitute a landmark in the development of international criminal jurisdiction. The jurist, the statesman, and the historian will find a mine of source-material contained within its records. It is of the utmost importance to crystallize the experience of these trials while the conscience of mankind in all countries has not yet forgotten the hideous misdeeds there recorded. It now becomes the task of the United Nations through its various organs to extend the institutions of positive international law as a deterrent against the repetition of such crimes in the future.

In his report to the President on June 7, 1945, Justice Robert H. Jackson, as chief counsel for the United States in the prosecution of Axis war criminals, said:¹

Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.

On February 5, 1947, President Truman submitted to Congress his first annual report on the activities of the United Nations and the participation of the United States, in accordance with the provisions of the United Nations Participation Act of 1945.² The President reported that the representatives of our government had endeavored constantly "to support the United Nations with all the resources we possess . . . not as a temporary expedient but as a permanent partnership." He recounted the various steps taken to perfect the organs and specialized agencies of the United Nations and the political and economic activities of these bodies. It is

¹ This JOURNAL, Vol. 39, No. 3 (July, 1945), Supplement, p. 188.

² *Department of State Bulletin*, Vol. XVI, No. 396. The complete report is contained in *Department of State Publication 2735* (United States and United Nations Reports, Series 7).

notable that the President characterized as "one of the important long range achievements" of the General Assembly's first session the adoption of resolutions introduced by the United States on the codification and development of international law. The President continued as follows:

The General Assembly unanimously directed its committee on codification to give first attention to the charter and the decision of the Nuremberg Tribunal, under which aggressive war is a crime against humanity for which individuals as well as states must be punished. The Assembly also agreed that genocide—the deliberate policy of extermination of a race or class or any other human group—was a crime under international law. These developments toward the application of international law to individuals as well as to states are of profound significance to the state. We can not have lasting peace unless a genuine rule of world law is established and enforced.

The use of the controversial phrase "world law" is not to be taken too literally. It must be restricted to the context. The great advance in international jurisprudence of the post-war period is the recognition of the principle that certain behavior of individuals violates the common conscience of mankind. The advance represented in the International Agreement of August 8, 1945, signed between the United States, Great Britain, France, and the Soviet Union, to which nineteen other nations have since adhered, is a decisive step in advance of the Hague Regulations and the Geneva Protocol of October 2, 1924. The charter contained in the agreement of 1945 not only specifically describes and defines the crimes within the jurisdiction of the Tribunal but also declares that it has the power to try and punish persons who were guilty of such crimes "whether as individuals or as members of organizations" (Art. 6). A further advance is represented by the extension of the definition of the punishable offenses to crimes against peace and crimes against humanity which are not war crimes in the strict sense. Thus there is a recognition that the punishment of such crimes is the responsibility of the international community as such, against which, in the last analysis, such crimes are directed. It is in this sense that we must understand the President's reference to "a genuine rule of world law."

Penologists of recognized reputation have pointed out that the Nuremberg trial, conducted before a military tribunal created *ad hoc*, should have been made possible by agreements before war ensued, thus establishing the necessary basis for the punishment of war crimes and crimes against humanity. This is the contention of Dr. Raphael Lemkin³ who originated the word "genocide" and also of the eminent Roumanian jurist Professor Vespasien Pella.⁴ Both authors believe that the failure to establish the necessary basis for jurisdiction between the two world wars was a

³ Raphael Lemkin, *Axis Rule in Occupied Europe*, Washington, 1944.

⁴ Vespasien V. Pella, *La Guerre-Crime et les Criminels de Guerre*, Paris, 1946.

lamentable error of foresight by the statesmen of the world. Judge Megalós Caloyanni, the eminent Greek jurist who served in several cases of the Permanent Court of International Justice as judge *ad hoc*, drew to the attention of the Academy of International Law at The Hague in 1931 the danger of losing an opportunity for international society to protect itself while yet there was time. Judge Caloyanni pleaded for the establishment of permanent penal jurisdiction for international crimes because repressive law and sanctions have always been the preventive and protective methods for every collective society, great or small.⁵

The initial problem is whether the creation of an international jurisdiction competent to punish international crimes should precede the precise definition of such crimes or whether such jurisdiction must await a more or less comprehensive codification. One is reminded of the old question whether the egg or the chicken came first. Caloyanni predicted in 1931, with a remarkable degree of accuracy, that those who would insist upon the rule *nulla poena sine lege*, would find the problem insoluble, but that those whose institutions of state recognized the binding character of customary law would not hesitate to press first for the establishment of a competent jurisdiction. In this he anticipated the action of the Allied Governments in 1945.

The plans for an international jurisdiction for the punishment of international crimes foundered after World War I because of the too ambitious nature of the various projects. The Committee of Jurists which drafted the statute for the Permanent Court of International Justice in 1920 recommended also the establishment of an International Criminal Court. The Assembly of the League pronounced the plan premature. Later a draft was prepared for the International Law Association by Dr. Bellot and adopted at its Vienna Conference in 1926. The Inter-Parliamentary Union tentatively adopted a draft at its Washington Conference in 1925 prepared by Professor Pella. The International Association for Penal Law at its meeting in Brussels in 1926 also adopted a resolution for the setting up of an international jurisdiction for the punishment of certain violations of the law of nations. These drafts were later deposited officially with the Secretary-General of the League of Nations. While differing in detail, they proposed to convey criminal jurisdiction upon the Permanent Court of International Justice through the creation of a Criminal Chamber.

We mention these projects as a reminder that the problem described by President Truman is not entirely a new one to international jurists. The fact is that a favorable political background is necessary for any general grant of criminal jurisdiction and this was lacking during the period between the two world wars, notwithstanding the absurdly inadequate measures to punish war criminals after World War I. It is doubtful even

⁵ 38 *Receuil des Cours, Académie de Droit International*, 1931, Vol. IV, p. 752.

after the experiences of World War II whether we may expect the setting up of a permanent court. However two events must be signalized which may direct the evolutionary process in this direction. The first is the fact that the procedure of the Nuremberg Tribunal gave satisfaction to the allied participants as measured by the various standards of their systems of jurisprudence. The other influence is the realization on the part of the United Nations of the necessity for the control by law of all methods of mass destruction. The recognition of this has been manifested by all as an essential of self preservation. If the violation of agreements not to use nuclear energy except for peaceful pursuits can be controlled by law through sanctions operating against individuals as well as against states, a road will have been opened for the establishment of international penal jurisdiction generally.

The International Court of Justice is not the proper forum to implement this control as its statute was not designed for penal jurisdiction. Sir Alexander Cadogan, in reply to a proposal to refer the British charge against Albania of having laid mines in Corfu Channel, is reported to have declared that the World Court was not a "police court."⁶ The truth is that no such international penal jurisdiction is lodged anywhere. It must be created. The imperative need for protection against the new forces of mass destruction, atomic and others, may eventually lead the way.

ARTHUR K. KUHN

THE UNITED NATIONS AND INTERNATIONAL LEGISLATION

The phrase in the United Nations Charter which refers to "the progressive development of international law" suggests both an end and a procedure. The end includes the conscious development and extension of international law to meet new conditions and to serve new community needs. Theoretically, the most efficient procedure for achieving these ends might be the enactment of new rules of international law by an international legislative body, acting by majority vote. The United Nations General Assembly is empowered to act by majority vote, either by simple majority or by a special two-thirds majority on important questions; but the power to enact new rules of international law immediately binding on the Members of the United Nations was denied to the General Assembly by the drafters of the Charter. The powers of the General Assembly in this field are apparently limited to the initiation of studies and the making of recommendations, but the procedure followed with reference to the Convention on the Privileges and Immunities of the United Nations indicates that the General Assembly is capable of playing an influential role in the development of international law.

The Preparatory Commission of the United Nations transmitted to the

⁶ *The New York Times*, February 22, 1947, p. 4.

General Assembly in January, 1946, a Draft Convention on Privileges and Immunities with the recommendation that the General Assembly should make recommendations with reference to the application of Article 105 of the Charter or propose a convention for this purpose.¹ A subcommittee of the Legal (Sixth) Committee of the General Assembly recommended on January 26, 1946, that the General Assembly should adopt and propose to the Members of the United Nations a general convention.

The general convention on immunities and privileges of the United Nations (reported the sub-committee) is in a sense a convention between the United Nations as an Organization on the one part and each of its Members individually on the other part. The adoption of a convention by the Assembly would therefore at one and the same time fix the text of the convention and also import the acceptance by the United Nations as a body on their side of that text. On the other hand, each of the Members individually would only accept and become bound by the convention when it had deposited its formal instrument of accession or ratification, a step which the Member would only take after it had fulfilled such requirements as its constitution prescribed.²

After further elaboration and drafting by the Legal Sub-Committee, the General Assembly at its 31st plenary meeting on February 13, 1946, adopted a resolution reading as follows: "The General Assembly approves the annexed convention on the privileges and immunities of the United Nations and proposes it for accession by each Member of the United Nations." The statements that the General Assembly "approved" the Convention and "proposes it for accession" are repeated in the preamble of the Convention itself; and Sections 31, 32, 34, and 35 read as follows:

Section 31. This convention is submitted to every Member of the United Nations for accession.

Section 32. Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each³ instrument of accession.

Section 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

Section 35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations. . . .⁴

¹ See *Report of the Preparatory Commission of the United Nations*, PC/20, December, 1945, pp. 60, 72 ff.

² United Nations document A/C. 6/17, 26 January 1946, par. 5.

³ The French version reads: *à la date du dépôt par ce Membre de son instrument d'adhésion.*

⁴ See United Nations document A/64, 1 July 1946, Resolutions Adopted by the General Assembly During the First Part of Its First Session . . . , pp. 25, 27.

The adoption and approval of this convention by the General Assembly constitutes a special case, since Article 105 of the Charter stipulates that the "General Assembly . . . may propose conventions to the Members of the United Nations for this purpose" and the particular convention runs between the United Nations on the one part and each of its Members which accede on the other part. However, Article 62 of the Charter provides that the Economic and Social Council "may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence" and that "it may call . . . international conferences" on such matters, presumably with a view to drafting other treaties or agreements between states. Even aside from the specific authorizations of Articles 105 and 62, there seems to be nothing in the Charter to prohibit the United Nations, its organs and committees, from initiating, drafting, approving, "adopting," and proposing for accession international instruments dealing with a wide variety of subjects.

Admittedly, these procedures fall short of the enactment of binding rules of international law by an international legislature. Nevertheless, they provide a procedure of deliberate law-making such as is described by Judge Manley O. Hudson when he writes: "The term international legislation would seem to describe quite usefully both the process and the product of the conscious effort to make additions to, or changes in, the law of nations. . . . An instrument which changes or adds to the law applicable to the relations of the states which are parties to it, may take any of numerous forms."⁶

International legislation which requires widespread acceptance in order effectually to achieve its purposes can best be formulated in a multipartite instrument by periodic or permanent conferences, or by the organs of the the United Nations. Although juridically it might be immaterial whether a plan for the international control of traffic in narcotics, for example, were formulated in a network of identical bilateral treaties rather than in a single multipartite convention, efficiency clearly points towards the latter procedure. The United Nations Charter appears to provide adequate procedures for the progressive development of international legislation.

HERBERT W. BRIGGS

THE TASK OF THE INTERNATIONAL LAWYER

It is here suggested that the world is not moving toward an international legal order, and that the international lawyer, and all lawyers, have a responsibility for educating the people as to the need of such an order, and for concentrated effort toward solution of the problems connected with its establishment.

⁶ M. O. Hudson, *International Legislation*, Vol. I, pp. xiii, xv.

In a speech made at the time of his retirement, Secretary Byrnes said, out of a relevant experience:

The struggle for peace is the struggle for law and justice. It is a never-ending struggle. Law and justice can be developed and applied only through living institutions capable of life and growth. And the institutions must be backed by sufficient force to protect nations which abide by the law against nations which violate the law. . . .

And we must realize that unless the Great Powers are not only prepared to observe the law but are prepared to act in defense of the law, the United Nations Organization can not prevent war. . . .

History informs us that individuals abandoned private wars and gave up their arms only as they were protected by the common law of their tribe and their nation. So I believe that in the long run international peace depends upon our ability to develop a common law of nations which all nations can accept and which no nation can violate with impunity) . . .

It is significant that Mr. Byrnes, who had to deal with the political problems which harass the world, should have made it his valedictory theme that a common law of nations must be developed and given adequate support. It is to law and government that all human beings look for personal security and justice, and there is little doubt that the American people are in theoretical or vocal agreement with him.

Yet the trend today is away from an international legal order. In spite of urgent vocal demands that there be established a system of law strong enough to protect peoples at least against the use of force—which is a primary function of law—the trend of positive action is in the other direction. Statesmen follow the old patterns of conduct, and popular support takes the form of mere words rather than of deeds.

Various evidences indicate this trend. The makers of the United Nations—chief among whom was the United States—created a political rather than a legal system. It was only because of the insistence of China that the word “law” is to be found in the Charter at all; a clause was later added stating in words as weak as could be written the function of the General Assembly in developing international law. The Charter does not change the ancient practice by which a state can be bound by a new rule of law only with its own formal consent. In the provisions for the settlement of disputes no obligation was put upon any organ of the United Nations or upon any Member to submit legal disputes to legal settlement and the Security Council is not required to consult law in its handling of disputes. The International Court of Justice was not given by its Charter or Statute compulsory jurisdiction over any type of dispute and it was apparently intended that any Member could withdraw a dispute from consideration by the United Nations merely by asserting that it was a “domestic question.” The enforcement measures provided were not put behind law and can only be used against aggression, in which case they can be blocked by a veto.

None of the specialized agencies have the power to make, administer, or enforce law. The World Health Organization was the only one to which was given any power to issue regulations, and even this small grant was made subject to veto by any Member.

The practice of the United Nations has also disregarded law, even the constitutional law of the organization itself, and has rather sought solutions through political adjustment. The Security Council in its first case overrode the Charter in its desire to condemn the Soviet Union, and when the Secretary-General protested this procedure, it overrode his protest as well. In none of the cases before the Security Council has international law been called upon for solution of the dispute and no case has yet been referred to the Court. The General Assembly disregarded the Charter provision concerning domestic questions in the case of Spain and South Africa and sought solutions based upon its current emotions. In both cases the rule overridden was a restrictive one which perhaps should never have been put into the Charter but it was part of the constitutional law of the United Nations.

Finally, disregard for legal order is shown by the nationalistic conduct of various states of which the United States is here taken for illustration. It was the United States which put into the Charter the veto and the domestic questions clause, and our purpose in both cases was to enable us to escape submission to law. When we accepted the obligatory jurisdiction of the Court we did so only with reservations, one of which excepted domestic questions "as determined by the United States." The trusteeship system of the Charter was weakened by our demand for "strategic areas" and subsequently by our insistence upon control for national purposes over certain Pacific islands. We are now seeking bases all over the world and building up a military system in the Western Hemisphere. In the discussion of the grave question of support for Greece the suggestion came late that this might be an international responsibility, and the trend of our discussions has been toward national rather than international action to halt Russia. If it be said that the United Nations is not strong enough for the task no one seems to think seriously of making it strong enough. Our actions seem to indicate that we intend to rely upon our national strength rather than upon the United Nations and to go our own way rather than that of the United Nations. The former path is that of power politics which leads to war but there is no evidence to show that the American people are willing to organize themselves so as to be prepared for such a war. Thus we reach the completely frustrating conclusion that the American people will support neither national action nor a system of international law and order.

International law is at a critical stage today and its crisis is that of every human being. Like any other system of law, it must depend upon the support of those whom it serves and to the average individual inter-

national law is still a faraway and mysterious institution which he does not relate to his personal situation. He is drawn toward international law because reason and experience assure him that law is the answer; he hesitates to support it partly because he is skeptical of international law and partly because he is unwilling to make the concessions of personal or national freedom of action necessary to establish the reign of law among nations. The eternal struggle of law is here represented, but now in a phase surpassing any former instance, for no conflict among individuals can equal the terrible cost of conflict among nations. Never in the history of law has there been such a need and such an opportunity.

The problem must be resolved, in the long run, by the votes of individual citizens, and a large and difficult task of educating the people to support international law lies ahead. It would be expected that those who practice law as a profession would be leaders in the effort to extend law among nations but it is unfortunately true that the average domestic lawyer is among those who must be educated. No one has been more ready than he to ask whether "there is any such thing as international law" and to argue that it is not true law. Since lawyers are supposed to know about law their skepticism has influenced the masses of the people. The science of international law has developed largely outside of the ranks of the qualified practitioners of domestic law and it is a strange commentary upon the existing situation that rules for the practice of law forbid experts in international law, not qualified by the requirements for a domestic lawyer, to offer professional services, with the result that the practice of international law is limited to domestic lawyers who, with a few exceptions, have had no training in international law and are incapable of offering expert advice in that field.

There would seem to be two chief approaches to the education of the lawyer as to the need of international law. The law schools have long neglected this field and they should be encouraged to offer courses and to require some knowledge of international law from their students. An increasing number of law schools are now doing this and others should be urged to fall in line. This approach, however, does not reach the lawyer who is already practicing, and to await the results of such training would be to delay the educational process too long. It is therefore desirable that law associations of various kinds should call attention to the need for development of international law, and the efforts of the American Bar Association in this direction are to be heartily praised and encouraged.

The responsibility for this leadership falls primarily upon the international lawyers and they should devote much time, individually and collectively, to the task of popular education. It is they who must furnish the explanations, the reasons, the arguments; and it is they who must show how a rule of international law could operate to solve a particular current problem. With no purpose of demeaning studies of state succession, rec-

ognition, or such topics, it is suggested that it is today more important for the international lawyer to go on the radio, to write popular articles, and in other ways to show to the people the vital importance in their lives of the development of international law, and to show that this law can not grow without their active support. It is important also that they study current problems and offer solutions in terms of international law for such international questions as aviation, trade, competition between private enterprise and totalitarian systems, and so on, and the organization and constitutional and administrative law needed for each. The effort of the international lawyer must be more positive, more utilitarian, more educational, than it has been in the past.

CLYDE EAGLETON

THE ITALO-AUSTRIAN AGREEMENT ON THE AUSTRIAN SOUTH TYROL

Although Austria is not a Party to the Treaty of Peace with Italy of 1947, Part I of that document contains in Section III special clauses concerning Austria¹ and Annex IV² contains the text of the provisions agreed upon by the Austrian and Italian Governments concerning the Austrian South Tyrol. This Agreement must be viewed in the light of Austria's long fight for the Southern Tyrol, which goes back to the Paris Peace Conference of 1919 and even to 1914/15.

Two different problems are involved. The first problem is the territorial one.³ Italian irredentism had, long before the First World War, coveted those parts of the old Austria which were inhabited by an Italian-speaking population. That meant, in the case of Southern Tyrol, the province of Trento. In 1914/15 Italy, which had remained neutral at the outbreak of the war, carried on negotiations with Austria and, on the other hand, with Great Britain and France. Austria was unwilling to cede the Southern Tyrol but Great Britain and France promised to Italy in the secret London Treaty of April, 1915, among many other things, the cession of the Southern Tyrol up to the strategic frontier of the Brenner Pass as a prize for her entry into the war on the side of the Entente Powers.

President Woodrow Wilson's Fourteen Points, the agreed basis of the peace settlement, provided in Point 9: "A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality." Such clearly recognizable lines of nationality had existed for a thousand years. They passed through the Salurner Klause; south of it was the Italian-inhabited province of Trento, north of it the Austrian, German-speaking, Southern Tyrol including Meran and Bozen. Italy should have

¹ Article 10.

² September 5, 1946.

³ See Josef L. Kunz, *Die Revision der Pariser Friedensverträge*, Vienna, 1932, pp. 16-18, 209-210.

obtained the province of Trento. True, *vis-à-vis* Great Britain and France she could invoke the secret London Treaty, but the United States was not bound by this treaty, and Wilson's Point 9, in conformity with the basic principle of national self-determination, was clearly in favor of Austria's retaining the German-speaking part of the Southern Tyrol. The Italian delegation at the Paris Peace Conference prepared for a difficult battle with Wilson to obtain the frontier of the Brenner Pass, and was agreeably surprised to get it without difficulty, merely because President Wilson did not know the facts: "Already, the President had, unfortunately, promised the Brenner Pass boundary to Orlando, which gave to Italy some 150,000 Tyrolese Germans—an action which he subsequently regarded as a great mistake and deeply regretted. It had been done before he had made a careful study of the subject. . . ."⁴

The Austrian delegation at the Peace Conference had fought desperately, but unsuccessfully, for the Austrian Southern Tyrol.⁵ The Austrian National Assembly resolved, on September 6, 1919,⁶ that "Austria expects that the League of Nations will as soon as possible make good the incomprehensible injustice inflicted upon the Southern Tyrol."

This cession of the purely Austrian part of the Southern Tyrol, the German-speaking inhabitants of which had been Austrians for centuries, the land of Walther von der Vogelweide and of Andreas Hofer, a cession without a plebiscite, in open contradiction to Wilson's Point 9, remained during the whole inter-war period the main obstacle to good-neighborly relations between Austria and Italy. This cession led to the Austrian demand for territorial revision, to a real popular movement, especially in the Northern Tyrol, to demonstrations and symbolical acts, and to a rich literature on the subject.⁷

The second problem was that of the protection of the Austrian minority. The Paris Peace Conference did not impose special treaties for the protection of national minorities upon the Great Powers. Italy was, therefore, not bound by such treaty and the League of Nations could not interfere. Democratic Italy had, however, not only given such promises unilaterally; these promises were also made internationally binding by their acceptance by the Peace Conference and by their insertion in Clemen-

⁴ Ray Stannard Baker, *Woodrow Wilson and World Settlement*, New York, 1922, Vol. II, p. 146.

⁵ *Tätigkeitsbericht der österreichischen Friedensdelegation*, Vienna, 1919, Vol. II, pp. 210-212; see also the Austrian note on the Austrian Southern Tyrol: the same, Vol. I, pp. 140-141, 159-160.

⁶ *Tätigkeitsbericht*, Vol. II, p. 629.

⁷ F. Klein, *Die Revision des St. Germainer Vertrages*, Vienna, 1920; Grabmeyer, *Südtirol*, 1919; H. Volkeltini, A. Verdross, W. Winkler, *Deutsch-Südtirol*, Vienna, 1925; A. Verdross, *Die rechtliche Lage Deutsch-Südtirols*, 1926; P. Herre, *Die Südtiroler Frage*, Munich, 1927; Mayreiter, *Die Literatur über Südtirol*, Innsbruck, 1926.

ceau's note to the Austrian Peace Delegation of September 2, 1919,⁸ in addition the Austrian note of September 6, 1919,⁹ emphasized that "the National Assembly expects that the promises given in the reply will be fulfilled by the Powers."

Democratic Italy kept these promises. But with Mussolini's fascism came one of Europe's worst examples of forcible denationalization.¹⁰ Mussolini's thesis that Fascist Italy is not bound by declarations made by pre-fascist governments involved, of course, a violation of international law. This policy of Italianizing the German-speaking mountain peasants in the *Alto Adige*, as the Austrian Southern Tyrol was now called, naturally impaired Italo-Austrian relations still further. In the great debate on the Southern Tyrol in the Austrian Parliament on February 23, 1928, even a man so little nationalistic as the Austrian Chancellor Dr. Seipel had, in cautious words, to recognize the difficulties arising out of the treatment of the Southern Tyrolese by Italy.¹¹ Mussolini answered immediately by a speech in Rome, in which he coined the sarcastic phrase: Austria is what she is.

True, Mussolini's fear of an *Anschluss* made him, during the nineteen-thirties, the quasi-protector of Austria, and, in 1934, when Chancellor Dollfuss was murdered in the National-Socialist revolt in Vienna, Mussolini was ready to march into Austria to prevent her annexation by Hitler. But nothing was changed with regard to the Austrian minority in the Southern Tyrol.

When Austria was annexed in 1938 by a powerful Germany, Mussolini was unable to do anything against it. But Hitler, the fanatical nationalist, was capable of political expediency. In his Rome visit he solemnly promised Italy the retention of the Brenner Pass frontier, abandoning a mistreated German-speaking minority to its fate. By Hitler's treaties with Italy of 1939 and 1941 the Austrians in the Southern Tyrol were free to opt for return to the Reich but if they did not so opt they were held to "de-

⁸ *Ainsi qu'il résulte des déclarations très nettes faites par le Président du Conseil des Ministres d'Italie au Parlement de Rome, le Gouvernement Italien se propose d'adopter une politique largement libérale envers les nouveaux sujets de race allemande, pour ce qui concerne leur langue, leur culture et leurs intérêts économiques: Tätigkeitsbericht, Vol. II, p. 323.*

⁹ Same, Vol. II, p. 330.

¹⁰ See, apart from the literature quoted in note 7: S. M. Bouton and Ch. H. Herford, *English and American Voices about the German South Tyrol*, New York, 1925; Fingeller, *Die Wahrheit über Südtirol*, 1918-1926; C. H. Herford, *The Case of German South Tyrol against Italy*, London, 1926; F. K. Hennersdorf, *Südtirol unter italienischer Herrschaft*, 1926; Reut-Nicolussi, *Tyrol under the Axe of Fascism*, London, 1930; see also for a brief report, Josef L. Kunz, "Italian Rule in German South Tyrol" in *Foreign Affairs*, Vol. V (1927), pp. 500-505.

¹¹ Fascist Italy pursued the same policy of Italianization toward her minority of 400,000 Yugoslavs.

serve neither protection, nor the privilege of claiming collective rights as a German minority."

It is understandable that Austria hoped that the present peace settlement would correct Wilson's error. Austria was, therefore, deeply disappointed, as the Paris Council of Foreign Ministers in 1946, which took from Italy such overwhelmingly Italian cities as Pola and Trieste, decided against the return to Austria of the purely Austrian, German-speaking, part of the Southern Tyrol. The disappointment and the resentment grew deeper when the Council rejected the case for "minor frontier rectifications," presented by the Austrian Foreign Minister Dr. Karl Gruber, who had been invited to submit this case.

Although the "Treaty for the reestablishment of an independent and democratic Austria" is only in the making, the Peace Treaty with Italy of 1947 already lays down that Italy's frontier will remain at the Brenner Pass.¹² The only clause in favor of Austria is Part I, Section VIII, Art. 10, par. 1: "Italy shall enter into or confirm arrangements with Austria to guarantee free movement of passenger and freight traffic between the North and East Tyrol." This clause will remove a longstanding Austrian complaint.¹³

It was under these circumstances that Italy and Austria, at the Paris Peace Conference of 1946, both on the margins of the Conference, both representing countries in a terrible plight, began direct and independent negotiations, carried on by the Italian Prime Minister Alcide de Gasperi and the Austrian Foreign Minister Dr. Karl Gruber. These two men undoubtedly felt that the time had come to pave the way for good-neighborly relations between Italy and Austria. They must have felt that their two countries, although divided by historical events long antedating the First World War, were bound by common ties as countries of a great and ancient culture, as countries definitely belonging to Western Christian civilization.

These negotiations led to an Agreement, the original English text of which was signed by the two Parties at Paris on September 5, 1946; and transmitted to the Paris Conference on the following day, and which now constitutes Annex IV of the Treaty of Peace with Italy. This brief Agreement is basically a treaty for the protection of the German-speaking minority in the Southern Tyrol. From this point of view alone the Agreement is highly interesting. For current peace settlements have abandoned the idea of international treaties for the protection of national minorities.¹⁴

¹² Part I, Sec. I, Art. I, lays down that "The frontiers of Italy shall, subject to the modifications set out in Articles 2 (France), 3, 11 (Yugoslavia), 4, 22 (Free Territory of Trieste), be those which existed on January 1, 1938."

¹³ The British Foreign Secretary Bevin had, on June 4, 1946, called the complication of Austrian rail transport caused by the amputation of South Tyrol "silly": *The New York Times*, June 26, 1946, p. 10.

¹⁴ See this writer's Editorial Comment "The Future of the International Law for the Protection of National Minorities" in this JOURNAL, Vol. 39 (1945), pp. 89-95.

The Potsdam Agreement and the attitude taken by the United States and the United Kingdom at the Paris Peace Conference of 1946, an attitude in favor of assimilation rather than of perpetuation of racial minorities, is certainly very different from the attitude taken by the Paris Peace Conference of 1919. The new idea of the international protection of "human rights" is a different idea, which does not include specific minority rights, although the problem of the protection of minorities is bound to come up again within this new framework.¹⁵

The first paragraph of the Agreement deals with the protection of the German-speaking minority in the Austrian Southern Tyrol, no longer called *Alto Adige*, but "Bolzano Province." The German-speaking inhabitants of this province and of the neighboring bilingual townships of the Trento Province are assured of complete equality with Italian-speaking inhabitants, within the framework of special provisions to safeguard the ethnical character and the cultural and economic development of the German-speaking element. In particular they are granted elementary and secondary teaching in the mother tongue, parity of the German and Italian languages in public offices and official documents and equality of rights in candidacy for public office, with a view to reaching a more appropriate proportion of employment between the two ethnical groups. In order to abolish Fascist measures, they are granted bilingual topographic naming and the right to reestablish German family-names, which had been italianized in recent years. There should be mentioned here also point (a) of paragraph 3, by which the Italian Government pledges itself, in consultation with the Austrian Government and within one year from the signing of the present Treaty, to revise in a spirit of equity and broadmindedness the question of the options for citizenship resulting from the 1939 Hitler-Mussolini agreements.

The provisions of paragraph 1 are on the lines of the 1919 minorities treaties. The rights transcend "human rights"; they are specific minority rights. They reject the philosophy of assimilation; they are based not only on the preservation of the Austrian Tyrolese in their racial, linguistic, and cultural character, but they also provide means for the cultural and economic development of the Tyrolese as a different ethnical group from the Italians. They are also on the lines of the 1919 minorities treaties in that they grant only individual, not collective, minority rights; they protect the individuals, belonging to a national minority, but do not recognize the minority as such as a legal entity.

But paragraph 2 of the Agreement goes considerably farther than the 1919 minority treaties. It grants to the Austrian Tyrolese regional autonomy, the exercise of autonomous legislative and executive regional powers.

¹⁵ The United Nations Human Rights Commission has appointed a Subcommittee for the prevention of discrimination and protection of minorities.

Two ways of granting collective minority rights exist: cultural autonomy and territorial autonomy.¹⁶ Political or territorial autonomy, which is possible only in the case of a national minority, compactly settled in a certain area, was granted after the First World War to the Podkarpatska Rus, the Aaland Islands, and the Territory of Memel. It has a territorial basis, embraces all individuals, also those not belonging to the minority, living in this area and extends to all matters, not only to strictly cultural minority matters. It makes use, for the purpose of the protection of a national minority, of the device of decentralization by regional autonomy within a unitarian State.¹⁷ Cultural autonomy,¹⁸ on the other hand, is granted on a personal basis, to all individuals of the minority, wherever living in the state. It recognizes the national minority as such, but as a personal group, with autonomous competence restricted to cultural matters. A cultural autonomy can also be locally determined, as long as it is on a personal basis and restricted to all or certain cultural matters.¹⁹

The true nature of the regional autonomy of paragraph 2 of the Agreement will depend on the framework within which the said provisions of autonomy apply, a framework to be set up by Italy in consultation with local representative German-speaking elements. It looks like a new combination of cultural and territorial autonomy. It is territorial in so far as it seems not to be restricted to strictly cultural matters; but it is a locally determined cultural autonomy in so far as it does not apply to all, but only to the German-speaking, inhabitants of this area.

Par. 3 of the Agreement, apart from the revision of 1939 options and a pledge for free traffic between northern and eastern Tyrol—in the latter respect Italy is internationally bound by Article 10, par. 1, of the Peace Treaty—, envisages the mutual recognition of the validity of certain degrees and University diplomas, and, in the economic field, facilitating of Austro-Italian border traffic. But the Agreement contains nothing about an Italo-Austrian Customs Union, a project sometimes discussed in England, though strongly resented by the Soviet Union and the States under her influence.

The Italo-Austrian Agreement was praised as a principal achievement during, although outside of, the Paris Peace Conference of 1946, and was

¹⁶ See Josef L. Kunz, *Prolegomena zu einer allgemeinen Theorie des internationalen Rechtes nationaler Minderheiten* in *Zeitschrift für Öffentliches Recht*, Vol. XII (1932), pp. 221-272.

¹⁷ *La Tchécoslovaquie s'engage à organiser le territoire des Ruthènes au sud des Carpathes sous la forme d'une unité autonome à l'intérieur de l'état tchécoslovaque, munie de la plus grande autonomie compatible avec l'unité de l'état tchécoslovaque: Czechoslovak Minority Treaty, Art. 10.*

¹⁸ Granted by the Estonian Law of February 5, 1923.

¹⁹ Such as the "local autonomy concerning religious and school questions" granted to the "community of Szekler and Saxons in Transylvania" by Art. 11 of the Rumanian Minority Treaty.

hailed by the Western Powers as a "very constructive step." But the equitable and beneficial purpose of the Agreement and its success will depend on legal problems, influenced by political considerations. The minority rights of par. 1 depend on Italian legislation "already enacted or awaiting enactment." The regional autonomy of par. 2 depends equally on Italian legislation. The carrying out of par. 3 depends on Italian action and on the conclusion of further special Austro-Italian agreements. The Agreement is thus rather a program, awaiting implementation.

But the legal status of the Agreement itself has to be considered in the first line. This Agreement is, no doubt, an international treaty which has been signed, but needs, it seems, ratification by Italy and Austria. The ratification by Austria will not prove to be easy politically. For, after all, the Agreement implicitly renounces Austria's territorial claim, a question on which most Austrians and, particularly the North Tyrolese, feel very strongly. The Agreement did not encounter a good reception by the political parties of Austria and caused resentment in North Tyrol. It is, finally, to be noted that the Agreement is not put under the guarantee of the Allies, who, by Article 10, par. 2, simply "take note" of this Agreement.

And yet it is earnestly to be hoped that real good-neighborly relations between Italy and Austria can be established. This will be to the benefit of the South Tyrolese and to the benefit of the two countries. It will promote not only the material but also the spiritual regeneration of Europe, of which Austria and Italy form so important a part. It will benefit the world and the United Nations. A basic precondition for the success of the United Nations, more vital than discussions about its Charter, is the conclusion of sound and just post-war settlements, acceptable to all nations. A solid house must be built upon firm ground, not on shifting sand.

JOSEF L. KUNZ

THE INTERNATIONAL COURT OF JUSTICE AND THE INTERPRETATION OF MULTILATERAL TREATIES

One important function of the Permanent Court of International Justice was to interpret multilateral treaties and presumably the International Court of Justice will be called upon to perform the same function. Construction of the third proviso in the American Declaration of August 14, 1946, accepting compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice, is, therefore, important. This proviso states:

This Declaration shall not apply to . . . (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.

According to Manley O. Hudson, formerly member of the Permanent Court of International Justice:

It seems probable that the Court would be inclined to give to the words in the American Declaration the meaning that they have in Article 62; *i.e.*, a party to the treaty would be "affected by the decision" when it "has an interest of a legal nature which may be affected by the decision." Article 63, read with Article 62, seems to indicate that when a treaty or convention is being construed, every party to the treaty or convention is in the position of having such an interest. On this view, it seems necessary to conclude that, whether the phrase "affected by the decision" applies to the *parties to the treaty*, or only to *the treaty itself*, the Court would lack jurisdiction under the American Declaration unless every party to the treaty is a party to the proceeding before the Court.¹

Such an interpretation might deprive the Court of jurisdiction to interpret any multilateral treaty to which the United States was a party unless the United States gave specific consent in the particular case or unless all the parties to the treaty became parties to the case. Suppose State A, bound by the optional clause, initiates an action against State B, also bound by that clause, on an issue involving interpretation of a multilateral treaty to which the United States is also a party. The United States is notified under Article 63 of the Statute and has the right to intervene. Would it have the right, not only to intervene, but also to insist that the Court cannot exercise jurisdiction because the decision would affect its legal interest? Could it claim that State A, in initiating action against B, would in effect also be initiating action against the United States, and that the United States can, therefore, invoke the proviso to prevent the jurisdiction altogether? That would certainly be an extreme interpretation, and Judge Hudson suggests that the proviso could be invoked only if the United States were the original defendant or plaintiff in the case. He believes, however, that if the American reservation were generally copied by other states, "the usefulness of the Court as the great interpreter of world law would be greatly curtailed."

Dr. Francis O. Wilcox, who served as assistant to the Senate Foreign Relations Committee during its consideration of the Declaration, thinks that such an interpretation of the proviso "undoubtedly goes beyond the intent of the Senate"² and the present writer has suggested that the reservation was "designed to protect the interests of third states, parties to multilateral treaties involved in a case," an interpretation which might make the reservation "unnecessary in view of the right of such states to intervene under Article 63 of the Statute."³

Interpretation of the proviso, which is certainly far from clear, would seem to require that its intention be ascertained.⁴ Was the intention to

¹ *American Bar Association Journal*, Vol. 32, No. 12 (December, 1946), p. 832.

² This JOURNAL, Vol. 40 (1946), p. 715.

³ "Toward Rule of Law," in *Free World*, October, 1946, p. 50.

⁴ "The method of interpretation consists in finding out the connection made by the parties to an agreement, between the terms of their contract and the object to which

assure reciprocity of obligations in respect to the decision of the Court concerning a multilateral treaty: (1) among all parties to the dispute before the Court? (2) among all parties to the treaty? (3) among all parties to the treaty who have a legal interest in the dispute before the court?

(1) The first intention seems to have been in the mind of Mr. John Foster Dulles, from whose memorandum of July 10, 1946, submitted to the Senate Foreign Relations Committee, the proviso arose. Mr. Dulles' statement was as follows:

Reciprocity.—Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the Court.

Comment: The Court statute embodies the principle of reciprocity. It provides for compulsory jurisdiction only "in relation to any other state accepting the same obligation" (Article 36 (2)). Oftentimes, however, disputes, particularly under multilateral conventions, give rise to the same issue as against more than one other nation. Since the Court statute uses the singular "any other state," it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several parties in such dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the Charter provision (Article 94) requiring members to comply with the decisions of the Court in cases to which they are a party.⁵

The meaning of this statement is not clear. It is possible that Mr. Dulles was concerned with the derogation from the reciprocity contemplated by the optional clause if intervention by a third party not bound by that clause were permitted. In this connection Judge Hudson has written:

If two states are before the Court by reason of declarations made under paragraph 2 of Article 36 of the Statute, it would seem a derogation from the conditions of reciprocity in their declarations to allow intervention by a third State which has made no similar dec-

it is to be applied." C. C. Hyde, *International Law*, 1945 (2nd ed.), p. 1468. Hyde, following Anzilotti, insists that evidence of intent should control the meaning even when the instrument appears to be clear. Courts have frequently held that evidence of intent, external to the text itself, can be used only to discover the meaning or sense of the words or phrases used, that is, the fixed association between the symbol and some external object, not to discover directly the will or intention of the parties. With this limitation, courts have tended continually to allow a wider latitude in the use of extrinsic evidence. Wigmore, *The Law of Evidence*, Vol. 4, secs. 2458 and ff.; Hudson, *The Permanent Court of International Justice, 1920-1942*, p. 643 ff. (commenting on the frequent absence of intention in the formulas of international instruments); and Wright, "The Interpretation of Multilateral Treaties," in this JOURNAL, Vol. 23 (1929), p. 97.

⁵ *Compulsory Jurisdiction, International Court of Justice*, Hearings before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 79th Cong., 2nd Sess., July 11, 12, and 15, 1946, p. 44.

laration; the situation is not essentially different, however, when two States are before the Court under a special agreement and it allows intervention by a third State which is not a party to the agreement.⁶

But concern for this situation, which is inherent in the generally recognized right of interested third states to intervene,⁷ is difficult to construe from Mr. Dulles' words. Rather he seems concerned lest a third state, not bound by the optional clause, might present arguments in a case and yet not be bound by the decision. This is impossible under the Statute if the third state is a "party" before the Court.

States may be parties to a dispute before the Court because of the optional clause (Article 36 (2)), or because they have accepted the jurisdiction for the particular case or are bound by a special treaty conferring jurisdiction (Article 36 (1)). It is clear from Article 59 of the Statute that all parties to a dispute before the Court, whatever may have been the basis of the Court's jurisdiction over them, are bound and are alone bound by the decision. Thus the Statute itself provides that there is complete reciprocity of obligations in respect to the decision, among all the parties to the dispute before the Court. Article 94 of the United Nations Charter merely affirms this rule with reference to members of the United Nations and authorizes the Security Council to apply sanctions. The question whether an intervenor under Articles 62 or 63 of the Statute is a "party" remains, however, and this may have been the question on which Mr. Dulles wanted clarification. A question may also arise if a third state which ought to be bound by the decision fails to intervene.

(2) Mr. Wilcox specifically states that it was not the intention of the Senate to assure complete reciprocity of obligations concerning the Court's interpretation of a multilateral treaty among all parties to that treaty.⁸ Such an intention would seem to involve a confusion of the influence of a decision as *res adjudicata* among the parties and its influence as a precedent in future cases involving others. Article 59 of the Statute insists only upon the former influence and denies any absolute application of the rule *stare decisis*. It would certainly be extraordinary if the idea of complete reciprocity of obligations flowing from a judicial decision concerning a statute were held to apply to all persons bound by that statute. Such an idea would require, for example, that no American court could interpret an act of Congress unless all the persons bound by that act, perhaps 140,000,000, were also parties to the dispute before the court. There has been no difficulty in either municipal or international law in recognizing that only parties to the dispute before the court are legally bound by the decision, although many other persons may be affected by the fact that the decision will probably have an influence upon future interpretations of

⁶ Hudson, p. 420.

⁷ Several treaties recognizing this right are noted in Hudson, p. 420, note 81.

⁸ Above, note 2.

their rights under the law. It does not seem likely that the proviso had the purpose of requiring all parties to any treaty to become parties to every dispute about it.

(3) The writer believes that the proviso was intended to assure that states with a legal interest which will be directly affected by a decision concerning a multilateral treaty become, in every sense, parties to the dispute before the Court. It was, therefore, intended to clarify Articles 62 and 63 of the Statute of the Court by requiring (1) that a request under Article 62 shall not be decided arbitrarily, but by a judicial determination of the claim presented by the requesting state that it has "an interest of a legal nature which may be affected by the decision in the case"; (2) that, if such an interest is found or if a state intervenes under Article 63, the intervenor shall have the status of a party to the dispute under Article 59 and other articles of the Statute, and, if a member of the United Nations, under Article 94 of the Charter; (3) that a state which has a legal interest of such nature that it ought to be bound by the decision may be required to become a party; and (4) that if the Court does not apply these rules in a case brought against the United States by virtue of its declaration under the optional clause, the United States may deny the jurisdiction. With this construction the reservation would be clarified if it were expanded to read as follows:

This declaration shall not apply to . . . (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty, (with an interest of a legal nature which will be) affected by the decision, are also (permitted, or in exceptional circumstances required by the Court to intervene and thereby to become) parties to the case before the Court, or (2) the United States of America specially agrees to the jurisdiction.

It is probable that the first two propositions would be applied by the Court in any case, but Article 62 and perhaps even Article 63 of the Statute could be construed as giving the Court freedom to reject a request for intervention on political grounds⁹ and, furthermore, it is not clear whether an intervenor is a party to the dispute before the Court in every sense of the term. Article 59 of the Statute says only that "parties" are bound by the decision. Article 62 throws no light upon the effect of intervention other than what may be drawn from the meaning of the word

⁹ The almost identical text of Article 62 of the Statute of the Permanent Court of International Justice was designed to exclude "political intervention" but it has been suggested that intervention might be denied even if a legal interest is shown. Hudson, pp. 209, 420. With reference to Article 63, identical in the Statutes of the two courts, Hudson writes (p. 422): "The action by the Registrar (in notifying states under this article) does not necessarily commit the Court, either to allowing or to excluding the intervention." In practice there has been some flexibility in permitting intervention under this article.

"intervene" itself.¹⁰ Article 63 says that an intervenor under this Article is bound only by "the construction (of the treaty) given by the judgment," not by other aspects of the decision.¹¹

In the writer's opinion the interpretation here suggested is supported by the following considerations.

(1) With a proper grammatical construction of the proviso, the phrase "affected by the decision" modifies the subject of the clause "parties," and not the word "treaty."

(2) The intention of the state which makes it should be the standard for interpreting a unilateral instrument such as this.¹² It is clear that the proviso, though a declaration of the United States, emerged from the Senate. Consequently, evidence of the Senate's intention should be sought and may be provided by extraneous materials such as the statement made by Mr. Wilcox and the proposal made by Mr. Dulles from which the proviso developed. This evidence, it is believed, suggests the intention of assuring reciprocity of obligation among parties to a multilateral treaty with an interest in the dispute greater than that arising from their participation in the treaty. Thus Mr. Wilcox refers to a possible case involving interpretation by the Court of a treaty of mutual guarantee.

States A, B, C, D, and E are parties to the treaty. State A obtains judgment from the court that B has violated the treaty. This decision might obligate States C, D, and E to join with State A in application of sanctions against B, even though States C, D, and E were not actually involved in the original dispute. Clearly the legal rights and duties of States C, D, and E are so materially affected that they might well become parties to the case before the Court.¹³

Clearly such a situation would not be adequately dealt with by assuring that these three states should have the privilege of becoming parties by intervention. State A has an interest that they *shall* be bound by the decision.

¹⁰ A study of the drafting of this text in the Statute of the Permanent Court of International Justice does not clarify the intention in this regard, but Hudson writes (pp. 209, 421): "If the request is granted, the intervenor (under Article 62) becomes a party to the pending case on a footing with the other parties."

¹¹ An intervenor under Article 63 "becomes a party . . . in so far as the proceeding relates to the construction of the convention, and the construction given by the judgment will be binding upon it; but apparently it does not become a party generally for all purposes." Hudson, p. 422.

¹² While the proper evidence for the interpretation of general treaties, like statutes, may be general or legal usage, and the proper evidence for the interpretation of bilateral treaties, like ordinary contracts, may be mutual usage understood at the time by the parties, any evidence of individual intention may be useful for the interpretation of unilateral instruments like declarations or wills. Wigmore, Sec. 2453; Francis Wharton, *Commentaries on Law*, 1884, Sec. 612; Wright, this JOURNAL, Vol. 23 (1929), pp. 96-97; Harvard Research in International Law, *Treaties*, in this JOURNAL, Vol. 29 (1935), Supplement, p. 657; Hudson, pp. 643 and ff.

¹³ This JOURNAL, Vol. 40 (1946), p. 715.

(3) The broad construction suggested by Judge Hudson would nullify such a considerable part of the jurisdiction conferred by the declaration that it is not reasonable to assume that the construction was intended.

(4) The Court can usually assume that a state which fails to intervene under Articles 62 or 63 has no legal interest which may be affected by the decision of the case. It is certainly outside the usual province of a court to hunt for persons who have legal interests which they have failed to assert. But a party before it may, as in the case of a guarantee, have a legal interest that other parties to a multipartite treaty be bound by the decision.

(5) The right of intervention under Article 63 should not be assumed to mean that all parties to a multilateral treaty have an interest of a legal nature in every case in which the construction of the treaty is involved.¹⁴ The fact that intervention because of a legal interest in the case and intervention because of participation in a multilateral treaty are dealt with in separate articles and in a different manner creates a presumption against that construction. In municipal law it has never been held that every person who might be bound by a statute has a legal interest in every case which may involve a construction of that statute and there seems to be no authoritative pronouncement that every party to a multilateral treaty necessarily has a legal interest in every case involving its construction.¹⁵

The conceptions (1) of being a party to a case, (2) of having a legal interest affected by the decision, and (3) of being a party to a convention construed by a decision are distinct. The proviso under discussion does involve all of these conceptions but it should not be assumed that it identifies the second with the first (which would make the proviso in large measure meaningless) or that it identifies the second with the third (which would make it in considerable measure destructive of the declaration). It should be construed as requiring the Court to treat claims of legal interest judicially and to require that a party to a multilateral treaty involved if found to have a legal interest becomes a party to the case in the sense of Article 59 and other articles of the Statute.

The second paragraph in the proviso "or the United States of America

¹⁴ Hudson writes (p. 420) that the "interest of a legal nature" referred to in Article 62 "would seem to require a special interest, in addition to a State's general interest in the development of international law" but suggests (p. 422) that "Perhaps Article 63 may be considered as a special application of the general principle laid down in Article 62, and the fact that a State is a party to a convention to be construed may be regarded as establishing that State's legal interest so that a judgment by the Court will not ordinarily be required." See also note 1, above. There was a tendency to recognize that a state had a legal interest in the observance of Mandates because of its membership in the League of Nations even if no special interest of its own or of one of its nationals was involved in a particular instance but this may have arisen because of the assumption that all Members of the League had an interest in the protection of the inhabitants of these territories. Parties to the Treaty of Versailles not Members of the League had no such interest. Q. Wright, *Mandates under the League of Nations*, pp. 158, 473-6, 493-5.

specially agrees to jurisdiction" seems to mean that the United States can deny the jurisdiction of the Court in a case brought against it, if the Court has demonstrably failed to act in the manner suggested, that is, if the Court has arbitrarily refused to permit the intervention of a party to a multilateral treaty involved in the case or has refused to treat an intervenor as a party entitled to the rights and bound by the obligations of a party, or has failed to require a state which ought to be bound by the decision to become a party before it. This does not give the United States a right of unilateral veto as does the Proviso in the American Declaration dealing with domestic jurisdiction. It might, however, raise an unfortunate controversy between the United States and the Court as to whether the Court has properly interpreted the reservation. It suggests inadequate confidence in the judgment of the Court.

The veto on matters which the United States considers within its domestic jurisdiction is absolute, although the United States would be violating a moral obligation if it exercised this veto without adequate grounds for asserting that the matter in dispute was really essentially within its domestic jurisdiction. Under the proviso dealing with multilateral treaties, however, the United States can not deny the Courts jurisdiction unless it is clear that the Court has failed to live up to the requirements of the proviso. The Court itself has final decision on the meaning of the proviso under Article 36 (6) of the Statute: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Thus, the United States could not exercise a veto under this proviso unless the Court refused to decide the issue, or possibly if it reached a conclusion so obviously unjustified by the terms of the proviso that it would come within the category of cases in which, under international law a state may reject an arbitral award or judicial decision.¹⁵

It would, therefore, appear that if the Court gives the consideration to intervenors probably intended by Articles 62 and 63 of the Statute, treats them in every respect as "parties," and gives heed to direct interests of the parties that other participants in multipartite treaties involved be bound by the decision, it will be carrying out the requirements of the American proviso.

QUINCY WRIGHT

¹⁵ Do neutral states if parties to the Hague Convention regulating the conduct of war necessarily have a legal interest in any dispute concerning those conventions between belligerents who are parties? Before becoming a member of the League, did Germany, a party to the Treaty of Versailles which included the League of Nations Covenant, have a legal interest in every dispute between two members of the League concerning the interpretation of the Covenant? Practice suggests a negative answer to these questions. On types of multipartite treaties see Hudson, *International Legislation*, 1931, Vol. 1, p. xvi, and Wright, *Legal Problems in the Far Eastern Conflict*, 1941, pp. 85 and ff.

¹⁶ Moore, *Digest of International Law*, Vol. 7, pp. 59 and ff.; Hackworth, *Digest of International Law*, Vol. 6, pp. 125 and ff. But see Articles 60 and 61 of the Statute.

CURRENT NOTES

MEETING OF AMERICAN COUNCIL OF LEARNED SOCIETIES

The thirtieth meeting of the American Council of Learned Societies was held at Rye, New York, on January 30 and 31, 1947. In connection with this meeting the twenty-third Conference of the Secretaries of the Societies constituting the Council was held on January 29 and 30, at the same place. The Society was represented at the Council meeting by Mr. Amos J. Peaslee and the undersigned, as alternate for Professor G. G. Wilson, and at the Conference of Secretaries by its Secretary.

In addition to routine business the Conference of Secretaries gave a good deal of attention to proposed reorganization of the Council and urged that in this connection copies of the existing Constitution and Bylaws, together with the draft of the new Code of Laws and a clear statement of the differences between them and the purposes of the proposed change be placed in the hands of the Secretaries for the information of the Constituent Societies. Reference is made to these documents below. The work of the Committee on Personnel of the Conference Board of the four Research Councils (ACLS, SSRC, NRC, ACE) was reported by Mr. L. H. Hattery, and the Secretaries recommended, in view of the serious dearth of new recruits in various fields of the humanities and social sciences, that the problem of secondary education as a proper basis for college and graduate study be studied by the Council.

The activities of the Societies in relation to the formation of public opinion in their special fields were described by the Secretaries and discussed at length. The recent activities of the American Society of International Law in this connection were particularly interesting. It was recognized that the Societies must preserve their non-partisan and scientific character while discharging their responsibility for the proper education and direction of public opinion. The Secretary of the Conference was instructed to conduct an inquiry on this matter in coöperation with the Secretaries of the Societies and draft a report on the basis of their replies. Recent developments in the field of international cultural relations were discussed and the executive officers of the ACLS were requested to furnish all Secretaries with a copy of the results of the Paris Conference of UNESCO. It was felt that the American Societies should examine their relations with UNESCO and the ways in which they could contribute more effectively to the development of international contacts.

The principal problem for discussion by the Council was inevitably the proposed new Code of Laws which had been rejected at a meeting in Boston in September, 1946, by the narrow margin of one vote. The new code was

recommended by the Executive Committee as a step calculated to increase the effectiveness of the Council and to increase its capacity to meet the challenge of the post-war world. For its adoption it required a two-thirds vote of the Council and subsequent ratification by the majority of the Societies. After extended discussion the Council accepted the new Code by a vote of forty to two and referred it to the Societies for ratification. In this connection the recommendations of the Conference of Secretaries have been acted upon and the documents in question have already been received by the Secretary and distributed to the members of the Executive Council. It is expected that the Executive Council will consider the matter at its meeting on April 24 and that the question will come before the Society as a whole at its meeting on April 26.

Subsequently the Council discussed various aspects of its program, including linguistic research, international intellectual relations, history of science, services to the United States Government, especially the Department of State, and other matters. The program of the Council relating to fellowships and subsidies for publications was discussed at some length, and the Council adjourned to await results of the Societies' action on the new Code of Laws.

P. B. P.

INTER-AMERICAN ACADEMY OF COMPARATIVE AND INTERNATIONAL LAW

The second session of the Inter-American Academy of Comparative and International Law was held at Habana, Cuba, February 8-28, 1947. An average of about forty-five students was in attendance, about half of them Cubans and the other half from the United States, Ecuador, Guatemala, Honduras, Mexico, Panama and Venezuela. Diplomas for attendance at all the courses were delivered to thirty students and certificates of assiduity for attendance at special courses to fifteen students. Three regular courses of an hour's duration each were given on the week days for three weeks. They dealt with the subjects of "Trusts in American Comparative Law," by Dr. Ricardo J. Alfaro, of Panama; "Sources of International Law," by the undersigned; "Banking Law," by Lcdo. Germán Fernández del Castillo, of Mexico; "Principles of the Common Law," by Mr. Phanor J. Eder, of New York; "Principles of Latin-American Civil Law," by Dr. Luis Machado, of Cuba; "Formation of American Nationalities," by Dr. Victor A. Belaúnde, of Peru; and "Evolution of the Idea and Policy of Continental Solidarity and Defense," by Dr. Alberto Ulloa, of Peru. The lectures by Dr. Machado and the undersigned were given in English, the others in Spanish. In addition to the regular courses six round table conferences were held in the afternoons on special topics of public and private law. The lecturers and specially invited guests, as well as the students, participated in the round tables.

It will no doubt interest the readers of the JOURNAL to learn of the "conclusions" of the Academy following the round-table discussions on the subjects of public international law. The first of these dealt with "Diplomatic Protection of Citizens Abroad." Our fellow Editor, Dr. Edwin Borchard, of Yale University, was scheduled to open this round table but unfortunately was unable to attend. He sent his paper, however, and it was read and thoroughly discussed. The conclusion reached was as follows:

I. The Inter-American Academy of Comparative and International Law expresses its juridical opinion that the diplomatic protection of citizens abroad should be incorporated in a general international system for the defense of the rights of man.

II. Diplomatic protection should be subject to the following limitations:

(a) Diplomatic protection can not be initiated unless the alien has exhausted his legal remedies. His government shall not adopt any measures of coercion nor resort to force.

(b) In case of international delay in the administration of justice or of a judgment contrary to the bill of rights recognized in the constitutions of a majority of countries or in public international instruments, the protecting government may open direct negotiations or appeal to other pacific means authorized by international law, for the settlement of the dispute. If such means fail, then the dispute may be submitted to arbitration or to a competent international court.

The second subject in this series of round tables was "International Defense of the Rights of Man." The opening report was presented by Dr. Ricardo J. Alfaro, Minister of Foreign Affairs of Panama. It likewise gave rise to animated debate, and the final conclusion reached was as follows:

I. It is indispensable to define the essential rights and liberties of man in an international declaration.

II. It is indispensable to include in the declaration to be adopted the three categories of universal rights: political, social, and economic.

III. It is indispensable to set up mechanisms for the promotion and protection of human rights everywhere.

The final subject of round-table discussion on public law was entitled "The Defense of the Constitution." It was presented by Dr. Raúl de Cárdenas, Vice-President of the Republic of Cuba and an outstanding authority on the subject of constitutional law. Dr. Cárdenas dealt with the part played by the judiciary in upholding constitutional rights and paid high tribute to the contribution of the United States in the introduction and spread of this vitally important principle of political science. The following conclusions were reached on this subject:

1. The system of annulling, through the courts of justice, dispositions of a general character and acts of authority that are incompatible with the Constitution, is to be maintained.

2. Arguments of public convenience adduced in accordance with the Constitution to limit rights recognized therein, may be impugned on the ground of unconstitutionality.

3. Actions claiming that a given legal provision is unconstitutional, may be public or private.

4. A declaration of unconstitutionality annuls the provision or act that is impugned.

5. The courts of justice should be invested, through some short and simple procedure, with power to render null and void any measure that is unlawfully opposed to a right enjoyed by individuals.

The entire proceedings of the meeting, including the texts of the lecture courses, the papers presented at the round tables, as well as the discussions and conclusions, will be published as soon as the editing of the *Proceedings* can be completed.

The meeting was solemnly opened in the Hall of the House of Representatives at the Capitol building by the Vice-President of the Republic, who substituted at the last minute for the President. Also in attendance were the Prime Minister of Cuba, the Secretary of State, other Cabinet officers, and the Mayor of Habana. In addition to the undersigned, Mr. Carl Rix, President of the American Bar Association, made a brief address. The round-table discussions were held in a large committee room in the Capitol building. The courses of instruction were held in the Academy of Sciences.

Plans are being made to hold the third session of the Academy at Habana in February, 1948. In general, students are required to have the equivalent of a bachelor's degree in law, political science, government or Latin-American relations to qualify for admission to the Academy. Persons interested in attending the next session should communicate with Dr. Enrique Dolz, Secretary-General, Lamparilla 114, Habana, Cuba.

GEORGE A. FINCH

Editor-in-Chief

NEW QUARTERLY ON INTERNATIONAL ORGANIZATION

Readers of this JOURNAL will be interested in the appearance of a new quarterly published by the World Peace Foundation entitled *International Organization*. Such an event testifies to the great growth of interest in the subject, as discussed in these pages already.¹ Mr. Raymond Dennett is the managing editor of the new publication and there is a very capable Board of Editors, most of whose members are members of the American Society of International Law. The new publication is intended to carry analytical and interpretative articles, factual summaries, documents, and bibliography con-

¹ This JOURNAL, Vol. 39 (1945), p. 803.

cerning the field with which it deals. Articles in the first number deal with the transition from the League of Nations to the United Nations, the peace treaties of 1946, and the genesis of the veto power in the Security Council. To judge by the first number, issued in February, the factual summaries are intended to occupy the great bulk of space in the review; indeed the reader may wonder whether quite as heavy a load of such matter is useful in the long run, inasmuch as the current factual summary becomes of relatively little importance in a short time. The old question of the value of bibliography without critical comment on the works cited arises also.

The appearance of the new quarterly should serve to relieve this Journal of some of the pressure felt recently for space for questions somewhat removed from the central legal interest of most of its readers; very informal working arrangements have already been developed with the new quarterly in this connection.

P. B. P.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1946—FEBRUARY 15, 1947

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *G. B. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *N. Y. T.*, New York Times; *P. A. U.*, Pan American Union Bulletin; *S. C. O. E.*, United Nations Security Council Official Records; *T. I. A. S.*, U. S. Treaties and other International Acts Series; *U. N. W. B.*, United Nations Weekly Bulletin.

July, 1946

- 4-January 2, 1947 PHILIPPINE REPUBLIC—UNITED STATES. The agreement concerning trade and related matters, signed at Manila, July 4, was proclaimed on Dec. 17 by President Truman. *D. S. B.*, Dec. 29, 1946, pp. 1190. The supplementary protocol of Oct. 22, 1946 was proclaimed by President Truman on Jan. 1, 1947. The Agreement entered into force Jan. 2, 1947. *D. E. B.*, Jan. 19, 1947, p. 129.

November, 1946

- 16 PHILIPPINE REPUBLIC—UNITED STATES. Signed air transport agreement at Manila. *D. S. B.*, Dec. 1, 1946, p. 1021; *N. Y. T.*, Nov. 19, 1946, p. 15. Text, with annex: *U. S. Aviation Reports*, 1946, pp. 570-574.
- 16 PHILIPPINE REPUBLIC—UNITED STATES. Signed Treaty of Conciliation at Manila on Nov. 16. *D. S. B.*, Feb. 9, 1947, p. 254. Text: *Cong. Rec.* (daily), Jan. 31, 1947, p. 768.
- 16/December 13 REPARATIONS (Japanese). U. S. reparations representative, Edwin W. Pauley, submitted recommendations in a report to President Truman. Summary: *N. Y. T.*, Nov. 17, 1946, pp. 1, 50; *D. S. B.*, Nov. 24, 1946, pp. 957-959. Additional details: *N. Y. T.*, Nov. 29, 1946, p. 16. Excerpt from Mr. Pauley's report on Manchuria: *D. S. B.*, Dec. 22, 1946, pp. 1154-1155.
- 17 FRANCE—SIAM. Signed in Washington an agreement and protocol annulling the Tokyo treaty of May 9, 1941, between Siam and France, and laying groundwork for the settlement of all questions at issue between them. *N. Y. T.*, Nov. 19, 1946, p. 18; *London Times*, Nov. 19, 1946, p. 3. Texts: *U. N. Doc. S/199*, pp. 3-8; *S. C. O. E.*, 1st yr., 2d ser., Supplement No. 9, pp. 163-167.
- 18 CHILE—YUGOSLAVIA. Signed treaty at Santiago, establishing diplomatic and commercial relations. *New Times* (Moscow), Dec. 1, 1946, p. 31.
- 18/December 5 CANADA—UNITED STATES. Exchanged notes interpreting the 1817 pact (Rush-Bagot) in regard to navies on the Great Lakes. *N. Y. T.*, Dec. 14, 1946, p. 6. Text: *D. S. B.*, Dec. 22, 1946, pp. 1152-1153; *Canada Treaty Ser.*, 1946, No. 40.

- 19 NARCOTIC DRUGS. U. N. General Assembly adopted resolution transferring to the U. N. control over the drug traffic, formerly exercised by the League of Nations. *N. Y. T.*, Nov. 20, 1946, p. 15. Text of resolution: U. N. *Doc. A/64/Add. 1*, p. 81.
- 19-December 10 U. N. E. S. C. O. General conference opened at Paris on Nov. 19. *N. Y. T.*, Nov. 20, 1946, p. 5; *London Times*, Nov. 20, 1946, p. 3. U. S. delegates: *D. S. B.*, Oct. 27, 1946, p. 779. Advisers: *D. S. B.*, Nov. 17, 1946, pp. 894-895. Elected Leon Blum president. *N. Y. T.*, Nov. 21, 1946, p. 3; *London Times*, Nov. 21, 1946, p. 3. Adopted resolution Nov. 21 in the general committee that the "Spanish Republic" be represented by "an honorary guest." *N. Y. T.*, Nov. 22, 1946, p. 18. Julian Huxley was elected Director-General for a 2-year term. *N. Y. T.*, Dec. 7, 1946, p. 8. He was officially installed Dec. 7. *N. Y. T.*, Dec. 8, 1946, p. 18. Approved Dec. 9 a full program for 1947 in which mass education and communications were emphasized. *N. Y. T.*, Dec. 10, 1946, p. 4. Text of Report of Program Commission: *Doc. UNESCO/C/23/46 (Rev.)*. Approved Dec. 10 a budget of nearly \$7,000,000. Text: *Doc. UNESCO/C/Adm. & Jur./S.C.Ad & Fin./26*. The 1947 meeting will be held in Mexico City, *N. Y. T.*, Dec. 11, 1946, p. 18; *London Times*, Dec. 11, 1946, p. 3. Radio address by Mr. Benton, chairman of the U. S. delegation, on Dec. 23 summarized the work of the conference. Text: *D. S. B.*, Jan. 5, 1947, pp. 20-22. Preliminary report: *D. S. B.*, Jan. 12, 1947, pp. 53-56. Report on the meeting by Congressman Chester E. Mellow: *Cong. Rev. (daily)* Mar. 6, 1947, pp. 1815-1820.
- 19-December 12 UNITED NATIONS. Economic and Social Council. United States, Venezuela, New Zealand and Lebanon were elected members by the General Assembly on Nov. 19. *N. Y. T.*, Nov. 20, 1946, p. 6. White Russia was elected a member on Dec. 7 while Belgium withdrew its membership on Dec. 12, followed by the election of Turkey and the Netherlands. *N. Y. T.*, Dec. 8, 1946; p. 16; Dec. 13, p. 11.
- 19-December 16 UNITED NATIONS. General Assembly. Voted to send back to the Security Council for reconsideration the membership applications of Albania, Ireland, Outer Mongolia, Portugal and Trans-Jordan. *N. Y. T.*, Nov. 20, 1946, p. 1. Adopted on Dec. 11 a resolution on progressive development of international law and its codification. Text: U. N. *Doc. A/64/Add. 1*, pp. 187-188; *American Bar Assoc. Journal*, Jan. 1947, p. 91. Text of Secretary Byrnes' address of Dec. 13 revealing general figures on U. S. forces in non-enemy countries. *N. Y. T.*, Dec. 14, 1946, p. 2; U. N. *Doc. A/P.V./62*, pp. 638-645. Approved Dec. 15 establishment of the International Refugee Organization. Admitted Siam as 55th member. Rejected suggestion that the 1947 session be held in Europe, and decided to convene at Lake Success, Sept. 16, 1947. The session was adjourned. *N. Y. T.*, Dec. 17, 1946, pp. 1, 4; *London Times*, Dec. 17, 1946, p. 3. Summary of chief results: *London Times*, Dec. 16, 1946, p. 4; *U. N. W. B.*, Dec. 31, 1946, pp. 2-19. Approved Dec. 14, agreements with I. L. O., U. N. E. S. C. O., F. A. O. and International Civil Aviation Organization, "provided that in the case of the agreement with I. C. A. O. that organization complies with any decision of the Assembly regarding Franco Spain." Text of resolution: U. N. *Doc. A/64/Add. 1*, p. 78. Texts of agreements: U. N. Docs. A/72, A/77, A/77/Corr. 1 and 2, A/78, A/106, A/106/Corr. 1; T/8. Disposition of items on the agenda of the 2d part of the 1st session: U. N. *Doc. A/283*.

- 19-February 13, 1947 UNITED NATIONS. Security Council. Belgium, Colombia and Syria were elected for 2-year terms beginning Jan. 1947, replacing Mexico, Egypt and the Netherlands. *N. Y. T.*, Nov. 20, 1946, p. 1. On Nov. 29 the Council adopted a General Assembly recommendation calling on it to reconsider the applications of Trans-Jordan, Albania, Outer Mongolia, Portugal and Ireland. *N. Y. T.*, Nov. 30, 1946, p. 4. On Dec. 3 the Greek Ambassador handed a 40-page complaint to Secretary General Lie asking help in quieting the situation along Greece's northern border, which was due to Yugoslav, Albanian and Bulgarian action. Text: *U. N. Doc. S/203*; *S. C. O. R.*, 1st yr., 2d ser. Supplement No. 10, pp. 169-190. Unanimously approved Siamese application for membership on Dec. 12. *N. Y. T.*, Dec. 13, 1946, pp. 1, 5. Although Albania and Bulgaria are not members of the United Nations, the Council decided Dec. 16 to admit their representatives to discussions of Greek charges. *N. Y. T.*, Dec. 17, 1946, p. 1. Voted Dec. 19 to send a mission to investigate the Greek situation. *N. Y. T.*, Dec. 20, 1946, pp. 1, 16; *London Times*, Dec. 21, 1946, p. 3. Text of resolution: *D. S. B.*, Jan. 5, 1947, pp. 23-24. *U. N. Doc. S/P.V./87*, Annex B. Voted Jan. 20 to place on the agenda the British complaint against Albania, filed Jan. 9. *London Times*, Jan. 21, 1947, p. 6; *N. Y. T.*, Jan. 21, 1947, p. 1. Text of complaint, etc.; *N. Y. T.*, Jan. 12, 1947, p. 42. Text of correspondence laid before Security Council: *U. N. Doc. S/247*; *S. C. O. R.*, 2d yr., Supplement No. 3, pp. 35-46. Adopted Feb. 10 a resolution that the Balkan investigating commission had exceeded its authority in asking the Greek Government to postpone execution of condemned political prisoners. *N. Y. T.*, Feb. 11, 1947, p. 8. Text: *U. N. Doc. S/P.V./100*, pp. 7-8. Voted to set up a commission on armaments, charged with preparing within 3 months a plan for the general regulation and reduction of armaments and armed forces but with proper safeguards. *London Times*, Feb. 14, 1947, p. 3; *N. Y. T.*, Feb. 14, 1947, pp. 1, 4. Text of resolution: p. 4; *U. N. W. B.*, Feb. 25, 1947, p. 145. *U. N. Doc. S/268/Rev. 1/Corr. 1*.
- 20-December 2 WHALING CONFERENCE. Met in Washington with representatives from 19 nations to amend and codify existing international regulations governing the conduct of whaling. *D. S. B.*, Dec. 15, 1946, p. 1101. At final session 13 nations signed a convention, designed to regulate the catch and eventually to increase the number of whales in the Antarctic region. *N. Y. T.*, Dec. 3, 1946, p. 11. Text of Final Act, Convention and Protocol: International Whaling Conference Doc. 64 (Dec. 1, 1946); *G. B. M. S. No. 3* (1947), Cmd. 7043.
- 21 NETHERLANDS-UNITED STATES. Exchanged notes at Washington agreeing that both countries will abstain from adopting any measures in their commercial policies prejudicial to the objectives of the proposed Trade and Employment Conference. Text: *D. S. B.*, Dec. 15, 1946, pp. 1105-1109.
- 22-January 29, 1947 POLISH ELECTION. American and British notes of Nov. 22 reminded Poland of the pledge in the Yalta agreement for "free and unfettered" elections. *N. Y. T.*, Nov. 23, 1946, p. 5. Text of U. S. note: *D. S. B.*, Dec. 8, 1946, p. 1057; *N. Y. T.*, Nov. 26, 1946, p. 20. Polish note of Dec. 19 rejected British note and accused British Government of failure to fulfill "Potsdam and Yalta obligations to Poland 'in deed or spirit'." *N. Y. T.*, Dec. 22, 1946, pp. 1, 33. Excerpts: *London Times*, Jan. 15, 1947, p. 2. On Jan. 5 U. S. sent identical notes to Great Britain and Russia asking joint action in demanding that the Polish Government permit free political campaigning for Jan. 19 elections. Text: *D. S. B.*, Jan. 19, 1947, pp. 135-136; *N. Y. T.*, Jan. 8, 1947, p. 6. U. S. note, delivered to the Polish Government on Jan. 9, charged violation of the

agreements of Yalta and Potsdam because of continued policy of suppression and intimidation of certain political groups. Text: *N. Y. T.*, Jan. 10, 1947, pp. 1, 7; *D. S. B.*, Jan. 19, 1947, pp. 134-135; *Cong. Rec.* (daily) Jan. 10, 1947, pp. 227-228. Substance of Soviet note of Jan. 13 to U. S.: *D. S. B.*, Jan. 26, 1947, p. 164. President Bierut rejected U. S. and British charges of political oppression on Jan. 14. *N. Y. T.*, Jan. 15, 1947, p. 19. British reply to Polish note of Dec. 19 was delivered Jan. 14. *London Times*, Jan. 15, 1947, p. 3. On Jan. 15 the U. S. received the only Polish reply to 3 U. S. notes. It rejected American protests. *N. Y. T.*, Jan. 16, 1947, p. 17; *London Times*, Jan. 16, 1947, p. 4. Department of State's formal statement of Jan. 28, based on American Embassy's observation, charged intimidation in the elections. Text: *N. Y. T.*, Jan. 29, 1947, p. 19; *D. S. B.*, Feb. 9, 1947, p. 251. Final official figures of allocation of Diet seats: *London Times*, Jan. 30, 1947, p. 3.

26-January 16, 1947 KOREAN OCCUPATION. U. S. Department of State announced Jan. 10, an exchange of notes of Nov. 26 and Dec. 24 between Russian and U. S. army commanders in Korea on the possibility of re-opening talks regarding a trusteeship for Korea prior to self-government. *N. Y. T.*, Jan. 11, 1947, p. 6. Texts: *D. S. B.*, Jan. 26, 1947, pp. 168-173. Text of Jan. 4 statement by Lieut. General Hodge on U. S. policy toward Korea: *D. S. B.*, Jan. 19, 1947, pp. 128-129. Text of General Hodge's statement of Jan. 16 on activities of dissident Korean groups: *D. S. B.*, Feb. 2, 1947, p. 210.

27 GREAT BRITAIN—SWEDEN. Signed agreement at London relating to air services. Text, with annex: *G. B. T. S. No. 68* (1946), *Cmd. 7008*.

27/December 27 ALBANIA—YUGOSLAVIA. Signed economic and financial agreement on Nov. 27. *London Times*, Dec. 12, 1946, p. 4. Ratified Dec. 27 by the Yugoslav Parliament. *N. Y. T.*, Dec. 28, 1946, p. 7. The text was published Dec. 29. It provided for the formation of a common tariff and customs territory, unification of state planning and monetary equality. *C. I. E. D.*, Dec. 23, 1946/Jan. 12, 1947, p. 26.

27-December 13 UNITED NATIONS. Narcotic Drugs Commission. Representatives of 15 nations held first session at Lake Success. *D. S. B.*, Dec. 8, 1946, p. 1050. Text of resolution adopted Nov. 29 on abolition of opium smoking in the Far East: *D. S. B.*, Dec. 29, 1946, p. 1170. Session ended Dec. 13. List of members, and accomplishments of the Commission: *D. S. B.*, Jan. 12, 1947, pp. 91-104. Text of Report to the Economic and Social Council: *U. N. Doc. E/251*.

28-January 22, 1947 FRANCE. First National Assembly of the Fourth Republic opened Nov. 28. President-Foreign Minister Bidault resigned. *N. Y. T.*, Nov. 29, 1946, p. 6. On Dec. 2 the Electoral College chose most of the members of the Council (second part of the Parliament). *N. Y. T.*, Dec. 9, 1946, p. 10. Leon Blum was chosen as President-Premier of the interim government on Dec. 12. *N. Y. T.*, Dec. 13, 1946, p. 9; *London Times*, Dec. 13, 1946, p. 4. The Council of the Republic, the upper chamber under the new Constitution, held its inaugural session Dec. 24. This meeting marked the end of the provisional régime and the entry into force of the Constitution. *London Times*, Dec. 27, 1946, p. 3; *N. Y. T.*, Dec. 25, 1946, p. 10. Vincent Auriol was elected first President on Jan. 16. *N. Y. T.*, Jan. 17, 1947, p. 1; *London Times*, Jan. 17, 1947, p. 4. On Jan. 22 Paul Ramadier formed a coalition Cabinet, giving the first complete constitutional government in seven years. *N. Y. T.*, Jan. 23, 1947, p. 1. Members of the Cabinet: *London Times*, Jan. 23, 1947, p. 4.

- 29 ARGENTINA—BRAZIL. Signed commercial agreement in Buenos Aires. Text, in Spanish: Boletín del Ministerio de Relaciones Exteriores y Culto de la Nación Argentina, Nov. 1946, pp. 17-25.
- 29 CREDITS—LIECHTENSTEIN. U. S. Treasury unblocked assets of Liechtenstein. *N. Y. T.*, Nov. 30, 1946, p. 23.
- 30 SPANISH RECOGNITION (Republican Govt. in Exile). Announced by Bulgaria. *N. Y. T.*, Dec. 1, 1946, p. 27.

December, 1946

- 2 GERMAN OCCUPATION. Great Britain and United States signed in New York an agreement for the economic merging of their zones of occupation, designed to make the areas self-sustaining in 3 years. *N. Y. T.*, Dec. 3, 1946, pp. 1, 12. Text of joint Anglo-American statement, containing the Memorandum of Agreement: *N. Y. T.*, Dec. 4, 1946, p. 17; *London Times*, Dec. 4, 1946, p. 3. Text of Memorandum of Agreement: *U. S. No. 2* (1946), *Cmd.* 5984; *D. S. B.*, Dec. 15, 1946, pp. 1102-1104; *G. B. T. S.*, No. 65 (1946), *Cmd.* 7001.
- 2-13 INTER-AMERICAN COMMISSION OF WOMEN. Fifth annual assembly took place in Washington. All member nations were represented for the first time. The next meeting will be held at Bogotá, December, 1947. *N. Y. T.*, Dec. 14, 1946, p. 4. Report on the meeting: *D. S. B.*, Jan. 12, 1947, pp. 59-60.
- 3 AUSTRALIA—UNITED STATES. Signed an air transport agreement at Washington. *N. Y. T.*, Dec. 5, 1946, p. 28; *D. S. B.*, Dec. 15, 1946, p. 1113. Text with annex: *U. S. Aviation Reports*, 1946, pp. 543-561.
- 3 FRANCE—GREAT BRITAIN. Signed financial agreement in London. *N. Y. T.*, Dec. 5, 1946, p. 15. Text: *G. B. T. S. No. 57* (1946), *Cmd.* 6988. Also signed agreement concerning war damage compensation. Text: *G. B. T. S. No. 60* (1946), *Cmd.* 7012.
- 3 NEW ZEALAND—UNITED STATES. Signed air transport agreement at Washington. *D. S. B.*, Dec. 15, 1946, p. 1113. Text with annex: *U. S. Aviation Reports*, 1946, pp. 543-561.
- 3/5 PRISONERS OF WAR. U. S. notes to France, Belgium, Netherlands and Luxembourg requested the release by October, 1947, of all German prisoners who had been loaned to those countries. *C. I. E. D.*, Nov. 25/Dec. 8, 1946, pp. 732, 745. Text of Secretary Byrnes' statement of Dec. 5: *D. S. B.*, Dec. 15, 1946, p. 1106.
- 3-6 INDIA. Round table conference of British Government, Moslem and Hindu leaders took place in London. *London Times*, Dec. 4, 1946, p. 4. The conference ended in failure as Great Britain made it clear that no constitution drawn without the participation of the Moslems would be acceptable. *N. Y. T.*, Dec. 7, 1946, p. 1. Text of British statement: p. 12; *London Times*, Dec. 7, 1946, p. 4.
- 3-18 AUSTRIAN OCCUPATION. Allied Council agreed Dec. 3 to reduce occupation costs to 15% of the Austrian budget after Jan. 1 and to divide them nearly equally among the Allies. *N. Y. T.*, Dec. 4, 1946, p. 27. Allied Council reached on Dec. 13 complete agreement on main issues of the Austrian denazification law and food distribution. *N. Y. T.*, Dec. 14, 1946, pp. 1, 5; *London Times*, Dec. 14, 1946, p. 3. British decision was announced Dec. 18 to make grants and to offer credits up to £10,000,000 for the economic recovery of Austria. *London Times*, Dec. 19, 1946, p. 4.
- 4 GREAT BRITAIN—NETHERLANDS. Signed agreement at London concerning the supply of certain aircraft and equipment. Text: *G. B. T. S. No. 59* (1946), *Cmd.* 7011.

5/11 IRAN—SOVIET RUSSIA. Iranian note complained to the U. N. Security Council that Russia had issued a warning against moving troops into the Azerbaijan province to police elections there. Text: *N. Y. T.*, Dec. 7, 1946, p. 8; *U. N. Doc. S/204*. The régime in Azerbaijan abandoned Dec. 11 its defiance of Premier Qavam and signified its willingness to allow Government troops to enter during the elections. *N. Y. T.*, Dec. 12, 1946, p. 1.

5-January 17, 1947 ATOMIC ENERGY. Texts of Mr. Baruch's address to the U. N. Atomic Energy Commission and altered U. S. proposals for control: *N. Y. T.*, Dec. 6, 1946, p. 17; *D. S. B.*, Dec. 15, 1946, pp. 1088-1091. Summary: *London Times*, Dec. 7, 1946, p. 3. On Dec. 12 President Truman named 9 scientists as members of the U. S. General Advisory Committee to assist the previously named civilian committee. List: *N. Y. T.*, Dec. 13, 1946, p. 2. The U. N. Commission voted Dec. 20 to refer to its working committee Mr. Baruch's demand for immediate approval of U. S. proposal for international control. *N. Y. T.*, Dec. 21, 1946, p. 1; *London Times*, Dec. 21, 1946, p. 3. On Dec. 27 Mr. Baruch reiterated U. S. position not to disclose atomic secrets "under any system which is open to nullification of punishment by what can be called a subterfuge." *N. Y. T.*, Dec. 28, 1946, p. 1. Text of remarks: p. 4. By a 10-0 vote the Commission adopted its first report to be sent to the Security Council. *London Times*, Dec. 31, 1946, p. 4; *N. Y. T.*, Dec. 31, 1946, pp. 1, 2. Text of Mr. Gromyko's statement: p. 2. Text of recommendations: p. 3. Text of Report: *U. N. Doc. AEC/18/Rev. 1*; Dept. of State. *U. S. and the United Nations Report Ser. No. 8*. Excerpts: *D. S. B.*, Jan. 19, 1947, pp. 106-112. On Dec. 31 President Truman signed Executive Order changing U. S. atomic energy production from military to civilian control. *N. Y. T.*, Jan. 1, 1947, p. 28. Mr. Baruch and fellow members of the U. S. delegation resigned from the Commission Jan. 4. *N. Y. T.*, Jan. 5, 1947, pp. 1, 27; *London Times*, Jan. 6, 17 in succession to Mr. Baruch. *Cong. Rec. (daily)* Jan. 17, 1947, p. 450; *D. S. B.*, Jan. 26, 1947, p. 155.

8 ARGENTINA—CZECHOSLOVAKIA. Signed trade agreement. *New Times (Moscow)*, Dec. 15, 1946, p. 32.

Dec. 8 Following complaints by India concerning treatment of its nationals in South Africa, the U. N. General Assembly voted to ask both governments to adopt measures in conformity with minority provisions of the Charter and to report on these measures at its next session. *N. Y. T.*, Dec. 9, 1946, pp. 1, 22. Text of resolution: *U. N. Doc. A/64/Add. 1*, p. 69.

8/February 13, 1947 CAMBODIA. Announcement of Dec. 8 that the territories of Cambodia and Laos would be turned over to France by Siamese troops. *N. Y. T.*, Dec. 8, 1946, p. 43. Announcement of Feb. 13 stated that virtual autonomy had been granted by the French, partly as a result of elections in Sept. 1946. Article: *London Times*, Feb. 14, 1947, p. 3.

9-January 31, 1947 ALBANIA—GREAT BRITAIN. Great Britain demanded of Albania reparation for damages to 2 ships and compensation for relatives of crew members lost in sinking of British ships in Corfu Channel on Oct. 22. *London Times*, Dec. 10 and 12, 1946, pp. 4 and 4. Text: *N. Y. T.*, Jan. 19, 1947, p. 34; *U. N. Doc. S/247*, pp. 2-8; *S. C. O. R.*, 2d yr., Supplement No. 3, pp. 36-41. Albanian reply, dated Dec. 21 was received Dec. 24, 1946. Summary: *C. I. E. D.*, Dec. 23, 1943/Jan. 12, 1947, pp. 1-2. Great Britain filed complaint with U. N. Security Council Jan. 9. *London Times*, Jan. 13, 1947, p. 4. Text of British note to Secretary General Lie, together with text of Albanian note of

- Dec. 21 and British reply of Jan. 9: *N. Y. T.*, Jan. 12, 1947, p. 42. Text of all correspondence laid before Security Council: *U. N. Doc. S/247. S. C. O. R.*, 2d yr., Supplement No. 3, pp. 35-46. On Jan. 20 the Council decided to place the question on the agenda. *London Times*, Jan. 21, 1947, p. 6; *N. Y. T.*, Jan. 21, 1947, p. 1. On Jan. 24 the Albanian Government asked that proceedings be delayed pending the arrival of its representative and on Jan. 31 the Council voted to defer discussion until a later date, to be set by the President. *U. N. Doc. S/262*.
- 10-13 **U. N. R. R. A. COUNCIL.** Sixth session met in Washington. The Danish Ambassador was elected chairman. *N. Y. T.*, Dec. 11, 1946, p. 17. U. S. delegates: *D. S. B.*, Dec. 22, 1946, p. 1146. Accepted Mr. La Guardia's resignation Dec. 12 and chose Maj. General L. W. Rooks to succeed him. *N. Y. T.*, Dec. 13, 1946, p. 7. Voted that relief shipments to Europe and the Far East be completed not later than March 31 and June 30 respectively. *N. Y. T.*, Dec. 14, 1946, p. 3. Seventh session of the Council to be convened prior to June 30, 1947, unless the Central Committee should decide otherwise. Article: *D. S. B.*, Jan. 26, 1947, pp. 159-160, 177.
- 10-14 **CARRIBBEAN COMMISSION.** Third meeting of the 4 national sections met in Willemstad, Curacao, Netherlands West Indies. Brief account of the meeting: *D. S. E.*, Jan. 26, 1947, pp. 158-159.
- 11 **GENOCIDE.** U. N. General Assembly adopted resolution defining and condemning genocide. *U. N. W. B.*, Dec. 24, 1946, p. 2; *N. Y. T.*, Dec. 12, 1946, p. 2. Text of resolution: *U. N. Doc. A/64/Add. 1*, pp. 188-189.
- 11 **GREAT BRITAIN—LUXEMBOURG.** Signed agreement in London relating to money and property situated in Luxembourg and United Kingdom which were subjected to special measures in consequence of the enemy occupation of Luxembourg. Text, with exchange of notes: *G. B. T. S. No. 1 (1947)*, *Cmd. 7023*.
- 11-February 26, 1947 **UNITED NATIONS—SITE.** John D. Rockefeller, Jr., offered tract of land on the East River in New York City for a permanent home. *N. Y. T.*, Dec. 12, 1946, p. 1. Text of offer: p. 4; *U. N. Doc. A/Site/50*. The offer was accepted Dec. 14 by the General Assembly. *N. Y. T.*, Dec. 15, 1946, p. 1. President Truman signed bill freeing the property from gift taxes. *N. Y. T.*, Feb. 27, 1947, p. 10.
- 12 **COUNCIL OF FOREIGN MINISTERS.** Ended its peace-making sessions in New York. Conclusions reached: *N. Y. T.*, Dec. 13, 1946, pp. 1, 10. Report on the meeting: *D. S. B.*, Feb. 2, 1947, pp. 183-186; Dept. of State. *Conference Ser. No. 93*.
- 12-January 28, 1947 **SPAIN.** U. N. General Assembly adopted resolution urging recall by U. N. members of ambassadors to Spain and asking the Security Council to take up the case again if the Franco régime remains in power. *N. Y. T.*, Dec. 13, 1946, pp. 1, 8. Text of resolution: *U. N. Doc. A/64/Add. 1*, pp. 63-64. On Dec. 15 the Spanish Government issued a note stating that the nations would regret the decision to withdraw their Ambassadors. *C. I. E. D.*, Dec. 9/22, 1946, p. 782. Report of action taken by U. N. members up to Jan. 6, as classified by U. S. Department of State: *D. S. B.*, Jan. 19, 1947, pp. 115, 122. As of Jan. 28, 38 nations had informed the United Nations that they had no mission chiefs in Spain. *N. Y. T.*, Jan. 29, 1947, p. 19.
- 13 **ARGENTINA—CHILE.** Signed economic agreement providing for a "customs union" and opening Pacific ports to each country. *N. Y. T.*, Dec. 14, 1946, p. 8.

- 13 SOUTH AFRICA—UNITED STATES. Signed agreement at Pretoria for the avoidance of double taxation and the establishment of rules of reciprocal administrative assistance with respect to taxes on income. *N. Y. T.*, Dec. 14, 1946, p. 6; *D. S. B.*, Dec. 29, 1946, p. 1192.
- 13—January 21, 1947 TRUSTEESHIP. U. N. General Assembly approved Report of Fourth Committee and 8 trusteeship agreements for League of Nations-mandated territories submitted by Great Britain, France, Australia, Belgium and New Zealand. *N. Y. T.*, Dec. 14, 1946, pp. 1, 3. Text of trusteeship agreements: U. N. *Doc. T/8*. Text of Committee report: U. N. *Doc. A/258*. On Dec. 14, refused South Africa's request to incorporate South West Africa in the Union and recommended that the territory be placed under trusteeship. Text of resolution: U. N. *Doc. A/64/Add 1*, pp. 123-124. On Jan. 21 General Smuts stated that his Government did not intend to submit to such an agreement, but was willing to submit an administrative report. *C. I. E. D.*, Jan. 13/26, 1947, p. 50. Voted for Mexico and Iraq as 3-year members of the Trusteeship Council, completing the action necessary to bring into existence the last remaining major organ of the United Nations. *N. Y. T.*, Dec. 15, 1946, pp. 1, 2.
- 14 CZECHOSLOVAKIA—GREAT BRITAIN. Signed agreement providing for Czechoslovak purchase of British surplus supplies in the amount of ten million dollars. *C. I. E. D.*, Dec. 9/22, 1946, p. 766.
- 14 UNITED STATES—URUGUAY. Signed air transport agreement in Montevideo. *D. S. B.*, Dec. 29, 1946, p. 1189. Text: *U. S. Aviation Reports*, 1946, pp. 575-581.
- 14—February 15, 1947 ANTARCTIC REGIONS. Chilean Foreign Office issued statement Dec. 14 on Chilean sovereignty in the area. Excerpts: *N. Y. T.*, Dec. 15, 1946, p. 52. Comment on French claim to Adelie Land: p. 52. Map: *London Times*, Dec. 18, 1946, p. 5. United States gave notice Dec. 27 that it reserved all rights to claim American-explored territory in the Antarctic. *N. Y. T.*, Dec. 28, 1946, p. 16; *D. S. B.*, Jan. 5, 1947, p. 30; *London Times*, Dec. 28, 1946, p. 4. British views: *N. Y. T.*, Dec. 29, 1946, p. 22. On Jan. 5 an Argentine mission left to explore the "Antarctic sector of Argentina." *London Times*, Jan. 6, 1947, p. 3. The New Zealand polar policy was outlined by Prime Minister Fraser. *C. S. Monitor*, Feb. 17, 1947, p. 10. Chilean expedition renewed Chile's claim to a large area. *N. Y. T.*, Feb. 16, 1947, p. 23.
- 15 FINLAND—UNITED STATES. Finland paid \$259,479.74 installment on its World War I debt. *N. Y. T.*, Dec. 17, 1946, p. 20.
- 15 REFUGEE ORGANIZATION. Constitution of the International Refugee Organization was approved by the U. N. General Assembly. Text: U. N. *Doc. A/284*. The document contains also agreement on interim measures to be taken in respect of refugees and displaced persons.
- 16-20 REFUGEES. Delegates from 35 countries were present at the 6th plenary session of the Intergovernmental Committee on Refugees in London. Withdrawal of Soviet Russia from the Committee was announced. *London Times*, Dec. 17, 1946, p. 2. Italy and Liechtenstein were elected to membership. Article: *D. S. B.*, Feb. 2, 1947, pp. 200-201.
- 17 IRAN—UNITED STATES. Effectuated agreement by exchange of notes, granting air-lines of the U. S. air traffic rights in Iran. *U. S. Aviation Reports*, 1946, p. 582.

- 18 CHINA—UNITED STATES. Text of statement by President Truman on U. S. policy toward China: *D. S. B.*, Dec. 29, 1946, pp. 1179-1183.
- 18 CURRENCY STABILIZATION. Par values of the currencies of 32 nations and 52 colonial areas were announced by the International Monetary Fund in Washington. *N. Y. T.*, Dec. 19, 1946, pp. 47, 49.
- 18-19 TRANSPORT ORGANIZATION. Sixth session of the Council of E. O. I. T. O. was held in Paris. Report on the meeting: *D. S. B.*, Jan. 12, 1947, pp. 60-61.
- 19/January 7, 1947 CHILDREN'S EMERGENCY FUND. Executive Board of the International Children's Emergency Fund held its first meeting Dec. 19. *U. N. Doc. E/ICEF/1*. At the Jan. 7 meeting Dr. Lukwik Rajchman of Poland was elected chairman. *N. Y. T.*, Jan. 8, 1947, p. 11.
- 20 CHINA—UNITED STATES. Signed air transport agreement at Nanking. *D. S. B.*, Jan. 5, 1947, p. 30. Text, with annex: *U. S. Aviation Reports*, 1946, pp. 521-530.
- 20 UNITED NATIONS—INTERNATIONAL LABOR ORGANIZATION. Mr. Lie of the United Nations and Mr. Phelan for the I. L. O. signed protocol in New York bring into force the agreement concluded between the two organizations, whereby the I. L. O. becomes a specialized agency of the U. N. Economic and Social Council. *D. S. B.*, Jan. 5, 1947, p. 24; *N. Y. T.*, Dec. 21, 1946, p. 3. Text of protocol and agreement: *I. L. O. Official Bulletin*, Dec. 20, 1946, pp. 383-393.
- 20/30 GERMAN OCCUPATION. The four military governors signed a law Dec. 20 prohibiting the manufacture, import, export, transport and storage of war materials. *N. Y. T.*, Dec. 31, 1946, p. 4. The law was published Dec. 30. *C. I. E. D.*, Dec. 23, 1946/Jan. 12, 1947, p. 6. Text: *Official Gazette of the Control Council for Germany*, Dec. 31, 1946, pp. 234-239.
- 20-January 31, 1947 INDONESIA. On Dec. 20 the second chamber of Parliament authorized the Dutch Government to sign the agreement, initialed at Cheribon, Nov. 15, 1945, by which the Government recognizes the Indonesian Republic, composed of Java, Sumatra and some small adjacent islands. *London Times*, Dec. 21, 1946, p. 3; *N. Y. T.*, Dec. 26, 1946, p. 15. Tjokorde Rake Soekawati was chosen temporary President of the new state of "Eastern Indonesia" on Dec. 24. *N. Y. T.*, Dec. 25, 1946, p. 30. Queen Wilhelmina proclaimed Dec. 25 the Provisional State of East Indonesia, embracing all the Netherlands East Indies, east of Java and Borneo, except New Guinea. *N. Y. T.*, Dec. 26, 1946, p. 19. Announcement was made Dec. 26 of formal inauguration of the Provisional State of East Indonesia. *C. S. Monitor*, Dec. 26, 1946, p. 4. On Jan. 31 the Netherlands Commissioner and the Indonesian Premier announced readiness to sign the agreement, but disagreed on their conditions for signing. *N. Y. T.*, Feb. 1, 1947, p. 4.
- 21 GREECE. Mark F. Etheridge was appointed U. S. representative on the Commission sent by the U. N. Security Council to investigate the situation involving Greece and bordering states. *N. Y. T.*, Dec. 22, 1947, p. 21. Assistants to Mr. Etheridge: *E. S. B.*, Jan. 19, 1947, p. 113.
- 22 FRANCE—ITALY. Signed trade and payments agreement. *N. Y. T.*, Dec. 23, 1946, p. 5; *London Times*, Dec. 23, 1946, p. 4.
- 24/27 FRANCE—GREAT BRITAIN. Effected agreement by exchange of notes in London concerning the mutual abolition of visas. Text: *G. B. T. S. No. 71* (1946), *Cmd. 7003*.

- 25/31 CHINA. National Assembly approved the new Constitution containing 175 articles. *N. Y. T.*, Dec. 26, 1946, pp. 1, 18. Short summary: p. 18. On Dec. 31 Generalissimo Chiang Kai-shek signed the order promulgating the Constitution. *London Times*, Dec. 31, 1946, p. 3.
- 27 AMERICAN PROPERTY IN POLAND. Department of State announced "agreement was reached on principles in terms of which the procedure of compensation to U. S. owners of enterprises taken over under the Polish Industries Nationalization Act of Jan. 3, 1946 will be implemented." *D. S. B.*, Jan. 5, 1947, p. 28.
- 27 CREDITS—POLAND (Nat'l Unity Govt.). U. S. Dept. of State announced that Polish assets, totaling \$9,300,000, would be unfrozen as of Jan. 7, 1947. *N. Y. T.*, Dec. 28, 1946, p. 1; *D. S. B.*, Jan. 5, 1947, p. 28.
- 27 PERU—UNITED STATES. Signed air transport agreement at Lima. *N. Y. T.*, Dec. 29, 1946, p. 28; *D. S. B.*, Jan. 5, 1947, p. 31. Text, with annex: *U. S. Aviation Reports*, 1946, pp. 562-569.
- 30 PRISONERS OF WAR. General Koenig (France) announced that between 7000 and 10,000 prisoners were being released in France and returned to their homes in the Saar. *C. I. E. D.*, Dec. 23, 1946/Jan. 12, 1947, p. 6.
- 31 UNITED NATIONS. Atomic Energy Commission. Presented 1st Report to the Security Council. Text: Dept. of State. *U. S. and the United Nations Report Serv.* No. 8; *U. N. Doc.* A. E. C./18/Rev. 1.
- 31 WORLD WAR. President Truman issued proclamation (2714) declaring the end of hostilities, effective at noon, Dec. 31. Text: *D. S. B.*, Jan. 12, 1947, p. 77. *N. Y. T.*, Jan. 1, 1947, p. 1. List of laws to expire immediately, in 6 months, or at other specified date: p. 22.
- 31-February 11, 1947 REFUGEE ORGANIZATION. With the signature of the Constitution of the International Refugee Organization on Dec. 31 by Liberia, the creation of the Preparatory Commission is now possible, although the necessary funds have not yet been pledged. *N. Y. T.*, Jan. 1, 1947, p. 28. The Constitution and Agreement on interim arrangements were signed Feb. 4 by Norway and by Great Britain on Feb. 5, making the 10th and 11th signatures. *U. N. W. B.*, Feb. 18, 1947, p. 122. By the time the Preparatory Commission met on Feb. 11, other signatories were Canada, Dominican Republic, France, Guatemala, Honduras, Liberia, Netherlands, Philippine Republic and the United States. *U. N. W. B.*, Feb. 25, 1947, p. 168.
- 31/February 13, 1947 UNITED NATIONS. Military Staff Committee. Announced completion of work on the principles covering the composition of the United Nations armed forces. *N. Y. T.*, Jan. 1, 1947, p. 27. On Feb. 13 the Security Council requested the Committee to submit not later than Apr. 30, 1947, its recommendations with regard to basic principles which should govern these forces. *U. N. W. B.*, Feb. 25, 1947, p. 143.

January, 1947

- 1 CANADA. Canadian Citizenship Act came into force, whereby every natural-born Canadian and all who take out naturalization papers, become Canadian citizens, although still British subjects. *N. Y. T.*, Jan. 5, 1947, IV, p. 9.
- 1 GERMAN OCCUPATION. Responsibility for the administration of economic affairs in the British and American zones was formally transferred to German authorities. *London Times*, Jan. 2, 1947, p. 4; *N. Y. T.*, Jan. 2, 1947, p. 13.

- 3 FRANCE—GREAT BRITAIN. Signed agreement in London providing for a final settlement in accounting for the reciprocal use during the war of merchant shipping. *London Times*, Jan. 4, 1947, p. 4.
- 3-February 14 UNITED NATIONS. Security Council. Summary statements by Secretary General Lie on matters presented and the stage reached in their consideration: *D. S. B.*, Jan. 19, 1947, p. 114; Feb. 2, p. 196; Mar. 2, pp. 385-386; *U. N. Docs.* S/238, S/257, S/262, S/267, and S/279.
- 5 SIAM—SOVIET RUSSIA. Announced establishment of diplomatic relations. *N. Y. T.*, Jan. 6, 1947, p. 3; *C. I. E. D.*, Dec. 23, 1946/Jan. 12, 1947, p. 26.
- 7 CHINA. In a personal statement on leaving China General George C. Marshall held that both the Government and Communist leaders were to blame for the present conditions. *N. Y. T.*, Jan. 8, 1947, p. 1. Text: p. 3; *D. S. B.*, Jan. 19, 1947, pp. 83-85.
- 8 ECUADOR—UNITED STATES. Signed air transport agreement at Quito. *D. S. B.*, Feb. 2, 1947, p. 214.
- 9/24 FOOD AND AGRICULTURE ORGANIZATION. Announcement made that the Preparatory Commission on World Food Proposals of the F. A. O. had agreed on the formation of a World Food Council with executive powers, composed of 18 governments and certain specialized agencies' representatives. *N. Y. T.*, Jan. 10, 1947, p. 2. Preparatory Commission at final session adopted unanimously a 4-point program of voluntary cooperation to feed needy countries and to stabilize agricultural prices. Summary: *N. Y. T.*, Jan. 25, 1947, pp. 1, 5; *London Times*, Jan. 25, 1947, p. 4; *U. N. W. B.*, Feb. 4, 1947, pp. 94-97, 99; *D. S. B.*, Feb. 9, 1947, pp. 247-250.
- 9-February 15 SPITSBERGEN (Svalbard). Norwegian Foreign Ministry announced that Russia had made wartime requests (1944 and 1945) for special privileges in Spitsbergen, sovereignty of which was granted to Norway by treaty at Paris, Feb. 9, 1920. *N. Y. T.*, Jan. 10, 1947, p. 1; Jan. 11, p. 2; *London Times*, Jan. 10 and 11, 1947, pp. 4 and 4. At the time of signature, rights of Russian nationals in Spitsbergen were reserved. In March 1925, the Soviet Government made application through France for adhesion to the 1920 Treaty. In 1935 the Soviet Government extended *de jure* recognition. *London Times*, Jan. 16, 1947, p. 3. Moscow radio stated Jan. 14 that early in 1945 Norway agreed to joint Soviet-Norwegian defense of the island group. *N. Y. T.*, Jan. 15, 1947, p. 20. British Foreign Office rejected the Soviet claim Jan. 15. U. S. Department of State declared consultation with the U. S. would be necessary for modification of the 1920 Agreement. *N. Y. T.*, Jan. 16, 1947, p. 13. Norwegian Foreign Office communiqué of Jan. 16 stated Norway's willingness to consider the possibility of a Russo-Norwegian agreement for military bases, provided other interested powers consented. Text: *London Times*, Jan. 17, 1947, p. 3. In a secret session on Feb. 15 the Norwegian Parliament rejected Russian request for military bases, according to announcement of March 3. *N. Y. T.*, Mar. 4, 1947, p. 10.
- 11/February 16 TRANS-JORDAN—TURKEY. Signed treaty of friendship at Ankara on Jan. 11. *N. Y. T.*, Jan. 12, 1947, p. 29; *London Times*, Jan. 13, 1947, p. 3. The treaty was ratified by Turkey on Feb. 16. *London Times*, Feb. 17, 1947, p. 3.
- 12 AFGHANISTAN—SOVIET RUSSIA. Exchanged ratifications at Kabul of the agreement, signature of which was announced June 13, 1943, delimiting the frontier along the Oxus River. *London Times*, Jan. 14, 1947, p. 3.

- 12/14 WAR CRIMES. Yugoslavia sent note to U. S. Jan. 12 requesting that Italian criminals registered by the War Crimes Commission be turned over to Yugoslavia. *C. I. E. D.*, Dec. 23, 1946/Jan. 12, 1947, p. 26. Yugoslav note to Great Britain, complaining of delay in handing over war criminals in Italy, was reported Jan. 14. *London Times*, Jan. 14, 1947, p. 4.
- 13-28 BURMA. Burmese delegation and heads of the British Government convened Jan. 13 in London to discuss the future status of Burma. *N. Y. T.*, Jan. 14, 1947, p. 21. Text of Mr. Attlee's address: *London Times*, Jan. 14, 1947, p. 3; Conversations ended Jan. 27. *N. Y. T.*, Jan. 28, 1947, p. 18; *London Times*, Jan. 28, 1947, p. 4. Or Jan. 28 Great Britain announced agreement with the Burmese to grant virtual independence immediately and ordered creation of an interim government pending the writing of a new constitution. Text of agreement initialled Jan. 27: *London Times*, Jan. 29, 1947, p. 4; *Cmd.* 7029. Summary: *N. Y. T.*, Jan. 29, 1947, pp. 1, 21.
- 14 FINLAND—UNITED STATES. President Truman ordered the return to Finland of 6 ships taken over from their Finnish owners on June 6, 1941. The owners will receive compensation for their use. *London Times*, Jan. 15, 1947, p. 4; *N. Y. T.*, Jan. 15, 1947, p. 10.
- 14-February 25 PEACE TREATY (German). Deputy Foreign Ministers of Great Britain, France, U. S. and Soviet Russia opened meetings in London Jan. 14, to discuss terms of the treaty for Germany. Netherlands submitted a memorandum calling for a confederation of German states. *N. Y. T.*, Jan. 15, 1947, p. 11; *London Times*, Jan. 15, 1947, p. 3. South Africa and Australia presented their views. *N. Y. T.*, Jan. 25, 1947, p. 4; *London Times*, Jan. 25, 1947, p. 3. French proposal for a loose federation of German states was handed Jan. 27 to the Department of State. *N. Y. T.*, Jan. 28, 1947, p. 17. Russia submitted Jan. 27 to the Deputies a memorandum outlining procedure for preparing a peace treaty to be presented for ratification by a future German state. Text: *N. Y. T.*, Jan. 28, 1947, p. 17. Deputies denied Albania a hearing to present claims against Germany. *N. Y. T.*, Jan. 30, 1947, p. 6. Session adjourned Feb. 25 with no agreement on terms of the treaty. *N. Y. T.*, Feb. 26, 1947, pp. 1, 4; *London Times*, Feb. 26, 1947, p. 3.
- 15 CREDITS—AUSTRIA. U. S. Treasury unblocked Austrian assets in the U. S. *N. Y. T.*, Jan. 16, 1947, p. 13.
- 17 UNITED NATIONS. Economic and Social Council. Nominations of U. S. members of various commissions were confirmed by the Senate. *Cong. Rec.* (daily) Jan. 17, 1947, p. 450; *D. S. B.*, Jan. 26, 1947, p. 155.
- 18/29 CHINA. Communists rejected on Jan. 18 the Nanking regime's plans for new negotiations. *N. Y. T.*, Jan. 19, 1947, p. 1. U. S. Dept. of State announced decision to abandon effort to unify China and to stop civil war. *N. Y. T.*, Jan. 30, 1947, p. 1; *London Times*, Jan. 30, 1947, p. 4; *D. S. B.*, Feb. 9, 1947, p. 258.
- 18-February 3 INTERNATIONAL MILITARY TRIBUNAL (Far East). List of the judges and the accused on trial: *C. S. Monitor*, Jan. 18, 1947, p. 9. The prosecution rested its case Jan. 24, after presenting more than 2,300 documents as evidence. *N. Y. T.*, Jan. 24, 1947, p. 13. On Jan. 27 the President of the Court refused to hear defense motions challenging General MacArthur's authority to set up the Tribunal, but did allow the challenge to be placed in the record of the proceedings. *N. Y. T.*, Jan. 27, 1947, p. 4; *London Times*, Jan. 28, 1947, p. 3.

Defense motions for dismissal of charges were overruled Feb. 3, and the Court adjourned for 3 weeks. *N. Y. T.*, Feb. 3, 1947, p. 3; *London Times*, Feb. 4, 1947, p. 3.

- 19-February 8 GREAT BRITAIN—SOVIET RUSSIA. On Jan. 19 the British Foreign Office announced a protest had been sent directly to Premier Stalin against an article in *Pravda* which alleged that the Anglo-Soviet alliance had been disavowed by Foreign Minister Bevin [in an address broadcast Dec. 22. *London Times*, Jan. 16, 1947, p. 3]. *N. Y. T.*, Jan. 20, 1947, p. 1. Text of British note: p. 4; *London Times*, Jan. 20, 1947, p. 4. Replying to Mr. Bevin's note, Mr. Stalin accepted Jan. 23 the explanation, and stated that extension of their treaty of alliance for 50 years would require changes in the treaty. Texts of notes: *N. Y. T.*, Jan. 25, 1947, p. 2. Announcement was made Feb. 8 of additional British note: *London Times*, Feb. 8, 1947, p. 4.
- 20 SOVIET RUSSIA—UNITED STATES. U. S. communication refused request to turn over to Russian authorities one Kirill Alekseev, on the ground that no extradition treaty exists. *London Times*, Jan. 22, 1947, p. 4. Text: *D. S. B.*, Feb. 2, 1947, p. 212; *N. Y. T.*, Jan. 22, 1947, p. 7.
- 20-21 U. N. E. S. C. O. Director-General informed Secretary General of the United Nations by notes of Jan. 20 and 21 that Italy, Austria, and Switzerland had made application for membership. Text of letters: *U. N. Doc. E/261*.
- 20-February 4 UNITED NATIONS. Social Commission. Frantisek Kraus of Czechoslovakia was elected chairman for the session at the opening meeting. *N. Y. T.*, Jan. 21, 1947, p. 2. Session ended Feb. 4. *U. N. W. B.*, Feb. 18, 1947, p. 121. Text of Report to Economic and Social Council: *U. N. Doc. E/260*.
- 20-February 5 UNITED NATIONS. Economic and Employment Commission. Held first session at Lake Success. Elected Ragnar Frisch of Norway as chairman. *N. Y. T.*, Jan. 21, 1947, p. 2. At final session adopted its report to the Economic and Social Council. *U. N. W. B.*, Feb. 18, 1947, p. 121. Summary: pp. 135-138. Text: *U. N. Doc. E/255*.
- 20-February 10 PEACE TREATIES. Treaties with Italy, Rumania, Bulgaria and Hungary were signed by Secretary of State Byrnes on Jan. 20. *D. S. B.*, Feb. 2, 1947, p. 199; *N. Y. T.*, Jan. 21, 1947, p. 1. Texts: Jan. 18, pp. 25-35; *G. B. M. S. No. 1* (1947), *Cmd. 7022*; Dept. of State. *European Ser. No. 21*. Commentary: *G. B. M. S. No. 2* (1947), *Cmd. 7026*. The treaty with Finland was not signed by Mr. Byrnes. Text: *N. Y. T.*, Jan. 18, 1947, pp. 35-36. Foreign Minister Molotov and Foreign Secretary Bevin signed in Moscow and London on Jan. 29 and Feb. 4. *N. Y. T.*, Jan. 30, 1947, p. 6; *London Times*, Feb. 5, 1947, p. 4. The treaties were signed in Paris on Feb. 10 by 5 Axis states and 20 Allied nations. *N. Y. T.*, Feb. 11, 1947, pp. 1, 3; *London Times*, Feb. 11, 1947, p. 4. Text of treaty with Italy: below, Supplement, pp. —.
- 22/February 20 FINLAND—UNITED STATES. Export-Import Bank authorized credit of 32 million dollars and a loan of 2½ million dollars to Finland. *N. Y. T.*, Jan. 23, 1947, p. 13; Feb. 21, p. 5.
- 26-27 EGYPT—GREAT BRITAIN. Egyptian Prime Minister announced that Egypt had broken off negotiations for revision of the 1936 treaty of military alliance and would submit all "outstanding problems" to the U. N. Security Council. *N. Y. T.*, Jan. 27, 1947, p. 8; *London Times*, Jan. 27, 1947, p. 4. Mr. Bevin announced failure of talks on Jan. 27. *London Times*, Jan. 28, 1947, p. 4.

- 27-February 7 UNITED NATIONS. Statistical Commission. Held first session at Lake Success. Elected Herbert Marshall of Canada as chairman on the 28th. *N. Y. T.*, Jan. 29, 1947, p. 16. Approved its report to the Economic and Social Council at closing meeting. *U. N. W. B.*, Feb. 18, 1947, p. 121. Text: *U. N. Doc. E/264*. The report was intended to advance the development of a comprehensive system of comparable international statistics. Summary: *U. N. W. B.*, Feb. 25, 1947, pp. 165-167.
- 27-February 10 UNITED NATIONS. Human Rights Commission. Held first session at Lake Success. Elected Mrs. F. D. Roosevelt as chairman. *N. Y. T.*, Jan. 28, 1947, p. 13; *U. N. W. B.*, Feb. 4, 1947, p. 91. The next session will open at Geneva on July 21st. *N. Y. T.*, Feb. 11, 1947, p. 13; *U. N. W. B.*, Feb. 18, 1947, p. 121. Text of report to the Economic and Social Council: *U. N. Doc. E/259*.
- 27-February 14 PALESTINE CONFERENCE. Re-assembled Jan. 27 in London. *London Times*, Jan. 28, 1947, p. 3. Arab side of the Conference recessed Jan. 28 for two days while conversations with the Zionists took place. *N. Y. T.*, Jan. 29, 1947, p. 20. British Government compromise plan was delivered Feb. 7. Text: *N. Y. T.*, Feb. 11, 1947, p. 12. At final meeting with the Arab delegation on Feb. 14 Mr. Bevin announced decision to turn the question over to the United Nations. *N. Y. T.*, Feb. 15, 1947, pp. 1, 5. Text of announcement at close of Conference: *London Times*, Feb. 15, 1947, p. 4. Text of Mr. Bevin's report to House of Commons: *London Times*, Feb. 19, 1947, p. 4.
- 28-February 6 PACIFIC AREA CONFERENCE. Convened at Canberra to consider the establishment of a South Seas Regional Advisory Commission for non-self-governing territories located in the Pacific, south of the equator, and east of, and including Dutch New Guinea. *London Times*, Jan. 29, 1947, p. 3. U. S. delegation: *D. S. B.*, Jan. 12, 1947, p. 51. Great Britain, France, New Zealand, Netherlands, Australia and the U. S. were represented. *N. Y. T.*, Jan. 28, 1947, p. 15. Closed Feb. 6. *D. S. B.*, Feb. 9, 1947, p. 245.
- 30 FOOD COUNCIL. International Emergency Food Council, meeting in Washington, voted for the establishment of a small committee to study the best means of assisting nations never before short of food. *N. Y. T.*, Jan. 31, 1947, pp. 1, 12.
- 30-February 10 GREECE. The Commission of inquiry, authorized by the U. N. Security Council, held its first meeting Jan. 30 in Athens. *London Times*, Jan. 31, 1947, p. 3. On intervention from the Commission Foreign Minister Tsaldaris of Greece granted a stay of execution to 5 guerrillas. *N. Y. T.*, Feb. 5, 1947, p. 3. The Commission voted Feb. 6 to ask the Council the procedure to be followed in requesting a government to postpone execution of political prisoners, and to ask the Council what rights it has generally to intervene in the internal affairs of the countries being investigated. *London Times*, Feb. 8, 1947, p. 3. Secretary General Lie issued Feb. 8 appeal for postponement of execution of a group of convicted guerrillas. *N. Y. T.*, Feb. 9, 1947, pp. 1, 38. Announcement was made Feb. 9 that the executions took place before an agreement for a delay was reached. *N. Y. T.*, Feb. 10, 1947, p. 12. On Feb. 10 the Council adopted U. S. resolution instructing the Commission not to request stays unless wanted witnesses are concerned. *N. Y. T.*, Feb. 11, 1947, p. 8; *London Times*, Feb. 11, 1947, p. 3.
- 31 ALLIED COMMISSION FOR ITALY. Was dissolved as of midnight Jan. 31/Feb. 1. *N. Y. T.*, Feb. 1, 1947, pp. 1, 4; *London Times*, Feb. 1, 1947, p. 4.

February, 1947

- 1 RUHR. French memorandum of Feb. 1, handed to British, American and Soviet Embassies in Paris, was made public on the 3d. Summary of French plan for international control of the Ruhr's economy: *N. Y. T.*, Feb. 4, 1947, pp. 1, 6. Text: Feb. 5, p. 4.
- 4 FINLAND—SOVIET RUSSIA. Signed agreement to transfer to Russia German assets totalling 6,000 million Finnish marks, and to sell an area near Petsamo to Russia. *C. I. E. D.*, Jan. 27/Feb. 9, 1947, p. 64.
- 4 UNITED NATIONS—FOOD AND AGRICULTURE ORGANIZATION. Signed protocol, establishing F. A. O. in formal relationship with the United Nations. *N. Y. T.*, Feb. 5, 1947, p. 2; *U. N. W. B.*, Feb. 18, 1947, p. 133.
- 4 UNITED NATIONS—U. N. E. S. C. O. Signed protocol establishing U. N. E. S. C. O. in formal relationship with the United Nations. *N. Y. T.*, Feb. 5, 1947, p. 2; *U. N. W. B.*, Feb. 18, 1947, p. 133.
- 4-6 AVIATION CONFERENCE. South Pacific Regional Air Navigation Conference met at Melbourne, with 17 nations represented. *N. Y. T.*, Feb. 5, 1947, p. 10; *London Times*, Feb. 5, 1947, p. 3. U. S. delegation: *D. S. B.*, Jan. 26, 1947, p. 153. At closing plenary session representatives of 3 nations signed an agreement setting up the South Pacific Commission. Functions etc., of the Commission: *N. Y. T.*, Feb. 7, 1947, p. 2.
- 5 POLAND. Boleslaw Bierut became President. *N. Y. T.*, Feb. 6, 1947, p. 11. Cabinet members: *N. Y. T.*, Feb. 7, 1947, p. 3.
- 5 UNITED NATIONS—UNITED STATES. President Truman submitted to Congress his report on U. N. activities and U. S. participation. *N. Y. T.*, Feb. 6, 1947, p. 4. Text of report: Dept. of State. *U. S. and the United Nations Report Ser. No. 7.*
- 6 MEXICO—UNITED STATES. Mexican Ministry of Foreign Affairs issued statement following conclusion of conversations, regarding illegal movement of Mexican workers. Text, including some recommendations: *D. S. B.*, Feb. 16, 1947, p. 303.
- 6-18 UNITED NATIONS. Transport and Communications Commission. Held first session at Lake Success. *U. N. W. B.*, Feb. 18, 1947, p. 121. Session ended Feb. 18 with acceptance of invitation to hold next session in Holland, the latter part of October or November. *N. Y. T.*, Feb. 19, 1947 p. 17. Text of report to Economic and Social Council: *U. N. Doc. E/270.*
- 6-19 UNITED NATIONS. Population Commission. Held first session at Lake Success. Members: *U. N. W. B.*, Feb. 4, 1947, p. 90. Text of report to the Economic and Social Council: *U. N. Doc. E/267.*
- 8/11 INTER-AMERICAN ACADEMY OF COMPARATIVE AND INTERNATIONAL LAW. Opened 2d session at Havana. Announced Feb. 11 it had reached conclusion that "diplomatic protection of nationals abroad should be incorporated in a general international system for the defense of the rights of man." *N. Y. T.*, Feb. 12, 1947, p. 10.
- 10 ARGENTINA—CHINA. Signed treaty of friendship at Buenos Aires. *N. Y. T.*, Feb. 12, 1947, p. 10.
- 10 DANUBE RIVER. Freedom of navigation was guaranteed by Part VII of the Bulgarian, Rumanian and Hungarian peace treaties, signed Feb. 10. Texts: *G. B. M. S. No. 1 (1947), Cmd. 7022*; Dept. of State. *European Ser. No. 21.*

- 10-14 NON-GOVERNMENTAL ORGANIZATIONS CONFERENCE. Delegates from 130 world-wide organizations met at Lake Success, under the auspices of the United Nations, to establish information outlets throughout the world. *N. Y. T.*, Feb. 11, 1947, p. 10. At closing session adopted several resolutions designed to make information about United Nations activities more readily available. *U. N. W. B.*, Feb. 25, 1947, pp. 142, 174-175.
- 10-24 UNITED NATIONS. Status of Women Commission. Held session at Lake Success. *U. N. W. B.*, Feb. 18, 1947, p. 122. Text of Report of Economic and Social Council: *U. N. Doc. E/281*.
- 11 CZECHOSLOVAKIA—HUNGARY. Czechoslovakia sent 3 notes regarding exchange of populations. *London Times*, Feb. 13, 1947, p. 3.
- 11 REFUGEE ORGANIZATION. Preparatory Commission of the International Refugee Organization opened sessions Feb. 11 in Geneva. Elected Lieut. Gen. M. A. Pope as chairman. *N. Y. T.*, Feb. 12, 1947, p. 12; *London Times*, Feb. 12, 1947, p. 3.
- 12 BULGARIAN RECOGNITION. Great Britain announced decision to grant *de jure* recognition. *London Times*, Feb. 13, 1947, p. 3; *N. Y. T.*, Feb. 13, 1947, p. 14.
- 12 CANADA—UNITED STATES. Announced informal agreement to continue military collaboration. *London Times*, Feb. 13, 1947, p. 4; *N. Y. T.*, Feb. 13, 1947, p. 1. Text of announcement: p. 17; *D. S. B.*, Feb. 23, 1947, p. 361.
- 12 GERMAN OCCUPATION. U. S. and United Kingdom decartelization laws became effective in their zones of occupation. Text of U. S. law: *D. S. B.*, Mar. 9, 1947, pp. 443-447.
- 13 DISARMAMENT. U. N. Security Council voted 10-0 with Russia abstaining to create an 11-nation "commission for conventional armaments" excluding consideration of the atomic bomb. *N. Y. T.*, Feb. 14, 1947, p. 1. Text of Resolution: p. 4; *U. N. Doc. S/268/Rev. 1/Corr. 1*; *S. C. O. R.*, 2d yr., Supplement No. 5, pp. 58-59.

MULTIPARTITE CONVENTIONS

INDUSTRIAL PROPERTY. London, June 2, 1934.

Application to:

Western Samoa (by New Zealand). *D. S. B.*, Dec. 29, 1946, p. 1188.

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT. Washington, Dec. 27, 1945.

Signatures:

Colombia. Dec. 26, 1946.

Venezuela. Dec. 30, 1946. *D. S. B.*, Jan. 5, 1947, p. 24; Feb. 2, p. 217.

INTERNATIONAL COURT OF JUSTICE. Statute. Optional Clause. San Francisco, June 26, 1945.

Declaration signed:

Guatemala (effective for 5 years), Feb. 4, 1947. *N. Y. T.*, Feb. 5, 1947, p. 11.

INTERNATIONAL MONETARY FUND. Washington, Dec. 27, 1945.

Signature:

Venezuela. Dec. 30, 1946. *N. Y. T.*, Dec. 31, 1946, p. 4; *D. S. B.*, Feb. 2, 1947, p. 217.

NORTH AMERICAN REGIONAL BROADCASTING. Interim Agreement. Washington, Feb. 25, 1946.

Signatures:

Canada, Cuba, Dominican Republic, Great Britain, Great Britain on behalf of the Bahamas and Newfoundland, Mexico (with reservation), United States.

Open for signature by Haiti.

In force for 3 years from March 29, 1946.

Text: *T. I. A. S.* 1553.

PATENTS (German-Owned). London, July 27, 1946.

Text: *D. S. B.*, Aug. 18, 1946, pp. 300-301.

Came into force Jan. 1, 1947.

List of countries which signed or accepted the Accord before Jan. 1, 1947: *D. S. B.*, March 9, 1947, pp. 434-435.

POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Adherence:

Austria. August 28, 1946. *D. S. B.*, Feb. 16, 1947, p. 304.

PUBLIC HEALTH OFFICE. Protocol. New York, July 22, 1946.

Signatures and Text: *Cong. Rec.* (daily), Feb. 10, 1947, pp. 953-954.

TRADE MARK AND COMMERCIAL PROTECTION CONVENTION AND PROTOCOL. Washington, Feb. 20, 1929.

Denunciation:

Panama (effective Nov. 13, 1947). *D. S. B.*, Feb. 9, 1947, p. 257.

WHALING CONVENTION. Washington, Dec. 2, 1946.

Signatures:

Argentina, Australia, Canada, Chile, Denmark, France, Netherlands, New Zealand, Norway, Peru, Soviet Russia, Great Britain, United States.

Signatures as observers:

Iceland, Ireland, South Africa and Sweden. *N. Y. T.*, Dec. 3, 1946, p. 11.

Text: *G. B. M. S.* No. 3 (1947), *Cmd.* 7043, pp. 16-24.

WILDLIFE PRESERVATION IN THE WESTERN HEMISPHERE. Washington, Oct. 12, 1940.

Ratification deposited:

Peru. Nov. 22, 1946. *D. S. B.*, Feb. 16, 1947, p. 302.

WORLD HEALTH ORGANIZATION. Constitution. New York, July 22, 1946.

Ratifications:

Iran, New Zealand, Syria. *N. Y. T.*, Jan. 23, 1947, p. 13; *U. N. W. B.*, Feb. 4, 1947, p. 77.

DOROTHY R. DART

JUDICIAL DECISIONS

THE NORDERNEY

GREAT BRITAIN; PROBATE, DIVORCE, AND ADMIRALTY*

[March 5, 1946]

Prize—Enemy ship and cargo seized—Condemnation—Execution of decree of condemnation—Delivery of property to Crown in lieu of sale—Marshal's costs and expenses incurred before decree—Form of order—Prize Court Rules, 1939, order 27, r. I (1).

Order 27, rule I, of the Prize Court Rules, 1939, provides: "Where the Judge condemns property as prize the decree of condemnation may be enforced—(1) If the property is still under arrest, by sale of such property; Provided that on the application of the proper officer of the Crown the Court shall order delivery of the property to the Crown in lieu of sale, and if at the time of such application an order for sale has already been made but no sale has taken place, the order for sale shall be rescinded for the purpose of giving effect to such application, but the order for delivery to the Crown may, if the Court thinks fit, be made subject to payment by the Crown of such costs, expenses, or other sums other than fee 49 in appendix B, as might have been ordered to be paid out of the proceeds of sale if the property had been sold under order of the Court."

The German steamer *Norderney* and her cargo, which consisted of 629 miles of submarine cable, were seized in Prize. The ship and cargo were placed in the custody of the Marshal in accordance with section 16 of the Naval Prize Act, 1864. The cargo was not discharged while the ship was in the custody of the Marshal pending an order for condemnation. The ship was requisitioned, and after its requisition the cargo remained on board, warehoused in the ship.

On the application by the Crown for a decree of condemnation of the ship and cargo the question was raised whether an order should be made in the terms of order 27, rule I (1), that the Crown should pay the costs and expenses incurred by the Marshal other than fee 49, the commission chargeable on a sale (see schedule B of the Prize Court Rules). Such expenses would include warehouse charges for storing the cable on board, and for discharging it from the ship in which it was stored on delivery.

Mr. A. W. Roskill for the Crown submitted that, unless an order for sale had been made and was rescinded to enable an order for delivery to be made to the Crown, the Court could not make it a condition of any order

* 62 *Times Law Reports* 275.

for delivery that the usual fees paid to the Marshal, and the expenses, which he had incurred or might incur in connexion with the warehousing and delivery of the cargo, should be paid by the Crown.

The President.—Where is the money to come from to meet such expenses?

Mr. Roskill.—It is submitted that they could be obtained from the Prize Fund Deposit Account.

The President.—So it might, until there was an audit. What would be the position then? The cargo has been allowed to go, and no provisions have been made to meet these expenses. What answer would the Marshal have?

Mr. Roskill.—On that hypothesis, of course, he would have none.

The President.—I am quite satisfied that this condition may be imposed on an order for delivery where an order for sale has been made and has been rescinded, or where an order for sale has not yet been made. As no understanding is offered I propose to make an order that this submarine cable be delivered, subject to the payment of the costs, expenses or other sums incurred by the Marshal, which, of course, means those which have been incurred and not those which would notionally have been incurred. The costs, expenses and other sums would be limited to what would properly be ordered to be paid out of the proceeds of sale if the property had been sold.

C. v. E.

GREAT BRITAIN; KING'S BENCH*

[March 29, 1946]

It is not necessary that a deportation order should be served on the person against whom it has been made before it can be held to be in force. Where such an order has been made against an alien, who, subsequent to the date of the order, has married an Englishman, and thus acquired British nationality, the effect of article 21 (3) of the Aliens Order, 1920, is to disregard the subsequent change of nationality by deeming the alien to retain the same nationality as she had at the date of the order, which accordingly remains valid and effective.

By a writ dated March 17, 1946, the plaintiff claimed a declaration and order prohibiting, and an injunction restraining, the defendant from deporting or attempting to deport her out of the United Kingdom.

The facts are stated in the judgment, which was delivered in Chambers. The case is reported with the sanction of the Judge.

Mr. Justice Sellers.—When this matter came before me in Chambers on an application by the plaintiff for an interlocutory injunction in the terms of the writ both parties asked me to treat the summons as the trial of the action.

By a writ dated March 17, 1946, the plaintiff claimed a declaration and order prohibiting, and an injunction restraining, the defendant from deporting or attempting to deport her out of the United Kingdom. The fol-

* 62 *Times Law Reports* 326.

Following facts are obtained and found by me from a number of affidavits put in at the trial. The plaintiff was born in Zelosolotvina on June 20, 1909. At that date Zelosolotvina was in the Austro-Hungarian Empire. On April 6, 1930, the plaintiff arrived in the United Kingdom with a Czech passport and has resided in this country ever since. In 1943 or 1944 she was fined for an offense in connexion with registration forms, and in March, 1945, she was convicted at Marylebone Court of two offences in connexion with the keeping of a disorderly house, and was fined in each case.

On April, 1945, the Home Secretary made a deportation order on the plaintiff in pursuance of powers conferred by the Aliens Restriction Acts, 1914 and 1919, and article 12 of the Aliens Order, 1920. On April 20, 1945, the plaintiff was warned that a deportation order had been made against her, but the order was not then served as it was impracticable to carry it out at that time.

By letter of November 9, 1945, to the Home Office the plaintiff asked for the cancellation of a restriction order made at the same time as the deportation order, and by a reply of January 9, 1946, from the Home Office, the plaintiff was informed that this would not be done, and that the deportation order would shortly be enforced unless she first made her own way out of the United Kingdom. About this time the plaintiff approached a farmer to marry her for the purpose of giving her British nationality. On January 10, 1946, notice of the intended marriage was given at the Marylebone Register Office, and on January 12, 1946, the marriage took place at that register office. The husband says that after the ceremony he returned to his home in the country, that he never lived with the plaintiff as man and wife and never had sexual intercourse with her, and that he regarded the ceremony as a business proposition. This evidence was not challenged by the plaintiff.

On March 1, 1946, the Home Office sent the deportation order relating to the plaintiff to the Commissioner of Police for the Metropolis and asked him to take steps to enforce it, and accordingly, on March 4, a police officer called on the plaintiff and told her to get her affairs in order as she might be deported on March 7, 1946, to Czechoslovakia. The plaintiff informed him that she had married an Englishman on January 12, 1946, and that the Russians were now in the place from which she came. The deportation order was not served on the plaintiff, as the practice apparently is to serve the order when the person concerned is arrested for the purpose of deportation.

An affidavit of a member of the Czechoslovakian Bar appears to establish that when the plaintiff was born in 1909 her legal domicile was Hungary, that in 1918 that part of Hungary in which she was born became part of the Czechoslovak Republic, that when she arrived in this country in 1930 she was a Czech national, and that when she married a British subject on January 12, 1946, she lost her Czech nationality, if she then had it, but that

she had probably lost it before by a decree of the Czechoslovak Republic of August 2, 1945, which came into force on August 10, 1945.

The present proceedings by the plaintiff arise out of these facts, and it is necessary to consider the power and authority by which the Home Secretary purports to act in enforcing against her the deportation order of April 6, 1945. In the letters and in the police officer's conversation it was indicated to the plaintiff that it was proposed to send her to Czechoslovakia. On the hearing before me Mr. Slade, for the plaintiff, objected that there was no power to deport a person to a named country. This was accepted by the Attorney-General on behalf of the Home Secretary, and no amendment of the writ was therefore pressed, and no issue on the matter arose for my consideration.

It is provided by section 1 (1) of the Aliens Restriction Act, 1914 (the principal Act) as amended by the Aliens Restriction (Amendment) Act, 1919, as follows: "His Majesty may . . . by Order in Council impose restriction on aliens, and provision may be made by the order." Section 2 (1) of the Act of 1919 amends section 1 (1) of the Act of 1914 by adding the following paragraph: "For determining what nationality is to be ascribed to aliens in doubtful circumstances, and for disregarding, in the case of any person against whom a deportation or expulsion order has been made, any subsequent change of nationality." By these two Acts, as continued by the Expiring Laws Continuance Acts, the Aliens Order, 1929, was made and was amended from time to time up to September 1, 1939. It was under article 12 of the Aliens Order, 1929, that the deportation order was made in this case, and the particular ground for the order fell under article 12 (6) (c); "If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

The contentions in the case arise under article 21 (3), which provides that where "any deportation order under the principal Act is in force against any person that person shall, unless the Secretary of State otherwise directs, be deemed to retain his nationality as at the date of the order notwithstanding any intervening naturalisation, marriage or any other event." It was contended on behalf of the plaintiff that she was no longer an alien and that the Aliens Order had no application to her now; that by section 10 of the British Nationality and Status of Aliens Act, 1914, the plaintiff, as the wife of a British subject, was deemed to be a British subject; and that the motive in her marrying had no bearing on the present question. It was further submitted on her behalf that, accepting that section 1 (1) of the principal Acts as amended, enabled the Secretary of State to make orders for disregarding any subsequent change of nationality, even for disregarding a change to British nationality, no such order had been made, and that article 21 (3) of the Aliens Order does not achieve that object but, using different words from the Act, has a different object and effect.

The argument on behalf of the defendant was that article 21 (3) gave him clear power to deport the plaintiff because the deportation order was still in force against her, and that notwithstanding the plaintiff's marriage after the date of the order she was deemed, under the article, to retain her nationality as at the date of the order.

On this issue I find in favour of the defendant. The effect of article 21 (3) is, in my opinion, to disregard the subsequent change of nationality by deeming the alien to retain the same nationality as at the date of the order—that is, to disregard a change arising or intervening between the date of the deportation order and completion of the order by its execution or other determination. It was argued that article 21 (3) might apply to an alien changing from one alien nationality to another alien nationality, but not to an alien acquiring British nationality. I find nothing in the language to support this view, and I do not see how the comity of nations would be any more or any less affected in the one case than in the other.

It was further submitted by Mr. Slade that the deportation order was not in force against the plaintiff and that therefore article 21 (3) does not apply. In my view, the order was in force. It was valid and effective, and, if the decision to which I have come on the first question is right, the order could be served at any time on the plaintiff and she could be forthwith arrested and deported. I see no reason for requiring a deportation order to be served in order to be in force, and there are good reasons against such a view. It would be impossible to hold that a deportation order in the hands of the police who were trying to effect service and arrest an alien was not in force. The order is in force because it has been made and is still subsisting. It has not been carried out or revoked.

In my judgment, the defendant acted within his powers, and the plaintiff has not established any basis for the declaration and the relief which she asks. I therefore dismiss the summons and the action, with costs.

BOOK REVIEWS AND NOTES

Making International Law Work. By George W. Keeton and Georg Schwartzenger. London: Stevens and Sons, Ltd.; 1946 (2d ed.). Pp. x, 266. Appendices. Index. 12/6.

This volume is published under the auspices of the London Institute of World Affairs as an aid in the preparation for the Diploma in International Affairs offered by the University of London, in which the authors are respectively Dean and Sub-Dean of the Faculty of Law. In this edition the text has been somewhat reduced and the appendices greatly enlarged.

The book is an admirable critical survey and analysis of the development and functions of international law and its relation to the historical attempts at world organization. It is packed with quotations, allusions, and precedents but, unlike the first edition, it has no documentation unless the list of "Readings" at the end of each chapter may be called such.

The title may well have been "Why International Law has not Worked," for the authors find little to commend in its past record. Indeed, the reader may be pardoned for wondering how it has worked at all during the 300 years since Grotius. In this period the world has been an ill-assorted heterogeneous group of nations to which the term "society" has been generously applied, since, as the text indicates, there has not been sufficient political cohesion to warrant the term "community." This society of nations, the authors say, has been activated chiefly by motives of self-preservation and self-interest (a process called power politics) and ruled by the "supreme law" of force to which international law, leavened with a sprinkling of international morality in deference to public opinion, has been a subservient and useful adjunct. Indeed, did not international law create the very bogey of state sovereignty which has been the stumbling block of world organization ever since, the cause of the decline and fall of the League of Nations and even now an apparition in the United Nations?

The book contains little optimism for the future of international law, although it concedes that the United Nations hold some promise of development through its institutions, especially the World Court. Nothing is made of the solid advance in international law since the Hague Conferences so eloquently depicted by Judge Hudson in the proceedings of the American Society of International Law for 1946. "Short of some minimum of world federation (say the authors) the world powers may maintain even for a prolonged period an uneasy equilibrium between themselves, but the rule of law between nations . . . must remain as precarious" as in the past.

The volume closes on the hysterical note, common today, that "a new and terrifying urgency," a threat against "human existence itself," leaves "no alternative" but "the establishment of a world legislature directly responsible to the peoples of the world [through elections], a world police, a world judiciary—and a world law." And we are pressed toward these new and untried experiments because "the time in which these changes must be achieved is short."

No suggestions are volunteered, however, as to how this panacea for a war-torn world can be compounded, before it is too late, out of the existing flux of races, religions, cultures, traditions, aspirations, and ideologies now spread indiscriminately over the earth. If they somehow could be fused, one may ask, what kind of government would be imposed on the world, what principles would it stand for, what limitations would bind it? A world government could be as unjust and tyrannical as any the world has ever seen and new rebellions and conflicts might still arise under the old name of "civil war," as occurred in the United States even under the Constitution.

The authors, perhaps, sense the difficulties involved, for their final admonition is that "there is no special virtue in legal or political forms" if the determination to make them work is wanting. The League of Nations failed because this catalyst was lacking and the United Nations may fail for the same reason. Would the proposed representative world government have any better chance of success?

L. H. WOOLSEY

Of the Board of Editors

Mezhdunarodnoe Pravo, Uchebnoe Posobie [International Law. Study Aid]. By V. N. Durčenevskii and S. B. Krylov. Ed. by Prof. E. A. Korovin. Moscow: Advanced Diplomatic School of the Ministry of Foreign Affairs, U.S.S.R.; 1946. 3 vols. Pp. 111, 156, and 100.

These three small volumes represent the first systematic treatment of the general principles of international law to appear in the U.S.S.R. since the war. Krylov, who is the judge elected to the International Court of Justice from the Soviet nominees, and Durčenevskii, who has been a legal adviser to the Soviet delegation at the peace conferences and the United Nations, have had much experience with their subject. The volumes set forth no new Soviet theories, but chronicle in some detail Soviet practice in the familiar fields of international law. In this fact the volumes provide a convenient source for outsiders wishing to check on the established Soviet position.

Readers who are familiar with the controversy in Soviet legal circles during the 1930's over the nature of international law as recognized and practiced by the U.S.S.R. will be interested to find that the authors do not enter this controversy. They state that although many articles appeared

in a Soviet journal in 1939 there is as yet no work on the subject. They propose no theory of their own, but they discuss the issues which gave rise to the conflict. For example, they consider the fact that international law has been developed largely as the result of relationships between bourgeois states. They indicate that with the advent of the U.S.S.R., international law could not remain solely bourgeois in character but became a composite. Bourgeois states recognized some of the principles introduced by the U.S.S.R., and the latter in the interest of coöperation recognized those aspects contributed by bourgeois norms which did not conflict with the interest of the U.S.S.R. Some principles were rejected, such as those resting on the thesis that states are not equal, and including even ceremonial customs when they were utilized by hostile states against the interests of the U.S.S.R. The composite character of current international law is recognized as of great significance.

The Republics of the U.S.S.R. are declared to have become subjects of international law since the law of February 1, 1944, granting them the right to form their own Ministries of Foreign Affairs. Recognition by other states or its denial is found not to affect the question of whether a new subject of international law has come into being. The authors review the difficulties faced by the U.S.S.R. because of delayed recognition and the legal consequences, and characterize such as manifestations of a political decision.

The familiar Soviet position as to the duty of a successor state to assume the obligations of a predecessor is set forth. Such a duty is found to exist only when there has been no social revolution. Examples from the practice of the French Republic following the French revolution and the new Soviet Government following the downfall of the Provisional Government are given. It is stated that the U.S.S.R. has accepted obligations under Tsarist treaties in many instances by specific declaration or by tacit admission, as with the boundaries between itself and China. It has even consented to compromise by paying on new loans a higher rate of interest than the market required in order to provide for small bondholders of Tsarist loans, but it has refused in general to accept the principle that it should pay Tsarist obligations, particularly when they were incurred to resist the revolutionary movement.

Territorial principles are stated with the inclusion of the familiar Soviet thesis that territory within the polar sector extending north or south in the Arctic or Antarctic from the boundaries of a state's mainland belongs to the state whose boundaries define the area if the state issues a declaration to that effect. Recognition is given to the difference of opinion among Soviet writers as to whether ice is territory. Territorial waters are treated as involving reasoned consideration in each case rather than the application of a general rule such as the three mile limit. Soviet treaties with other powers concerning fishing or navigational rights are cited as examples

of the preferred approach. Soviet support of the principle that dominion over air space coincides with territory is also given.

The instrumentalities through which the U.S.S.R. conducts its foreign relations are described. Emphasis is placed upon the trade delegations and the Soviet claim to immunity for these delegations. A list of all states with which the U.S.S.R. maintained diplomatic relations on November 7, 1945, is appended. Existing international conventions are discussed, such as those creating international agencies and regimes and the Soviet position on each set forth. When the U.S.S.R. has not adhered, a brief statement of the reason is given, as for instance that the U.S.S.R. will not adhere to the white slave traffic convention as it seeks to eliminate prostitution entirely.

Arbitration as an institution is described but the Soviet preference stated for diplomatic action or conciliatory commissions. Arbitration is welcomed only for commercial disputes involving questions of the conflict of laws. The treatment of the new International Court of Justice is purely descriptive.

Non-Soviet readers will find these volumes thorough but brief when compared with American treatises for students. They may worry about the concept that international law will be accepted only when it does not conflict with the principles and interests of the Soviet state, because of its composite character. Presumably this concept concerns only customary law, for if the U.S.S.R. has signed a treaty, the question falls under the chapter which reaffirms the oft-stated principle that the U.S.S.R. considers its own treaties sacred. To avoid confusion as to what principles of customary law are to be accepted or rejected a concerted effort might be made to reduce the important principles of customary law to writing so that a multi-lateral treaty might be signed. Perhaps the United Nations will expand their codification program beyond its original scope and utilize it for the purpose of creating international legislation.

JOHN N. HAZARD

Columbia University

Le Droit des Gens et Le Système du Droit Polonais. By Alexander-Czeslaw Melén. Fribourg: St-Paul; 1945. Pp. 120.

The literature on the relation between international law and municipal law is now supplemented by Dr. Melén's study of the application of public international law by the Polish courts under the Constitutions of 1921 and 1935. Two general conclusions are stated. The first is that the Polish courts were enabled to give the fullest possible application to appropriate rules of international law and treaty provisions. This conclusion seems to be borne out by copious quotations from the decisions of the Polish courts but is somewhat weakened by the failure of the author to distin-

guish holdings from dicta. The work would have been much improved if the author, instead of presenting a mass of isolated quotations, had discussed the issues and the decisions in the most significant of the cases cited. The author is also rather uncritical in his discussion of some positions taken by the Polish courts, particularly with respect to the view that the Poland of 1918 was not a new state, but a continuation of the Poland of 1795.

The second conclusion, that the Polish practice supports the monistic rather than the dualistic theory of the relation of international law to municipal law, is arrived at by successive elimination of various conceivable "transformers" of international into municipal law in Poland and is not very meaningful or convincing to the reviewer. The Polish practice in giving domestic effect to rules of customary international law and to treaty provisions does not appear to be basically different from the practice in many other states. In this connection, the author betrays lack of knowledge or understanding of the American practice and sources in asserting without qualification, for example, that American courts will not give effect to a rule of international law unless it has been "accepted" by the United States and that proclamation by the President is essential in the United States to the domestic effectiveness of treaties. Dr. Melén's dissertation is a useful guide to the Polish practice in the period 1919-1939, but must be employed with caution.

OLIVER J. LISSITZYN

Columbia University

Colección de Estudios en homenaje al profesor Camilo Barcia Trelles. Universidad Compostelana. Santiago. 1945. Pp. 393

This is a collection of studies offered to Professor Barcia Trelles at the occasion of his quarter century of teaching international law. Barcia Trelles, member of the Institut de Droit International, is widely known through his writings, through his stay in this country and Latin America and through his lectures at The Hague Academy. Perhaps best known are his studies on the Monroe Doctrine. His approach toward the study of international law is, contrary to the Vienna and Italian Schools, closely bound up with international politics. In his treatment of the Monroe Doctrine, or recently of the problem of the Mediterranean, and always, he is, first, a Spaniard, proud of his great country and of his country's achievement as the founder of the modern Law of Nations. A strong believer in international law and in Spain, he is the defender of the ideas of Victoria and Suárez, according to which international law, necessarily based on the rock of an objective law of justice, is the law of mankind, divided into nations.

Of the fifteen contributions the majority bear on problems of international law. Most contributors are, of course, Spaniards. But there is one

contribution in Portuguese, and three in English. Yanguas Messia, the well-known international lawyer of the University of Madrid, treats the Conflict of Laws in Vatican City. H. C. Gutteridge, of the University of Cambridge, England, writes on the doctrine of the *forum non conveniens*. There are interesting studies on the "Legislation of the Indies," on legal problems in Visigothic Spain. Interesting, also from the point of view of literature, is the study of Cañalso's satire against internationalists in the XVIIIth Century.

Edwin Borchard develops his pessimistic attitude toward an organization to enforce peace, whereas Frederic R. Coudert writes on world organization and the role of the lawyers. Garcia Arias treats the diplomatic immunities in the light of the doctrine of Bynkershoek. P. Venancio D. Carro, O. P. gives a highly interesting study on the conception of international law in the Spanish theologians-jurists of the XVIth Century and its connection with the teachings of St. Thomas. From these conceptions he draws the conclusion that all belligerents have gravely violated the law in this war and that all men of the XXth Century have good reason of being profoundly ashamed of themselves. As you would expect, the Soviet Union is to him the "number one enemy" of all humanity.

The introductory words to the volume are written by the Rector of the University of Santiago de Compostela, the leading Spanish philosopher of law Luis Legaz y Lacambra.

JOSEF L. KUNZ

Of the Board of Editors

La Jurisdiction Obligatoire de la Cour Permanente de Justice Internationale.

By Stévan Glichitch. Paris: Jouve & Cie; 1940. Pp. 184.

The Process of International Arbitration. By Kenneth S. Carlston. New York: Columbia University Press; 1946. Pages xiv, 318. \$4.50.

It is to be hoped that a new era is dawning in the history of the judicial settlement of international disputes. To this end a resurgence is needed in our literature on the subject, and these two volumes may be its precursors.

Though the first of the volumes under review was published in 1940, it has lost none of its value as a consequence of the revision of the Statute of the Court. It gives a competent outline of the compulsory jurisdiction of the Court, though with perhaps too little emphasis on the variety of instruments which confer such jurisdiction; and more attention might have been given to the limits of the jurisdiction *ratione materiae*. Half of the volume is devoted to procedural matters, proceedings instituted by *compromis* being considered along with those instituted by applications.

The second volume gives evidence of painstaking industry in the assembling of scattered materials, and it will be particularly useful as a bibliographical aid. The handling of the materials assembled, their arrange-

ment, and the appreciation of their significance, are the chief problems in such an undertaking, and on this score the volume might have been made more helpful. The title of "jurisdiction," the main part of the volume, is employed as a catch-all for various topics. For some of the more puzzling cases, such as the later judgments of the Central American Court of Justice and the judgments in the *Sabotage* cases, the facts are set forth in detail. A comprehensive history and analysis of international jurisprudence since 1794 is much to be desired, and when it is undertaken this volume may serve as a useful *point de depart*.

M. O. H.

Of the Board of Editors

The Alien and the Asiatic in American Law. By Milton R. Konvitz. Ithaca: Cornell University Press; 1946. Pp. xvi, 299. \$3.00.

This book is far above the average in its subject; it is unique, I really believe. The first two chapters deal with the right to exclude aliens and the right to expel aliens. The substance is based upon decisions of the federal courts, notably the United States Supreme Court in the *Harry Bridges* case. It gives, however, a good survey of the history. The author commends the Supreme Court in its latest view that deportation is a penalty subject to all the safeguards surrounding a criminal prosecution and punishment. Chapter III is headed "The Right or Privilege of Becoming a Citizen," which has now been extended to most Asiatic peoples except the Japanese. The fourth chapter is "The Right to Remain a Citizen," and deals primarily with the *Schneiderman*, *Baurgartner* and *Knauer* cases. Chapter V discusses "The Right of Aliens to Own Land," and especially the California legislation on the subject. Chapter VI discusses "The Right of Aliens to Work," and is notable for the exhaustive tables of the statute law of the United States furnished by the author on pages 190-211. Chapter VII deals with "The Right of Aliens to Share in the Natural Resources." The author criticizes severely the discriminations found in American law. Chapter VIII deals with "Foreign Languages and Segregation in Schools," and insists that the separation of the races is not equality. Chapter IX discusses miscegenation statutes, Chapter X the registration of aliens, and Chapter XI the *Kirabayashi* and *Korematsu* cases and others dealing with the war orders which took persons of Japanese extraction, including American citizens, into relocation camps, really concentration camps.

This is followed by a bibliography, a table of statutes and documents, a table of cases and an index. The author produces a critique of the law at the end of each chapter which adds to the value of the factual recital. His liberal outlook will be concurred in by many readers.

EDWIN BORCHARD

Of the Board of Editors

The General Principles of Law. By A. M. Stuyt. The Hague: Nijhoff; 1946. Pp. xii, 272. Index.

The book under review is a Dutch Doctor's thesis written in English. The contents of the book are excellent and valuable. The author inquires into the general rules of international law, governing the attribution and the exercise of a state's territorial, personal, and administrative jurisdiction. While much of the relevant literature in the different languages is taken into consideration, the book is primarily based on decisions of international tribunals and courts since 1794, including the decisions of the highest federal courts of the United States, Switzerland, and Germany in cases between states of the union, cases which were decided according to rules of international law. In this respect the book is excellent.

But the author's intention is, first of all, "to construct a new method of inquiry into the general principles upon which international law is based," and to find out how international decisions ought to be analyzed in order to arrive at a synthesis of the general principles of international law. The book is, therefore, in the author's intention, an essay in method. The author rejects the method used by other writers, who studied the problem of the "general principles of law, recognised by civilized nations." He distrusts as dangerous the transfer of generally recognised rules of municipal law into international law, or the use of "natural law." Since 1794 no international tribunal has applied "natural law"; where "natural law" has been invoked before international tribunals it was done to support political claims.

The inquiry has as its object the analysis of general rules of international law, for international tribunals apply concrete rules, not abstract principles. But the inquiry into these general rules is made in order to arrive at a synthesis of the underlying general principles. There may be a general rule (such as the formula of the Thalweg), not derived from a general principle of law; there may be a recognised general principle, although, in the present state of international law, no general rule, deduced from this principle, can be defined; deriving all possible rules from such principles is the "fine task" of international tribunals.

What principles? Of international law or of general law? Principles of general law, the author means. For instance, the rule of municipal law of acquiring property by occupation of things which belong to no one and acquisition of sovereignty over *terrae nullius*, are, in the author's opinion, derived from a general principle of law, stated in Roman law as *Quod enim nullius est, id ratione naturali conceditur occupanti*. But it should be said that the fathers of international law simply transferred this rule of positive Roman law, which, at the same time, was looked upon as *ratio scripta*, into the new international law.

The question of the nature of these "general principles" is excluded by the author from his investigation as metajuridical, but he hopes that his

conclusions may have some interest as an introduction to the philosophy of law. He concludes that there are general principles of international law which are ultimately based on the two *juris praecepta* of Roman writers: *alterum non laedere* and *suum cuique tribuere*. But this result is obviously an anti-climax. For the two "principles" are empty formulas.

JOSEF L. KUNZ

Of the Board of Editors

L'Organisation de la Société Internationale. By Paul Guggenheim. Neuchâtel: Baconnière; 1944. Pp. 175. Fr. 4.75.

Published in 1944, this study was particularly timely while the attention of the world was centered on the emerging charter of the United Nations. But many of the author's ideas are equally appropriate today, for he attacks with admirable penetration such timeless problems as the chances for universal federation; the limits of international organization; universalism, continentalism, and regionalism; the great and small powers in international organization; the principle of unanimity; the organization of public opinion in the international community; the Atlantic Charter and traditional international law; and utopia, reality, and ideology in the field of international organization.

A number of the author's views have a special bearing on current problems of world organization.

Two grave defects in the League system have reappeared, according to Dr. Guggenheim, in the system of the UNO. They are, first, the absence of obligatory arbitration, and, second, "machinery of enforcement which is both effective and capable of frightening, in time, the eventual offender, but without underestimating the primitive nature of the international society" (p. 19).

The view according to which the public international unions, such as the Universal Postal Union, are natural stepping stones to federation, is refuted by the author, who contends that the real condition precedent here is an agreement among the Great Powers on their common interests. In fact he reserves for the latter a position of great responsibility, leaving to them the right to solve political disputes, with authority, if necessary, to impose their will on smaller powers. Obligatory arbitration for legal disputes is recommended, but some method of enforcing the decisions would be necessary. How this could be worked out in practice the author does not explain. Collective security, he believes, can be attained progressively, but the principle of sovereignty, and the rule of unanimity for the creation of new rules of law, must be maintained provisionally until the world has reached a more advanced stage.

The author points out that there are, in present conditions, certain limits to the efficacy of world organization. Nations, big and small, are not likely to give up the right to determine just how far they will go in co-

operating among themselves. Nor will they easily surrender the right to say to what extent the world organization may intervene in their internal affairs. Furthermore, until international law is considerably improved and extended, too much hope must not be entertained for the enlargement of the scope of obligatory arbitration. Finally, he says, in the effort to keep the peace "it seems much more important to us to solve the problems of emigration, colonies, and raw materials, than to reach an agreement on obligatory arbitration, diplomatic mediation, interstate consultations on disarmament or the institution of an international police" (p. 48).

Most of the current suggestions for the modification of the dogma of sovereignty the author considers premature, except those such as were permitted under the Covenant of the League of Nations, and those whose aim is to generalize the optional procedure for the definitive settlement of political disputes. Another legitimate exception is found in the principle of majority vote already functioning in the work of certain administrative and financial unions. Further progress in this direction must await improvements in legal techniques, and such changes in the internal culture of states as to ensure a minimum of ideological homogeneity.

The author maintains that the "tribune of free peoples" so dear to President Wilson can not be realized without incorporating in the new charter, as a sacred individual right, freedom of thought and expression. He admits, however, that this may require considerable time.

Taking a stand which resembles E. H. Carr's demand for a synthesis of power and morality, Dr. Guggenheim warns us against two evils. These are, on the one hand, to cling uncompromisingly to absolute sovereignty and integral independence of states, and, at the other extreme, to attempt to set up at once some super-state provided with centralized administrative, judicial, and legislative powers like those within the individual states. In this order of ideas, he contends that it is futile to plan for a world police before we have set up some central organ capable of determining what acts are illicit or aggressive.

This is a thoughtful book, and while the issues and the arguments are not new—for ever since the Atlantic Charter they have been constantly debated—they are presented here with such admirable objectivity and such a keen critical sense, avoiding both the utopian and the reactionary, that the book is well worth the study of all students of world organization.

JOHN B. WHITTON

Of the Board of Editors

La Costituzione dell' ordinamento internazionale. By Piero Ziccardi. Milan: A. Giuffrè; 1943. Pp. 457. Index. Lire 100.

This big volume, published in Italy in the middle of the war, is a more than ample theoretical investigation into the problem of those highest norms of general international law which form its constitution and of the

basic norm on which all others depend. The author rightly says that this investigation is of great theoretical interest and of great practical importance.

He starts his investigation with a review and critique of the doctrine. The problem was not studied until recently in consequence of the inroads made into XIXth century positivism by the newer Italian School and by the Vienna School. The author pays tribute to Verdross as the principal and highly influential pioneer in this field. But he rejects the constructions of both these schools. The basic norm, he states, identifies a legal order; if the basic norm is changed, the old legal order is extinguished, the continuity of the legal order is broken. But the basic norm can not be sought in sociology or ethics; it can not, contrary to the Vienna School, be sought in a pre-supposed, non-positive norm. All this would destroy the science of law as an independent science, would make it a mere technique, a mere appendix of an other science—sociology, ethics or philosophy—, from which it would have to take its object. For the science of law to be an independent science it must be exclusively a science of positive law, excluding not only any notion of natural law but also any *a priori* considerations.

The function of the basic norm, according to the author, is not to create the legal order, but to serve as the fundamental norm of a legal order, the existence of which is already given. The constitutional norms, as the highest norms of the international legal order, and the basic norm as the highest of the constitutional norms, must be positive norms. The way to determine these norms is to look at the data offered by empirical, juridical experience. The science of law is not a normative science, but a science of juridical experience.

The most important constitutional norms are the norms on the sources of the law; the basic norm must be the highest of these norms. Rejecting the treaty and the general principles of law for this task, the author finds custom to be the highest source of international law. And he finds this to be only natural; for there is a strict connection between the material structure of a society and its constitutional legal order. Rejecting the monistic doctrine and holding, with the Italian School, international law and municipal law to be *toto genere* different, the author insists on the non-authoritarian character, on the parity-structure of international law, on its high degree of decentralization. In consequence, only custom can constitute the basic norm, as custom is itself a highly decentralized form of creating law, decentralized to all the sovereign states. The author strongly insists on the fundamental principle of the equality of states. Not all subjects of international law possess the law-making function, but only those which the author terms "International Powers": sovereign states, Dominions, and the Holy See. Of the two elements of customary

law, repeated behavior, and *opinio juris*, the author excludes the first as non-essential.

The author recognizes the existence of particular constitutions; but as they consist of treaties, and as every treaty has the reason of its legal validity in the norm *pacta sunt servanda*, which is a customary rule of general international law, all such particular constitutions are always anchored in the basic norm of general international law.

The book shows the virtues of the Italian School; the theoretical reasoning, the far-flung acquaintance with the whole literature on international law in all the great languages, the strict distinction between international law and international politics. The book, published in 1943, shows no trace either of fascism or of the fact that the Second World War was going on. The author gives in a footnote a careful and rather complete bibliography of National Socialist literature on international law only to dismiss it in the text as political and, therefore, irrelevant for a legal discussion.

But the author also clings to the dualistic construction, to sovereignty and equality. A modification in the sense of making international law directly binding upon individuals would, he says, necessitate a complete change of the present international law to such a degree that the continuity would be broken and the present international law be replaced by a totally different international legal order.

The book is interesting and with many points one can be in agreement. But this reviewer considers the dualistic construction as theoretically untenable, doubts the possibility of basing the whole law on a highest positive norm, and can not accept the author's method of "juridical experience."

JOSEF L. KUNZ

Of the Board of Editors

Internationale Ordnung. By Wilhelm Röpke. Zürich: Eugen Rentsch; 1945. Pp. 355. Index. Fr. 12.00.

Devoted exclusively to the international aspects of the crisis of society and how to overcome it, this penetrating study completes a trilogy of books which began in 1942 with *Die Gesellschaftskrisis der Gegenwart* and was continued in 1944 with *Civitas humana*. The introduction deals with the nature of the international crisis, with false and true internationalism, the sociology of war, Machiavellism, *Realpolitik*, and with the implications of nations, sovereignty, and community of states. At the end of the introduction and each chapter are assembled notes, suggestive lines of research and exposition, and recent European and English-American bibliographies.

Divided into three parts, the first part covers "war and peace as economic problems," embracing three chapters treating of (1) capitalism and imperialism, (2) the international raw material and colonial problem, and (3) the international population problem. In concise understandable German

(not the super-theorizing verbiage), Röpke says what he wants to say, calling a spade a spade. His basic theme is to treat "liberalism" and "collectivism" as the two great contrasts in conflict with each other in the domestic as well as in international life. He endeavors to prove that an international order is only possible on a "liberal" and not on a "collectivistic" basis.

The second part is devoted to an analysis of the fears of world economy in the light of its recent decline. The obstacles to the development of a common will in the various nations to overcome this decline are numerous and powerful, observes the author, but the greatest obstacle to be tackled is the psychological root of *fear*. Röpke traces the various origins of such fear and in two additional chapters stresses "the fear of competition" and "the fear of passive balances of payments."

In the third part he presents "the path to a new world economy," with its transitory problems of reconstruction and employment, and describes the paramount role to be played by the United States; the alien collectivistic school; the place of planned economy; the regional principle; and the international and gold currency regulation in world economy. Inseparable unity is required to solve all of these vital problems of reform in our time, asserts the author. In the concluding chapter, entitled "the world's historical hour," he attacks the current spiritual epidemics of the masses which he believes are detrimental to national and international order.

CHARLES KRUSZEWSKI

Chicago

Philosophie du Panaméricanisme et l'Organisation de la Paix. Le Droit Panaméricain. By J. M. Yepes. Neuchâtel: Bacomière; 1945. Pp. 348.

The well-known Colombian international lawyer Jesús Maria Yepes, who has given a great deal of his life to studies on Pan-America, presents in the book under review a synthesis. The "philosophical bases," the history of Pan-America, the ordinary and extraordinary Pan-American Conferences are briefly sketched; the Consultative Meetings are more fully treated as well as the Pan-American Union. There follows a discussion of what the author calls the "Pan-American law of nations."

Such synthesis naturally can not be complete; all Inter-American non-political coöperation and the technical conferences are excluded. The book has its merits. The author is also critical of the Arbitration Treaty of 1929, the prohibition of political activities in the Pan-American Union, the imperfection and confusion of the Pan-American peace machinery and presents at the end of the book a proposal *de lege ferenda* for the reform of Pan-America.

But the book has its grave defects scientifically and juridically. It belongs rather to the category of Pan-American panegyrics. Pan-America is praised as a turning-point in history, as a model for other continents and

for the future world-wide international organization. The Pan-American law of nations, he writes, if made world-wide, would constitute the ideal formula, containing the secret of peace. Writing in April, 1945, he severely criticizes the Dumbarton Oaks Proposals, as being opposed in fundamental points to the Pan-American law of nations.

His Pan-America is really only that of 1933-1942: the Pan-America which has continental solidarity as its foundation, and the good-neighbor policy as its skeleton. And the good-neighbor policy means basically, autonomy and full independence—although not absolute sovereignty; equality of states, and strictest non-intervention by a single state, whether by force or threat of force, whether direct or indirect, whether into the internal or external affairs of another republic, and includes, therefore, the abolition of diplomatic intervention for the protection of citizens abroad. The Argentine crisis, the tension between Argentina and this country, which has delayed, down to the present time, the Conference on Inter-American Defense, and the 9th general Conference, to be held at Bogota, is passed over under discreet silence. The author tells us that the "balance of power" idea has never played any role in Latin America, that the few Latin American wars were of a "strictly juridical nature," that the non-recognition of conquest, the principle that "victory gives no rights" are fully recognized. What about Chile's conquests by war? He tells us that the Americas never repudiated the democratic and republican spirit, that Latin America "practices rigorously representative democracy," and that, while the President has great powers, his term is fixed in advance by the Constitution and can not be altered by him. But Latin America is the classical land of dictatorships. What about Latin American civil wars, presidential "continuismo," the "Estado Novo" of Getulio Vargas? The author praises America's respect for the dignity of man and human rights, but Ciro Alegria recently wrote that a guarantee of human rights in Latin America exists often "only on paper."

Here we see one of the principal juridical defects of the book. The author only quotes and discusses the text of the Constitutions, the text of Pan-American treaties and resolutions and never investigates or discusses how they work. But a legal order consists not only of general, abstract norms, but also of the dynamic totality of its application through concretisation into individual norms. He who wants to know what the law of the Inter-American System is must also study how the abstract norms work in practice. There is often a divergence, sometimes a contrast, between the principles laid down in *abstracto* and their application.

The author asserts that Pan-American resolutions, if unanimously approved, are legally binding without ratification but no discussion or proof of this crucial problem is offered. The author treats the 1928 treaty on the organization of the Union of American Republics as positive law, as the institutional basis of Pan-America and affirms that it is for Pan-America

what the Covenant was to the League of Nations. This is juridically untenable. The 1928 treaty has never been ratified by all the 21 Republics, has never become positive law.

Very doubtful is also the author's conception of a "Pan-American law of nations," which, he asserts, is totally different from Alvarez' "American Inter-national Law." This conception of the author is, to a great extent, natural law, as he himself says. These principles, he states, rest on natural law and are, therefore, even if not codified in Pan-American treaties and resolutions, "morally binding." But law is not "morally binding," if it is law it is legally binding.

This reviewer is a great friend of Latin America, a student and admirer of the Hispanic culture, a protagonist of the Inter-American System, but he is also a legal scholar. The book under review, valuable in many parts, is, in the words of the dedication, to "teach the grandeur and beauty" of Pan-Americanism. But the truly objective, scientific, and strictly juridical work on the Inter-American System remains to be written.

JOSEF L. KUNZ

Of the Board of Editors

Eroberung des Friedens. By Paul Reiwald. Zurich: Europa Verlag; 1944. Pp. 218.

In this unusually well documented volume, referring liberally and eclectically to psychoanalysis, social psychology, history, political science, law, criminology, and world literature, the author carefully develops the theme of man's ancient aggressive drives, their sublimation in the individual, and their—so far—unsublimated survival in the sovereign state. The psychological exploration of the dynamics of aggression both in the individual and in the group leads to a plea for a new concept and new methods of international organization. Preparing the reader for the analogy between individual and state, Reiwald stresses the fact that the individual, under the impact of natural and social forces, developed a conscience (super-ego in psychoanalytic terminology) and a standard of morality. Aggression was repressed into deep, unconscious layers of man's self and, if it could not be entirely repressed, it was turned into channels which were useful and acceptable to the community. Social forces, including such coercion as the penal code, serve a twofold purpose: they create in the individual the willingness to forego the gratification of his own aggressive drives and at the same time provide a sanctioned and legitimate outlet for aggression against the criminal, the nonconformist, the one who does not sacrifice satisfaction of his aggressive urges. The state, on the other hand, the sovereign state of our time, has not yet conquered its own aggressions. It lives by a double standard: toward its citizens it maintains the standards of lawfulness and morality, toward its fellow states it persists in aggressive acts and under the guise of sovereignty clamors for the acceptance of the very

drives which it punishes within its own jurisdiction. As a result states commit aggressive acts against one another and, in the absence of international conscience and morality will continue to do so.

How then can peace ever be conquered? Reiwald sees the answer in the understanding of the psychological processes which socialized the individual—sacrifice of individual aggressive drives, identification with other individuals of the group, and the collective, justified, and lawful unleashing of aggression against any individual who by his aggressive act disassociated himself from the group—, and the deliberate application of the same development in international organization. Reiwald suggests as analogous steps (1) partial or total sacrifice of sovereignty on the part of individual states, (2) identification of states or nations with others to whom they are geographically or ethnically linked and eventually with all others in a world society, and (3) the establishing of an international penal code to act both as an outlet for collective, lawful aggression against any aggressor block of nations and as a conscience-building force to promote international morality.

Despite the somewhat utopian title of the book and the intensity of conviction and presentation Reiwald is no utopist. He develops his theme on a single track and brings it to an almost inevitable solution, which seems feasible and even satisfactory because it is unpretentious and essentially honest. If the reader is left with a slight feeling of frustration it is not because of anything Reiwald has said but rather because of the things he has left unsaid. More than anything else, a discussion of the influence of physical, emotional, and economic stress on individual and collective aggression would seem to have been well within the scope of this excellent and comprehensive psychological presentation.

HEDDA BOLGAR

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The Danzig Dilemma. By John Brown Mason. Stanford: Stanford University Press; 1946. Pp. xviii, 378. Appendices. Indexes. Maps. \$4.00.

To those who might be tempted to question the timeliness of a book on Danzig which is not and does not pretend to be an authoritative exposition of the political, economic, and legal data which make up the history of the Free City as an international entity, Dr. Mason aptly replies: "The full story of the Free City is valuable because the Danzig dilemma is not unique. It exists wherever the desire of one nation for access to the sea clashes with the national desires or rights of another people. Trieste is an example and there are others in Europe and South America. The experience

of Danzig needs to be studied, pondered, and recalled when the time comes to deal with these problems in a strong and effective way" (p. 307).

It is often dangerous to proceed by analogy in international government. The case, for example, of Trieste is more complex than that of Danzig. Generally speaking, one should be very cautious in applying the lessons of Danzig. Wherever the dilemma of freedom of communications versus national freedom arises, however, those lessons should be learned.

Some of them have an even broader bearing. There is, for example, the question of the appeal to the Council of the League of Nations from the arbitral decisions of the High Commissioner who represented the League locally. Both Dr. Mason and, before him, Mr. Morrow, recognize that there was room for improvement here.

The intricacies of the problems connected with Poland's right to conduct Danzig's foreign relations are very ably presented by Dr. Mason. He may be right in concluding that Poland did not gain fundamentally in regard to a free and secure access to the sea by that right (p. 239). However that may be interesting possibilities are here revealed, it would seem, for those who may be confronted with the wider dilemma: whether to see an immature people entrusted with the responsibility of the untrammelled conduct of its foreign relations or to deny them any part in that conduct, perhaps in the face of growing national consciousness and resentment. The solutions patiently worked out by the League High Commissioners may, perhaps, be adapted to the transitional stage between protectorate and independence in a setting very different from that of Danzig where two nations with a great history behind them were at loggerheads.

Ultimately, the lesson of Danzig would seem to be this: where the interests of two or more states in an important sphere of action are inextricably interwoven there are only two statesmanlike attitudes to adopt: cut the Gordian knot—subject the people outright to foreign rule, or remove them—or else set up permanent and effective machinery for international government. The Governing Commission for the Saar constituted such machinery. It was successful. To cut the Gordian knot means human sorrow and distress, a lowering of the standards of justice and culture, resentment and the determination to mend by violence what was done by force. Inadequate international machinery, however, as at Danzig, is hardly better. It begins by raising false hopes, festering sores are kept open, and, above all, reliance upon international law and confidence in international organization, as an alternative to war, are undermined.

Dr. Mason's book is a well written, easily read, substantially accurate survey of the Danzig problems by an impartial observer who is also a man of sound judgment. I have only found in it one statement which I believe is inaccurate when he says (p. 118) that, in establishing the Harbor Board, a joint commission headed by an umpire entrusted with the ownership and the management of the port and waterways of the Free City, the Treaty

of Paris "negotiated" by the Principal Allied and Associated Powers greatly curtailed certain rights originally assigned to Poland: "Instead of gaining complete control of the port and waterways, she was allowed only to share that control with Danzig on terms of equality." The Treaty of Versailles, in Article 104, did not give Poland any control over the port of Danzig; it merely assured to Poland without any restriction the free use and service of the port as far as necessary for Polish imports and exports.

While the book is an excellent introduction to the subject, it does not quite do justice either to the economic issues involved or to the legal problems that make the study of Danzig so worth while today. The treatment of the problem of competition between Danzig and Gdynia is much less developed than relatively minor issues such as the case of the Polish letter boxes and the dispute about the *port d'attache* for the Polish naval units. There exists a good dissertation by Dr. William Cargo on this subject which has unfortunately escaped Dr. Mason's attention.

There is a good deal of repetition and the sub-titles are sometimes not quite accurate—as for example that on p. 115—but on the whole it is an acceptable and well organized book. The formal presentation is good but not flawless either: excerpts from the Warsaw Agreement and a couple of maps would have much enhanced the enjoyment and profit of the reader and there are two indexes where one would have done better service.

JAN HOSTIE

ECITO *

Legal Aid. By Robert Egerton. New York: Oxford University Press; 1947. Pp. xvi, 160. Appendixes. \$3.75.

This book is one of a series published by the International Library of Sociology and Social Reconstruction. The author is Solicitor of the British Supreme Court. He has supplied a Bibliography and three appendices dealing with the legal aid problem in England.

The book should be read against the background of the changes now taking place in the British Empire. Whether the bar of the future is to be socialized or merely to undergo lesser changes is a matter of no mean interest. One may, on this point, read with benefit such articles as that by L. C. B. Gower in 9 *The Modern Law Review* 211 (October, 1946) entitled "The Future of the English Legal Profession."

The task of legal aid work is to make the law and the courts accessible to the poor man. As Egerton says (p. 3):

The problem is not small or unimportant. In 1941-2 only about 9,000,000 people in England and Wales were paying any income tax; in 1938-9 just over 3,500,000. The remainder of the forty-one and a

* In this review the author expresses only his individual opinions.

half million do not all require legal aid, because some of them are wives with husbands, or children with parents, who can afford to pay for legal services for their dependents, but the numbers involved are very substantial and there are many people who are at present unable to enforce their rights by legal process.

The reader who knows something of legal aid work in the United States will welcome a chance to observe the subject from a comparative, or international, point of view. He will be interested in the fact that only three chapters, V, IX, XII, are needed to cover the provisions for legal advice. Seven chapters deal with legal aid in court. In the United States less than ten per cent of the cases coming to legal aid societies ever get into court.

The general reader will be attracted by the historical survey of the growth of an enterprise designed to make effective in Anglo-Saxon jurisprudence the principle that before the law must be equal. He will also find value in the all too brief chapter on "Legal Aid in Other Countries."

The present reviewer notes that in England, as in this country, many members of the bar have been reluctant to come to grips with the need for legal aid for the poor. The names of those who, during the last generation, have led the fight in England for greater recognition of legal aid service are given and the practical suggestions made by the Rushcliffe Committee appointed by the Lord Chancellor in 1944.

This is a good book, challenging, well written, and persuasive, in support of a most important principle of democratic life. It should be widely read, particularly by lawyers. As to them, Professor Goodhart says in the introduction: "The legal profession is open to criticism, not because it has been ungenerous, but because it has closed its eyes to a problem which it, in particular, should have recognized."

JOHN S. BRADWAY

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NOTES

The Constitution and What It Means Today. By Edward S. Corwin. Princeton: Princeton University Press; 1947 (9th ed.). Pp. xvi, 271. Index. \$2.75. The newest edition of this compact and authoritative commentary (which has gone through nine editions since 1920) brings down to the beginning of the present calendar year the essential developments relating to Constitutional interpretation in the United States. In the eighth edition, which appeared in 1946, considerable attention was given to war powers as seen in executive and legislative acts. In his preface to the ninth edition Professor Corwin suggests that from decisions affecting organized labor and its leadership, and from the public reaction thereto, are likely to arise "the most interesting problems of constitutional interpretation for some time to come."

With the skill and incisiveness which have come to be associated with his long-recognized leadership in this field, the author has shown what the law has come to be, adding critical comments in many instances, and re-

ferring to nearly six hundred and fifty decisions, which are listed in the table of cases. He offers the opinions, among others, that in the field of constitutional law the doctrine of *stare decisis* is "very shaky," and that, "In consequence of the modern doctrine of due process of law as 'reasonable law,' *judicial review ceases to have definite, statable limits . . .*" (pp. 192, 193).

Specialists in international affairs will find in the volume a number of references to international law, as in connection with Congressional power to determine the rights and duties of the United States under this law (p. 56), the status and capacity of States of the Union (pp. 77, 181), powers allowed to a military commander (p. 92), public debts as affected by governmental succession (p. 147), and sovereignty as an attribute of nationality and as including paramount ownership over tide-water lands (p. 180). There will probably be some disagreement with the author's view that "Total War has completely destroyed International Law so far as it formerly attempted to set limits to methods of warfare" (p. 95), but general appreciation of his timely observations concerning collaboration between the executive and legislative departments of the United States Government under the United Nations Participation Act of 1945 to fulfill engagements under the United Nations Charter (pp. 62-63, 102).

ROBERT R. WILSON

Of the Board of Editors

A Diplomatic History of the American People. By Thomas A. Bailey. New York: Crofts; 1946 (3d ed.) Pp. xxvi, 937. Tables. Appendices. Maps. Cartoons. Index. \$4.25. The appearance of the third edition of this useful diplomatic history should be welcomed by students of American foreign policy generally. The present reviewer has recorded his estimate of the original edition, pointing out particularly its highly readable qualities and its general effectiveness.¹ The same qualities are to be found in the new edition, in which Professor Bailey carries the story on through six eventful years of American history. The second edition (1942) contained two new chapters, which related to the entrance of the United States into the Second World War; in the present edition the author has added two chapters on the diplomacy of that War, which afford a valuable summary of the development. Particularly useful are the notes in the Bibliographical Appendix (which retains, under the classification of "Recent References," the notes which appeared in the second edition, and has as "New References" many books and articles which have appeared since 1942), and the Bibliographical Notes at the ends of chapters (also arranged so that "Recent" and "New" references are shown separately). There is a 37-page index.

International legal aspects of foreign relations receive considerable emphasis. The author has given special attention to developments relating to the international law of neutrality. There will probably be some dissent from his view that Hitler "abolished neutral rights . . ." (p. 757) or "abolished" part of international law (p. 772). Regardless of what might be concluded concerning the evolution of the law of neutrality during the period under examination, it would seem to be paying the leader of the Reich too high a compliment to give him credit for abolishing law by violating it. Of the period following the Spring of 1940, Professor Bailey says that, in order to quiet the isolationist minority and give the color of

¹ This JOURNAL, Vol. 34 (1940), p. 543.

legality to its course, "the United States government cited international law to justify departures from an international law which was now largely dead" (p. 763). Referring to the atomic bomb exploded at Hiroshima, he observes that "Many old concepts of . . . international law . . . were blown up in a billowing cloud" (p. 869).

While giving considerable attention to the Good Neighbor policy as affected by the war, and to such events as the relinquishment by the United States in 1943 of its rights of extraterritoriality in China, and giving some attention to the role of the European neutrals, the author has not undertaken to go into diplomacy conducted through Protecting Powers on such questions as the rules applicable to the conduct of hostilities, the treatment of prisoners of war and of civilian enemy aliens. There is a passing mention of the International Civil Aviation Conference at Chicago in 1944 (p. 843 n.), and a brief summary of accomplishments at the Bretton Woods, Dumbarton Oaks, and San Francisco Conferences.

As in the earlier editions, Professor Bailey has emphasized especially the part which public opinion plays in the formulation of foreign policy. He stresses the need for public education in this field and concludes with the useful reminder that "Upon every citizen in our democracy rests a solemn obligation to inform himself, so that he may shape American foreign policy—*his foreign policy*—along constructive and far-sighted lines."

ROBERT R. WILSON

Of the Board of Editors

Pearl Harbor: The Story of The Secret War. By George Morgenstern. New York: Devin-Adair; 1947. Pp. xvi, 426. Appendix. Maps. Index. \$3.00. This is a sensational book. Persons reading the report of the Joint Congressional Committee on Pearl Harbor had the impression that it was a stroke of misfortune that so many errors in human calculation had combined to make the Pearl Harbor disaster possible. To be sure the minority report, signed by Senators Ferguson and Brewster, had already indicated that the major responsibility for the successful attack lay at the door of the higher officials of the government in Washington who had failed to communicate the secret Japanese messages, intercepted by the Navy Department, to Admiral Kimmel and General Short at Pearl Harbor.

Now comes Mr. Morgenstern and with exact citations undertakes to prove from the reports of the eight commissions which investigated Pearl Harbor that the Washington officials had plenty of notice from Japanese sources as to when the attack was coming and, if Captain Safford's testimony is to be believed, where it was coming. They wanted Japan to commit the first overt act and did nothing to prevent the anticipated attack. On November 26, 1941, Secretary Hull knew exactly that he was offering Japan terms which no nation could accept. The use of the word "treachery" seems absolutely unjustified since every person knew that the Japanese envoys in Washington had reached the end of negotiations on November 26 and remained in Washington solely to kill time.

Why was the fleet at Pearl Harbor in the first place? Was it to defend American or foreign interests? Why was it continuously weakened to fight the undeclared war in the Atlantic? What did Franklin D. Roosevelt promise Winston Churchill in August, 1941, when they met in the Atlantic? It could hardly have been merely for the purpose of drawing up the abstraction known as the "Atlantic Charter." Why did General Marshall take a horseback ride on the morning of December 7, when he must have

known that the fourteenth part of the vital message was momentarily expected? Why, in notifying Pearl Harbor at 11:58 A.M. of the impending danger, did he use the commercial radio which failed to reach Honolulu until after the attack? Must we believe, as John Bassett Moore says, that the Pearl Harbor attack was a godsend to Franklin D. Roosevelt, enabling the United States to enter both the war against Japan and Germany for which the president had assiduously labored? Why has the "East Winds Rain" file disappeared from the Navy Department since it is crucial in proclaiming Japan's warlike intentions?

Either Mr. Morgerstern is blazing a false trail or else the war was planned by American officials who deceived their countrymen by making Messrs. Kimmel and Short scapegoats for Washington officials. The evidence must be refuted or conviction stands. Two things, nevertheless, are plain: sanctions mean war and the term "aggressor" is worthless because chameleonic. This book should be read carefully by every person who does not identify bellecosity with patriotism. The author, a Chicago newspaperman, knowing the sensational character of his story, has fortified himself by citations from original sources. It is now the work of the defenders of the official saga to refute his citations and quotations.

EDWIN BORCHARD

Of the Board of Editors

La Conferencia de San Francisco. By Victor Andres Belaunde. Lima: Lumen; 1945. Pp. 160. Dr. Belaunde was a delegate of Peru to the United Nations Conference on International Organization and he has written what is partly a personal record and partly a commentary on the work of that Conference. It is colored by his devotion to American solidarity and by animosity toward Russia: thus he denies, on page twenty-five, Molotov's fear that a Latin American bloc would vote against Russia, and, on page twenty-eight, rejoices in the *unidad moral del Continente* which voted Argentine into the Conference.

Aside from such predilections, and even including them, the book is a contribution to our understanding of the United Nations. It gives a vivid picture of the apprehensions of the small nations as to the dominance claimed by the Great Powers, and of their struggle, partly successful, to strengthen the Assembly and to support international law, judicial process, and human rights. The problem of American regionalism he regards as not so difficult in terms of settlement of disputes, but he apparently wonders, as do others, how the Declaration of Chapultepec is to be tied into the United Nations system in terms of enforcement or sanctions. The veto, he explains, is a reason for regional action; he is concerned as to an *Asamblea impotente frente al Consejo paralizado*.

There are numerous suggestive comments which aid in the study of the Charter. Belaunde notes that the only principle in the Article entitled "Principles" is sovereign equality, and that few states are agreed as to what it means. He comments justly on the absurd idolatry of texts, such as the Moscow Declaration. He regrets the relegation of respect for treaties to the Preamble, which, he says, should not contain juridical principles. He condemns the extension of the range of the "domestic questions" clause, which he blames upon fear of the United States Senate.

This is a book useful to students of the Charter and particularly useful as contributing to understanding of the Latin American viewpoint.

CLYDE EAGLETON

Of the Board of Editors

A Short History of the Far East. By K. S. Latourette. New York: Macmillan Co.; 1946. Pp. xiv, 665, Index. \$6.00. At no time since the inauguration of formal relations between the East and the West in the nineteenth century has there been a greater need for a fresh clarification of the basic issues involved in current developments in the Far East as well as for a more realistic appraisal of the rapidly changing situation in that region. A series of stirring events is taking place in the lands of the Orient. In China a bitter struggle is being waged for the establishment of a genuinely progressive representative government. For Japan, the conclusion of peace and the processes of reform and reeducation await further implementation. Whereas Korea still remains divided in two separate zones controlled by two foreign armies, the Philippines have fully attained statehood. Although India is promised complete independence in 1948, Indonesia, Burma, Indo-China, and other lesser lands are passing through the agonizing transitional period of "blood, sweat, and tears."

These events are of cataclysmic significance. They not only demand a rational readjustment of the relationship between the colonial powers and subject peoples, but, more significant, test severely the genius and capacity of the technologically backward races to govern themselves and to promote economic well-being and happiness. The problems of the Far East today are infinitely more complicated than they were in 1894 or 1905 or 1915 and they can be adequately understood only through a knowledge of the past. Viewed in this light, Dr. Latourette's book is a most timely and valuable contribution.

The purpose of the work, as stated by the author is to provide intelligent Americans, including both "general readers" and college teachers and students, with a comprehensive introductory survey of the contemporary Far East. In a sense a restatement of the author's learned volumes on "The Development of China," "The Development of Japan," and "The Chinese: Their History and Culture" this book covers a broader field and deals not only with these two countries but with Korea, India, and Southeast Asia as well. It is divided into two sections, the first devoted to a study of the Orient prior to the middle of the nineteenth century when the influence of the West upon Asia began to become pronounced, and the second to the modern period and the changes brought about by the invasion of Western ideology and technology.

As a life-long student of the Far East, Dr. Latourette exhibits throughout the work a complete mastery of the subject, systematic presentation of facts, a succinct analysis of the factors influencing the course of events, and obvious restraint in rendering the verdicts of history.

With good reason the author attaches special importance to China in the development of Far Eastern affairs. Speculating over the stream of Chinese history, Dr. Latourette noted, as do many historians, that since the Ming dynasty the Chinese did fewer new things, showed less ability to create, and for increasingly long periods were politically under the domination of foreigners. He asked a most pertinent question: "Does all this indicate that the Chinese were declining in ability to rule themselves and to think? If so, are not the disorders of the twentieth century symptoms of a further and fatal decay?" (p. 138). The significance of the question thus raised can scarcely be over-estimated, if, in our quest for realities in these soul-searching days, the situation brought about by the unmitigated legacy of war-time inflation and the painful acceleration of armed strife is taken into serious consideration.

As a partial explanation, though by no means an adequate answer to this vitally important question, the author has written a very suggestive paragraph in connection with the rise of the state cult of Confucianism in the Han dynasty:

This espousal of Confucianism discouraged intellectual originality and weakened or obliterated rival schools. The vigorous debates and the throbbing intellectual activity of the Chou period declined and disappeared. They were not immediately quenched. However, as Confucianism was more and more sponsored by the state, the road to official preferment and so to what ambitious men most desire—wealth, power, and prestige—lay through its advocacy. Intellectual variety and advance slowed down. China tended to become a static society, bound by one set of ideas. Change and progress were sacrificed to unity and stability (p. 107).

It would seem undoubtedly true that the ethical precepts of Confucianism, the great emphasis on filial piety and the exaggerated sense of family loyalty, have constituted the foundation of an attitude of life of the Chinese intellectuals which made for the rigidity of stereotyped thinking and the inflexibility of their social and political institutions in adapting to changing circumstances. The agrarian nature of Chinese economy through-out the ages moreover tended to perpetuate conservatism and resistance to fundamental change.

Finally, a few minor suggestions may perhaps be offered. To characterize Wang An-shih's reforms as measures "towards communism" (p. 130) is somewhat misleading; "socialism" or "state socialism" may be a more appropriate epitaph. The United States has never been committed to "protecting the territorial integrity and the political independence of China" (p. 186); the word "respect" was used in the Nine-Power Treaty of Washington. In the discussion of Japan it would seem helpful to uninitiated readers of Far Eastern history if the internal contradictions in the Japanese social system were brought into sharper focus inasmuch as they constitute a fundamental cause for military expansion, as Norman, Lattimore, Maki, and others have so ably demonstrated. While the Potsdam Declaration is recorded, no reference is made to the important decisions of the Yalta Conference.

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THE NEW WORLD HEALTH ORGANIZATION

By WALTER R. SHARP *

The signing of the Constitution for a World Health Organization, on 22 July 1946 in New York City, is likely to be a landmark in the history of international coöperation for public health and medicine. At this ceremony the representatives of sixty-one nations affirmed their intention of bringing all inter-governmental health action under the aegis of a single agency which, it is hoped, will soon embrace the entire family of states. The new "Magna Carta" of health envisages an organization far wider in scope and function than any previous undertaking in this sphere of international collaboration. Still more significant is the new approach to the problem of disease embodied in the WHO Constitution—an approach which takes full cognizance of the revolutionary advances of the past decade in preventive and curative medicine.

The steps leading to the International Health Conference at Hunter College last summer constitute equally a landmark in the development of the United Nations system. The idea of creating a new world-wide health agency had its inception at the San Francisco Conference. At the instance of the Brazilian and Chinese delegations a resolution was unanimously adopted requesting the United Nations to call as soon as possible a conference with this end in view. The following February the Economic and Social Council initiated action to this effect by establishing a Technical Preparatory Committee of Experts to formulate draft constitutional proposals for the new organization and instructing the Secretary-General to convene an International Health Conference in New York not later than 20 June. WHO, when it comes into being, will therefore be "the first-born child" of the United Nations in the sense of Article 62 of the Charter; and once WHO is brought into formal relationship with the UN, it will be the first "specialized agency" to materialize as a result of direct UN sponsorship.

In the birth of WHO there was a further innovation. For the first time since the end of hostilities against the Axis representatives of neutral and ex-enemy states were permitted not only to participate in a meeting held under official United Nations auspices but also to affix their signatures to the formal instruments adopted by the Conference. Sixteen countries not members of the UN were invited to send observers to Hunter College and

* Chairman, Department of Government, College of the City of New York. The opinions expressed in this article are those of the author in his private capacity and not as a staff official of the International Health Conference or as Administrative Consultant to the Interim Commission of WHO.

thirteen of them accepted.¹ There were also present observers from the Allied Control Authorities for Germany, Japan, and Korea, as well as from seven inter-governmental organizations namely FAO, ILO, PICAQ, UNESCO, UNRRA, the *Office internationale d'Hygiène publique*, the Pan-American Sanitary Bureau, and from three private organizations namely the League of Red Cross Societies, the World Federation of Trade Unions, and the Rockefeller Foundation. These observers, together with voting delegations from all the then fifty-one members of UN, made up the largest and most representative gathering of public health officials ever to assemble under the same roof. All the world but Spain took part (or was invited to take part) in the historic meeting.

In addition to the Constitution of WHO three other instruments were signed at the conclusion of the Conference: the Final Act, an Arrangement for the immediate establishment of an Interim Commission, and a Protocol providing for the gradual liquidation of the *Office internationale d'Hygiène publique*.² In accordance with Chapter XIX of the WHO Constitution the latter will come into force as soon as twenty-six states members of the United Nations formally accept the instrument.³ Under the Arrangement setting up the Interim Commission, the inaugural session of the World Health Assembly (the general policy-determining organ of WHO) must be convened not later than six months after the Constitution becomes effective.

Pending the establishment of the permanent Organization, the Interim Commission is instructed by the Arrangement to formulate detailed plans for its initial administrative set-up and working program.⁴ The Commission is also entrusted with the task of expediting the transfer of the functions of the League of Nations Health Organization, the *Office*, and the

¹ Countries accepting were: Albania, Austria, Bulgaria, Eire, Finland, Hungary, Iceland, Italy, Portugal, Siam, Sweden, Switzerland, and Transjordan. Only Afghanistan, Rumania, and Yemen failed to respond.

² The Final Act, WHO Constitution, and Arrangement were signed on behalf of sixty-one states; the Protocol on behalf of sixty. Among the signatories to all four instruments were the U.S.S.R., Byelorussia, and the Ukraine—subject to subsequent approval.

³ By 1 June 1947 fourteen states had indicated acceptance: China and the United Kingdom (by signature without reservation as to approval), and Albania, Canada, Ethiopia, Iran, Italy, Liberia, Netherlands, New Zealand, Saudi Arabia, Switzerland, Syria, and Transjordan (by deposit of instruments of acceptance with the Secretary-General of the United Nations).

⁴ The Commission consists of "eighteen states entitled to designate persons to serve on it," these states having been elected by the Conference. They are: Australia, Brazil, Canada, China, Egypt, France, India, Liberia, Mexico, Netherlands, Norway, Peru, Ukraine, United Kingdom, United States, U.S.S.R., Venezuela, and Yugoslavia. In making the selection the Conference gave special regard to the desirability of a broad geographical representation, particularly since the members of the Interim Commission are expected to act collectively for all the signatories to the WHO Constitution.

UNRRA Health Division, as well as the initiation of negotiations with the Pan-American Sanitary organization looking toward its eventual merger with WHO. The Interim Commission has established its headquarters office in New York (Empire State Building) and a working center in the *Palais des Nations* at Geneva.

At its first session in New York (July 1946) the Commission appointed Dr. Brock Chisholm, formerly Canadian Deputy Minister of Health and an internationally known psychiatrist, as its Executive Secretary. A small technical and administrative staff was promptly assembled, consisting largely of personnel transferred from the League Health Section, the *Office*, and the UNRRA Health Division. Desirous of avoiding any break in the continuity of international health coöperation, the Commission, at its second and third sessions in Geneva (November 1946 and March–April 1947), set up a number of expert committees to develop programs of disease control and biological standardization work and to draft proposals for revising existing International Sanitary Conventions. Early in 1947 the responsibility for continuing through the year the peace-time phases of the UNRRA program of emergency assistance to the health services of war-devastated European countries, Ethiopia, and China was assumed by the Commission's staff, a grant of \$1,500,000 from UNRRA funds being made for this purpose. Other committees of the Commission are now actively engaged in the initiation of negotiations with a view to the eventual conclusion by WHO of coöperative agreements with the United Nations and with those specialized agencies (ILO, FAO, UNESCO, and ICAO) whose activities overlap the field of WHO's competence. When the World Health Assembly meets, probably during the early part of 1948, the transition to the permanent Organization should accordingly be effected with a minimum of lost motion.

The Central Institutional Structure of WHO

If the United Nations may be considered the "constitutional father" of WHO, the League of Nations Health Organization is clearly its "organic grandfather." The Report of the Technical Preparatory Committee of Experts, which served as "the bible" for the deliberations of the International Health Conference, borrowed extensively from the experience of the League in health matters.⁵ It will be recalled that the health work of

⁵ This Report is reproduced in the *Journal of the Economic and Social Council*, No. 13, 22 May 1946. The Technical Preparatory Committee consisted of sixteen public health experts designated by the Council from the following countries: Argentina, Belgium, Brazil, Canada, China, Czechoslovakia, Egypt, France, Greece, India, Mexico, Norway, Poland, United Kingdom, United States, and Yugoslavia. The U.S.S.R. was invited to send an expert but did not do so. Representatives of the *Office*, the League Health Organization, UNRRA, and the Pan-American Sanitary Bureau attend the sessions of the Committee in a consultative capacity. The Committee met in Paris for three weeks during March–April 1946.

the League was conducted by means of three principal bodies: (1) a General Advisory Health Council, whose functions were entrusted to the Permanent Committee of the *Office*, (2) a Standing Health Committee of twelve medical experts, and (3) the Health Section of the Geneva Secretariat. Flanking these three bodies was a cluster of expert commissions and committees set up as circumstances required to study and report on methods of coping with specific diseases and miscellaneous health problems.⁶ The Advisory Council met annually as a central planning and policy body while the Health Committee, convening four times a year, supervised the work of the Secretariat and the expert committees.

In the new agency these three organs substantially reappear in expanded form as the World Health Assembly, the Executive Board, and the Secretariat, respectively.⁷ As the general policy-determining organ of WHO, the Health Assembly is given the specific functions of appointing the Director-General, approving the budget, electing the Executive Board, sponsoring special health conferences, establishing technical committees, making recommendations to Member states, and adopting conventions and regulations on a wide variety of subjects.⁸

While the Executive Board is analogous in size and function to the Standing Health Committee of the League, the expert character of its membership is less firmly assured. The Board will "consist of eighteen persons designated by as many Members" (member states) for overlapping terms of three years. Such states will be chosen by the Health Assembly, due account being taken of the desirability of "an equitable geographic distribution." While the persons designated by these eighteen states "should be technically qualified in the field of health," they will serve as government representatives and not as experts in their personal capacities. As such, they may be changed at the will of the appointing governments.⁹

⁶ Accounts of the League's activities in the health field may be found in Mander, L. A., *Foundations of Modern World Society*, Stanford, 1941, Chap. I; Davis, H. E., ed., *Pioneers in World Order*. New York, 1944, pp. 193-208 (by Frank G. Boudreau); de Huszar, G. B., ed., *Persistent International Issues*, New York, 1947, Chap. 4 (by George K. Strode); and Winslow, C. E. A., "International Organization for Health," in *Report of the Commission to Study the Organization for Peace*, New York, 1944.

⁷ Art. 9 of the WHO Constitution. The Technical Preparatory Committee proposed "Conference" as the name for the deliberative organ of WHO—a term which would have better conformed to the terminology employed in similar UN specialized agencies; curiously enough, the delegates at Hunter College insisted on adopting the term "Assembly" because, in their view, it connoted a more representative type of organ.

⁸ Arts. 13, 14, 18. The provisions dealing with conventions and regulations are discussed below.

⁹ Arts. 24-25. A proposal introduced by the Ukraine to have the "Big Five" permanently represented on the Board received the support of only one other delegation.

Some difference of opinion developed in the Conference regarding the powers of the Board. The United States delegation sponsored an amendment to the Paris Draft Proposals which would have in effect limited the Board's role to that of a "standing committee" of the Assembly. This amendment, seconded by Canada, China, and a number of other delegations, met with strong opposition from the Soviet and many European and Latin-American representatives. Accordingly, in the final text of the Constitution, not only is the Board designated as "the executive organ of the Health Assembly," but it is authorized to submit program-proposals on its own initiative, to convene special conferences, to establish standing committees, and "to take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action." The Board, in addition, nominates the Director-General to the Assembly and submits to the Assembly recommendations regarding his budget. The Constitution further stipulates that the Director-General shall be "subject to the authority of the Board" when exercising his duties as "chief technical and administrative officer of the Organization."

It is apparent that in a fairly wide sphere of activity the functions of the Assembly and Board will overlap. Although this overlapping of authority has the virtue of flexibility it may possibly give rise to some friction and confusion. Moreover, the Board's broad powers of supervision over the Director-General could be so exercised as to compel him to secure its prior consent not merely to the appointment of staff but to current decisions on organizational and technical matters. To be sure, no such tight control is likely to develop, but the fact remains that the executive head of the Organization may find himself in a position where he may be obliged to consult the Board far more often than will be found consistent with vigorous and progressive administration. The "doctors" at Hunter College, not unlike certain American judges and constitutional lawyers, evinced a marked aversion to "executive discretion."

There is little that is novel in the provisions of the WHO Constitution dealing with the permanent Secretariat, which will comprise "the Director-General and such technical and administrative staff as the Organization may require" (Art. 30). The Paris Draft proposed a five year term for the Director-General but the Conference wisely left to the Health Assembly the power to fix the tenure and other conditions of his appointment. The conditions governing the selection of staff substantially duplicate the provisions of Art. 101 of the United Nations Charter, the parentage of which, incidentally, may be traced back through the UNESCO and FAO Constitutions to the practice of the League and the ILO. Individual integrity, efficiency, and competence are laid down as "the paramount consideration in the employment of staff," with due regard also the importance of its recruitment "on as wide a geographical basis as possible" (Arts. 35-37).

Controversial Features of the WHO Constitution

There were two major areas of dispute in the framing of WHO's fundamental charter. These had to do (1) with the basis of membership in the Organization and (2) with arrangements for operations at the regional level.

(1) *Membership.* The note of universality recurred time and again in the discussion of the conditions which should govern admission to membership in WHO. "Germs know no frontiers," "health is indivisible" and "germs carry no passports"—these were the action slogans of the Conference. Every delegation readily approved the general principle that "membership in the Organization shall be open to all States" (Art. 3). Nor was there any appreciable dissent from the view that those neutral and ex-enemy states invited to send observers to the Conference should be permitted to become members merely by accepting the Constitution (provided such acceptance is effected before the first session of the World Health Assembly).¹⁰ Political considerations nevertheless intruded when it came to determining the requirement for the admission of states *not* represented at the Conference. It was the Spanish question that precipitated the controversy—and the closest vote taken during the entire Conference.

Here the point at issue, concretely, was whether the Health Assembly should be granted power to approve applications for membership by a simple majority or a two-thirds vote. The three Soviet delegations vehemently argued in favor of the latter provision, and the Legal Committee incorporated this view in its Report to the full Conference. However, when the Conference in plenary session proceeded to consider the Report, the Chilean delegate moved an amendment providing for simple majority action by the Health Assembly on future membership applications. This amendment was supported with lavish oratory by a solid Latin-American bloc, effectively aided by Canada. The Canadian delegate explained in moving terms the position of the advocates of easy admission: "We cannot afford to have gaps in the fence against disease; and any country, no matter what its political attitudes or affiliations are, can be a serious detriment to the effectiveness of the World Health Organization if it is left outside. It is important that health should be regarded as a world-wide question, quite independent of political attitudes in any country in the world."

The chief of the U.S.S.R. delegation led the onslaught on the Chilean amendment. Its purpose, in his opinion, was clearly to "open the doors to Spain"; but there "are other countries. What about Japan? What about Germany? . . . Our charter does not have in view separate states. It

¹⁰ Art. 5. States members of the United Nations are not bound by this time restriction (Art. 4).

has in view the World Health Organization. It is not written to preserve health in any particular state. . . . It is written to preserve health internationally, in the whole world. . . . If Spain asks to become a member of this organization, I will be the first to accept such a request, but on condition that this request be made by a democratic Spain." Thus drawn, the issue provoked several hours of spirited argument before it was settled. The Chilean amendment was finally adopted by a vote of 25 to 22, the Ukraine insisted upon a roll call so that every delegation's position might be on record. Aside from the Latin-American and Arab League states, which unanimously supported the amendment, only Canada and the Philippines cast their ballots with the majority. All the "Big Five" but China, which abstained, voted against the amendment.

Associate Members. A second question affecting membership which gave rise to considerable debate concerned arrangements for the participation of dependencies, protectorates, and trust territories in the Organization. At the instance of the Chinese delegation, a proposal was introduced in the Legal Committee of the Conference for the admission as "associate members," with all rights and privileges except voting and holding office, of all such territories "ineligible to separate membership in the United Nations, whose areas and populations are large enough, whose health problems are of world concern, and which have indigenous health administrations." The United States countered with the suggestion that provision be made for direct relationships with these categories of territories "through special agreements with the responsible governments." Still a third solution of the problem, brought forward by the United Kingdom and supported by France, Canada, Mexico, New Zealand, and South Africa (all but two of them states having colonies or mandates), would have limited the participation of non-self-governing territories to the regional branches of the Organization.

As the discussion progressed, the United Kingdom delegation indicated its willingness to accept the principle of associate membership at the central level provided such members be limited in number to a fixed maximum of twenty. China lent its support to this solution and agreed with the United States that participation by such territories in the central organs of WHO should require the consent of the governments responsible for the foreign relations of the territories concerned.

After reference of the issue to a special drafting sub-committee, a generally acceptable formula was evolved. The text embodying this formula authorizes the Health Assembly by simple majority vote to admit to associate membership "territories or groups of territories which are not responsible for the conduct of their international relations" . . . "upon application on behalf of such territories or groups of territories by the Member or other authority having responsibility for their international relations." The purpose of the revised wording was to make it possible for

trust territories, whether under single-power or United Nations administration, to be admitted to WHO as associate members. As adopted the text leaves to the Health Assembly the discretionary duty of determining "the nature and extent of the rights and obligations of associate members." But there is no constitutional limit on the number of such members.

(2) *Regional Arrangements.* By far the most contentious question before the Conference was the problem of regionalism. The practical solution of this problem was complicated by reason of the existence of the Pan-American Sanitary organization and the vigorous support for its continued identity which came from the American Republics. Before the issue was ironed out, a special "harmonizing" subcommittee had to labor long and arduously in the search for a formula satisfactory both to the "federalists" and the "autonomists."

Spearheading the "bloc" which urged immediately and complete absorption of the PASB by WHO were the three Soviet delegations. Early in the debate they introduced a resolution which would have empowered the World Health Assembly, by unilateral act, to transform all existing regional inter-governmental health organizations into "regional committees subordinated to the World Health Organization." No such drastic solution as this was acceptable to the United States, let alone the Latin-Americans. The Peruvian delegate pointedly called attention to the fact that the Mexico City Conference of 1945 had resolved that the Pan-American Sanitary Bureau should continue to act as "the general coordinating sanitary agency of the American Republics." The PASB, in the view of the Latin-Americans, constituted the oldest and most successful example of international health coöperation—from which, incidentally, they have enjoyed substantial subsidies largely made possible by funds contributed to the PASB by the United States government. While the PASB should obviously work in the closest harmony with WHO, its operating autonomy must be preserved.

As a concrete basis for discussion, a draft resolution was submitted by the Chairman of the United States delegation, Dr. Thomas Perran,¹¹ to the effect that regional health agencies should be integrated or brought into relationship with WHO through special agreements providing either that such agencies be transformed into regional offices or that their facilities and services be utilized by WHO pending their progressive merger as circumstances permitted. Meanwhile, the PASB would be expressly recognized "as the appropriate body both to promote programs and undertakings among the American Republics on regional health problems of common interest in continuation of its present work and in harmony with the general policies of the World Health Organization, and in addition to act, when necessary, as the Regional Committee for the Organization."

¹¹ Dr. Parran also served as President of the Conference.

Within six months after the coming into force of the WHO Constitution the Director-General would be directed to enter into negotiations with the appropriate authorities of PASB for the purpose of bringing it into formal relationship with WHO.

To the Latin-American bloc this United States proposal appeared to provide adequate safeguards for the continuance of a quasi-autonomous status for the PASB. Various other delegations, among them China, the United Kingdom, and Norway, nevertheless pressed for an arrangement which would ensure its consolidation with WHO as rapidly as possible, and Egypt contended that the nascent health bureau of the Arab League should be given equal treatment in case the PASB were allowed to maintain its identity.

After prolonged argument the principle of "progressive and ultimate merger" was approved. Even so, the language embodying this principle is studiously vague and it may require tedious and complicated negotiations before consolidation is completely effected. Accordingly to the "harmonizing" formula the PASB and all other inter-governmental regional health organizations in existence prior to the signing of the WHO Constitution are "in due course" to be "integrated with" (not into) the WHO. This integration will be effected "as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned."¹² Clearly a wide area of adjustment will be open to the negotiators as a result of these very elastic provisions.

Once the future status of the Pan American Sanitary Bureau was resolved, the other problems relating to arrangements for regional action were adjusted without too much difficulty. It was agreed that the Health Assembly might from time to time define the geographical areas in which it seemed desirable to establish regional committees and offices. With the consent of a majority of the Member states located within an area thus defined, the Assembly is authorized to set up a regional branch of WHO consisting (a) of a regional committee composed of representatives of all Members and Associate Members from the area, and (b) of a regional office to reserve as "the administrative organ" of the regional committee (Arts. 44-51). Non-self-governing territories within the region which have not been admitted to WHO as Associate Members may, with the consent of the controlling governments or authorities, participate in the regional

¹² Art. 53. The Interim Commission ran into certain snags in its initial conversations with the Pan American Sanitary Bureau, though there is no reason to suppose that, given a spirit of conciliation and good will on both sides, mutually satisfactory arrangements cannot eventually be worked out. The Twelfth Pan American Sanitary Conference at Caracas (January 1947), in authorizing the negotiation of a working agreement with WHO, took the position that the PASB should retain its present name with the subtitle "Regional Office of the WHO."

committee in such manner as may be determined by the Health Assembly after consultation with the governments or authorities concerned.

The definition of the functions to be performed by a regional committee provoked some difference of opinion. The advocates of "centralization," led by the United Kingdom and Soviet delegations, took the position that action by a regional committee should be "subject to the general authority" of the central policy-making organ of the Organization. This group was eventually persuaded to accept a milder statement to the effect that the regional committee should be designated as "an integral part of the Organization" in accordance with the Constitution (Art. 45). The attributions of the regional committee were nevertheless spelled out with some precision. These attributions will encompass: (a) intra-regional activities, including the determination of policies on "exclusively regional" matters, the supervision of the regional office, and the calling of technical conferences on regional problems; (b) the tendering of advice to the central organization, including, in particular, the recommendation of additional regional appropriations by the regional Members of WHO "if the proportion of the central budget of the Organization allotted to that region is insufficient for the carrying out of the regional functions"; and (3) the exercise of any additional functions delegated to the committee by the Health Assembly, the Executive Board, or the Director-General (Art. 50).

The final problem to be resolved was that of how the head of a regional office and its staff should be appointed. On one side various proposals were submitted which in effect would have given either to the Director-General or to the Executive Board the power to select the regional director. This procedure, it was observed by the Canadian delegate, would "permit interchange of regional directors" and "protect regional committees against undue political influence." But because this arrangement was objectionable to the Pan American bloc an intermediate solution was proposed whereby the Executive Board's approval of the regional committee's nomination would be necessary. In the end, on the suggestion of the United States and Mexico, it was decided that the appointment of the regional director should rest with the Board "in agreement with the Regional Committee" (Art. 52). Under this formula the initiative in nominating a regional director will presumably be taken by the Board but the Regional Committee may force the Board to submit an alternative name (or names) if it objects to the original nomination. There is nothing in the Constitution to prevent the appointment of a regional director from outside the regional area in question, nor his subsequent assignment to another regional office or even to the central headquarters office, or *vice versa*. An analogous compromise was reached as to the appointment of the staffs of regional offices, with a similar alignment of views, the text adopted

providing for their appointment "in a manner to be determined by agreement between the Director-General and the Regional Director."¹³

Although the prolonged and often heated discussion of the regional issue did not yield complete unanimity the final solutions reflect the overwhelming opinion of the Conference that WHO should have world-wide paramountcy in the future development of inter-governmental coöperation on health problems. At the same time it was generally accepted that considerable freedom of action on regional matters should be left to regional units functioning as organic parts of the general organization. Accordingly the provisions dealing with regional arrangements in the WHO charter are more elaborate and detailed than are to be found in the basic instrument of any of the other specialized agencies to date. The successful operation of the WHO framework of central-regional relationships will obviously depend upon the wisdom and skill with which the leadership of the Organization utilizes its policy-shaping and administrative prerogatives. At the least the plan should make for a much more effective coördination of effort in the international health field than heretofore especially since there will henceforth be only one inter-governmental agency of global scope with general jurisdiction over health matters.

The Ambit of WHO Activity

The architects of the WHO Constitution were not content merely to carry forward the not inconsiderable accomplishments of previous undertakings in public health involving international collaboration. On the contrary, their conception of the field of action which WHO should encompass was a broad and progressive one. In the Preamble of the charter health is defined not negatively as the absence of disease or infirmity but positively as "a state of complete physical, mental, and social well-being," the enjoyment of which is "one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." The attainment "by all peoples of the highest possible level of health," is set forth as the over-all objective of the Organization.¹⁴

Among the fundamental principles upon which an effective international health program should be based the "healthy development of the child," in order that he may "live harmoniously in changing total environment," has an important place in the WHO charter. The introduction

¹³ Art. 53. Only the Arab states, Paraguay, and the Dominican Republic refused to cast their votes for adoption of the two compromise formulas governing the appointment of regional directors and regional staffs.

¹⁴ Art. 1. The Draft Proposals submitted by the Technical Preparatory Committee listed seven different ways by which this broad aim might be furthered, but the Conference Committee on Scope and Functions felt that there would be a signal advantage, from the psychological standpoint, if a single, all-inclusive objective were put forward at the beginning of the Constitution.

of psychiatric techniques into public educational systems is clearly implied by this statement. The Preamble of the Constitution further recognizes that the realization of high levels of health the world over may have a vital bearing on the quest for peace and security and to this end "the extension to all peoples of the benefits of medical, psychological, and related knowledge" will be sought in every practicable manner. It was also the consensus at Hunter College that the only effective means of controlling the international spread of pestilential disease in our day is to strengthen national health services everywhere, because the glaringly low standards of sanitation and hygiene which still prevail over two-thirds of the globe constitute "a common danger" to all peoples. For the eradication of communicable disease, it must be attacked at the source. The older techniques of quarantine, while still necessary, were considered no longer adequate for an age in which air transport may carry bubonic plague or typhus fever to the ends of the earth in a few hours.

Such are the basic concepts underlying the formulation of WHO's aims and purposes. It cannot be denied that they are ambitious and sweeping in their implications. How are they to be implemented concretely? No more than its predecessors among international health agencies is WHO endowed with independent legislative or executive power. The positive obligations assumed by its Members are limited indeed. Aside from agreeing to contribute to its annual budget whatever quota is set by the Health Assembly no participating state is constitutionally bound to do more than (a) submit to the Organization an annual report "on the action taken and progress achieved in improving the health of its people," including measures it may have put into effect with respect to recommendations, conventions, agreements, and regulations adopted by the Assembly; and (b) communicate promptly such statistical and epidemiological information as may be requested by that body (Arts. 61-65). Although these obligations admittedly represent some advance beyond the pre-war stage of international health organization, their net effectiveness will be conditioned by the impact of comparative analysis, research, publicity, and demonstration upon national health policies.

In realistic terms it may be said that WHO will be able to move toward its central objective only insofar as it can prod governments and private groups to provide services and initiate programs they might not otherwise undertake. The financial and technical resources essential to its work will be forthcoming only in the degree that Member states, chiefly a few of the richer ones, are willing to supply them. During the earlier phases of its life the new Organization will probably not have either the means or the authority to conduct extensive field activities comparable to those of an advanced national health administration though such developments may come later. The role of WHO will be primarily that of a catalytic agent.

It is within this context that the various functions conferred upon the Organization by its Constitution should be assessed. For convenience, these functions may be grouped as follows: (1) administrative and coördinative, (2) technical and research services, (3) informational, (4) assistance and promotion, and (5) quasi-legislative.

(1) *Administrative and coördinative.* In the language of its Constitution WHO is designated as the "directing and coördinating authority on international health work." Specifically it will administer the duties previously assigned to the *Office international d'Hygiène publique*, and since 1944 to UNRRA, by existing international sanitary conventions. As a continuing part of this task the permanent staff and expert committees of WHO will have the obligation of formulating draft proposals for unifying, strengthening, and extending such conventions, concerning which more will be said below. Secondly the Constitution enjoins the Organization to establish coöperative relations with other organizations, both inter- and non-governmental, international and national, which are concerned with any phase of WHO's work.¹⁵ All of this implies that international coöperation for health cannot effectively be conducted today, so to speak, "functional isolation" from the surrounding social and economic environment. It is wisely recognized that WHO will need to collaborate closely with cognate "specialized agencies," such as ILO, FAO, UNESCO, and ICAO, not only in order to deal effectively with "borderland" problems like industrial hygiene, health insurance, nutrition, rural hygiene, research in the biological and physical sciences, and the sanitary aspects of aerial navigation, but also with a view to minimizing as far as possible duplication of effort and jurisdictional friction. This will be equally true of the relations of WHO with various commissions of the Economic and Social Council, notably the Social, Narcotic Drugs, Population, and Statistical Commissions, as well as with the Trusteeship Council and the recently created International Children's Emergency Fund.¹⁶ Some of these coöperative arrangements will doubtless be spelled out more fully in formal agreements concluded between WHO and the United Nations and other specialized agencies.

¹⁵ Arts. 70 and 71, as part of the Chapter entitled "Relations with Other Organizations," stipulate that any formal agreements entered into with other inter-governmental agencies shall be subject to approval by a two-thirds vote of the Health Assembly. Consultative arrangements with non-governmental agencies, on the other hand, may be worked out at the staff level, although, in the case of national organizations, the consent of the government concerned must be obtained.

¹⁶ In the enumeration of "Functions" in Article 2 of the Constitution, reference is made three times to "coöperation with other specialized agencies where necessary." Arrangements have already been initiated by the Interim Commission for the setting up of joint WHO-ILO expert committees on industrial hygiene and medical care and a similarly constituted joint WHO-FAO committee on nutrition.

(2) *Technical and research services.* Under this head a variety of activities are envisaged. First and most immediate is the continuation of two services performed by the League Health Section: epidemiological intelligence and the administration of work in biological standardization. The Geneva office of the Interim Commission has already taken over the publication of the *Weekly Epidemiological Record* formerly issued by the League, and provision has been made in the 1947 budget of the Commission to maintain the pre-war system of grants-in-aid to the biological laboratories at Copenhagen and Hampstead (London). The Organization, once firmly established, may, within the limits of its budgetary resources, establish such other statistical and research services as it considers appropriate, undertake the technical work involved in the preparation of proposals for standardizing diagnostic procedures and revising as necessary the international nomenclature of diseases, causes of death, and public health practices, and assist in developing international standards with respect to food, biological and pharmaceutical products.

A sharp division of opinion emerged at the Conference as to whether WHO should directly concern itself with health insurance. Although the importance of improving the quality of medical care available to low income groups was not challenged, certain delegations believed it unwise for the new Organization to get entangled in the highly explosive subject of "state medicine." As a compromise the Constitution provides merely that WHO may "study and report on . . . administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital and social security."¹⁷ Considerable caution will no doubt be exercised in launching any program of fact-finding and analysis in this field.

(3) *Informational.* Not only can WHO, like its Geneva predecessor, do much to facilitate the international exchange of technical information, but its charter places special emphasis on popular health education. The development of "an informed public opinion among all peoples on matters of health" appears conspicuously in the impressive list of functions set forth in Chapter II of the Constitution. To this end an ambitious publications program aimed at the general public is contemplated. In addition—and potentially even more important—the radio and film are to be employed as instruments for explaining to the world's population in simple and graphic terms the implications of preventive medicine and social hygiene. These informal activities will be articulated closely with the overall public relations work of the United Nations Secretariat, particularly in the field of films and broadcasting. While opportunities for this kind of experimentation are almost unlimited, the long-range results will

¹⁷ Art. 2 (p). Belgium, the Netherlands, and Sweden contended that health insurance properly belonged to the International Labor Organization.

obviously depend upon the extent to which the leadership of WHO succeeds in mobilizing the resources of private as well as public groups in scores of countries for a concerted and vigorous attack on superstition and ignorance.

(4) *Assistance and promotion.* Under these two rubrics the ambit of possible operations is equally wide. The Organization is directed to furnish assistance to governments upon request for the strengthening of their health services—by giving technical advice, lending experts, and organizing field missions. In emergencies, such as the threat or outbreak of an epidemic, it may be called upon for whatever aid it can render within the limits of its facilities. The long and fruitful experience of the League and the Pan American Sanitary Bureau in furnishing assistance to countries whose health standards are backward affords a solid base upon which to build this type of work, embracing, *inter alia*, the sponsoring of fellowships, travel grants, and supervised study tours for public health personnel.

The beneficiaries of technical aid are not confined to the governments of Member states. Whenever requested by the United Nations the Organization is also directed to assist in improving health services for "the peoples of trust territories." Since the source of such requests will presumably be the Trusteeship Council, the maintenance of close working relations between it and the Health Organization should contribute materially to the development of the social welfare aspects of the trusteeship system.¹⁸

Over and beyond action in response to direct appeals for aid in specific situations the Organization is authorized to promote on its own initiative improved standards of teaching in the "health, medical, and related professions." Further, it is expected to foster the advancement of "maternal and child health and welfare," and, in coöperation with such agencies as the ILO and FAO, it may participate in promotional efforts reaching into the broad domain of social legislation—housing, recreation, working conditions, the prevention of accidental (chiefly household) injuries, and related aspects of environmental hygiene. Finally, it may, in collaboration with UNESCO, undertake such activities as it deems advisable in the field of mental health, "especially those affecting the harmony of human relations"—and presumably calling for the encouragement of psychiatric methods in treating the ills of international society.

(5) *Quasi-legislative.* Although WHO is not granted by its Constitution any legislative authority *per se*, it may nevertheless engage in three types of operations of a quasi-legislative character for which partial prece-

¹⁸ Among the delegates at the Conference there was strong support for including specific mention of "displaced persons" in the section of the Constitution covering forms of assistance which might be requested by the United Nations. Because of the insistent opposition of the Soviet representatives, however, it was finally decided to adopt a more general phraseology referring to "special groups, such as the peoples of trust territories."

dents exist in other fields of international organization, notably labor and civil aviation. The first of these quasi-legislative functions consists of formal recommendations which the Health Assembly may submit to Member governments "with respect to any matter within the competence of the Organization."¹⁹ The Paris Draft Proposals did not include any provision for recommendations, but the Conference, after some hesitancy, voted to accept the substance of a Belgian amendment to this effect, based largely upon the practice of the ILO during the last twenty-five years. There is one difference, however, between the WHO procedure as to recommendations and that of the ILO: unlike the Members of the latter Organization, the Members of WHO will not be constitutionally obligated to bring such proposals to the attention of their competent national authorities, within a specified period, for the purpose of making appropriate legislative or administrative arrangements for their application. An explicit requirement covering this point was not believed to be necessary in the light of the obligation of every Member government to render an annual report to the Organization on the action taken not only in respect of recommendations but also as to conventions and regulations.

The second type of quasi-legislative action includes conventions and agreements dealing with any matter within WHO's jurisdiction. Such instruments, if approved by a two-thirds majority of the Health Assembly, become legally binding on a Member of the Organization "when accepted by it in accordance with its constitutional processes." Concerning the obligation of Member states to effect such acceptance, a procedure closely resembling ILO practice was embodied in the WHO charter. Within eighteen months each Member must notify the Director-General of the action it has taken, and if it has not accepted the instrument in question it is required to "furnish a statement of the reasons for non-acceptance." Once the convention (or agreement) has been accepted, an annual report on its application must thereafter be made to WHO headquarters (Arts. 19-20).

The import of the foregoing provisions for the development of an effective international health code may be far-reaching. In the past, as the Report of the United States Delegation on the International Health Conference pertinently observes, it has been necessary for governments interested in a particular phase of international health legislation to convene special conferences for the purpose of formulating new or revised conventions. "Such conferences have been held at long and irregular intervals to deal only with particularly pressing problems," with the result that "sanitary conventions have remained unmodified for long periods during which scientific advance has often made their provisions archaic."²⁰ In

¹⁹ Art. 23. Such recommendations may be adopted by simple majority vote of the Assembly.

²⁰ *Dept. of State Publication 2703, Conference Series 91*, p. 16.

the future there will be a permanent mechanism through which steps can be taken periodically with a view to broadening the scope and strengthening the provisions of world health law. This represents a distinct advance in international legislative technique for the health field.

Still more significant are the provisions of the WHO charter governing regulations. By simple majority vote the Health Assembly is empowered to formulate regulations on five classes of subjects:

- sanitary and quarantine requirements;
- nomenclatures as to diseases, causes of death, and public health practices;
- standards as to diagnostic procedures for international use;
- standards affecting the safety, purity and potency of biological, pharmaceutical and similar products in international commerce; and the
- advertising and labelling of such products.

The range of this regulatory action was extended by the Conference beyond the Draft Proposals presented by the Technical Preparatory Committee so as to include not merely "drugs in official pharmacopoeia and biological products," but "similar products" as well. Concurrently, "advertising" was added to "labeling" in connection with the regulation of all such products in international trade.²¹

On the enforceability of regulations the Conference accepted the comparatively novel principle known as "contracting out." Accordingly regulations voted by the Health Assembly become binding on all Member states which do not notify the Director-General of their rejection or reservations within the period stated in the notice given of the Assembly's action (Art. 22). This procedure, which places on each Member the burden of declaring its refusal to accept a regulation, was the subject of warm debate. The Ukraine and Belgium spearheaded the opposition to what was branded "an infringement on sovereignty," or, in milder terms, an arrangement by which a state might be bound "through oversight." In the special subcommittee to which the question was referred, the procedure for modifying the International Sanitary Convention for Aerial Navigation of 1933 was cited as a precedent, while certain delegates argued with some justification that the Chicago Convention on International Civil Aviation establishing ICAO contained comparable provisions.²²

After the Ukraine had indicated its willingness to accept the proposed procedure provided its application "were limited, on a temporary basis

²¹ Art. 21. On the other hand, the Conference yielded to the views of the Soviet and Latin-American delegations in refusing to include in the regulatory powers of WHO the prevention of the importation of products "not conforming to standards adopted by the Health Assembly."

²² Under the 1933 Convention for Aerial Navigation, the *Office international d'Hygiène publique* could submit to the contracting parties a proposal of amendment suggested by any one of them and a government's approval could either be expressly given

pending later positive action by governments," to the employment of new techniques for controlling the international spread of disease, a number of complicated amendments were evolved by the subcommittee as substitutes for the original proposal. In the end all of these were rejected and the original proposal was adopted by unanimous vote of the full Conference.

The American government played a leading role in developing the "contracting out" concept before the Technical Preparatory Committee. To quote again from the Report of the United States Delegation: "This was done in pursuance of a suggestion made in the Senate Foreign Relations Committee that some way be found" [to permit the rapid application of new scientific techniques] "without requiring that Committee to consider highly specialized technical matters. It is felt that the mechanism incorporated in the Constitution can accomplish this result. In most cases it will only be necessary to modify existing domestic regulations, within the scope of the executive branch of the Government, to meet the requirements of international health regulations. When more is required the Government can reserve its position pending necessary reference to Congress."²³

The WHO charter does not attempt to define in substantive terms the difference between a regulation and a convention (or an agreement). This lacuna may conceivably be a subject of dispute which may some day have to be referred for settlement to the International Court of Justice in pursuance of Article 75 of the Constitution.²⁴ Nor is there any constitutional sanction in case a Member state is charged by another Member with failure to enforce an international regulation which has duly come into effect. The only way in which a Member may be penalized directly by the Organization for non-fulfilment of its obligations lies in the discretionary right of the Health Assembly to suspend the voting privileges and services to which such Member is entitled in the event it "fails to meet its financial obligations or in other exceptional circumstances."²⁵ In the last analysis

or implied "from the fact that it refrains from notifying the latter of any objections within twelve months." The Chicago Civil Aviation Convention authorizes the Council of ICAO, by two-thirds vote, to adopt "annexes" (recommended international technical standards and practices) which become effective within three months, or such longer period as the Council may prescribe, "unless in the meantime a majority of the contracting States register their disapproval with the Council."

²³ Work cited, p. 17.

²⁴ Article 76 provides further that the Organization, upon authorization by the General Assembly or in accordance with any agreement between WHO and the United Nations, may request the Court for an advisory opinion "on any legal question arising within the competence of the Constitution."

²⁵ Art. 7. The point was made by the Canadian delegate that in the remote contingency of resort by a Member state to bacteriological warfare it would be essential to withhold from such Member epidemiological information which might reveal the effectiveness of its action.

the principal enforcement sanction in the hand of WHO will be the mutuality of interest of its Members in the world-wide observance of agreed *minimum* protective standards.

WHO Within the United Nations System

The Constitution of the World Health Organization bears the imprint of the United Nations specialized agency pattern of inter-relationship more fully than is the case with the basic charter of any of the other functional institutions thus far affiliated with the central UN machinery. The term "United Nations" occurs twenty-three times in the WHO charter and there are seven different references to the Secretary-General. In the introduction to the Preamble the contracting states proclaim its basic principles to be "in conformity with the Charter of the United Nations," and the Preamble closes with the declaration that they "hereby establish the World Health Organization as a specialized agency of the United Nations."

Many of the procedural provisions of the Constitution were reproduced from the UN Charter with little variation. Two instances of this have been cited earlier in these pages—relative to the appointment and status of staff and the suspension of Members' voting privileges. A further example is to be found in the section governing voting procedure in the Health Assembly and Executive Board. At the end of long and snarled discussion of this problem the Canadian delegation brought forward a compromise formula which was frankly lifted from Article 18 of the Charter. Thus in WHO such questions as the adoption of conventions, the approval of formal agreements with the UN and other inter-governmental organizations, and amendments to the Constitution will require a two-thirds majority vote of the Members present and voting, whereas decisions on less fundamental matters, "including the determination of additional categories of questions to be decided by a two-thirds majority," will need only a simple majority (Art. 60). Except for the absence of the "Big Five" veto, the provision of the WHO Constitution (Art. 73) governing the coming into force of amendments conforms to that laid down in Art. 108 of the UN Charter for the "parent" organization. Again, while the WHO, like the UN, does not constitutionally recognize the right of members to withdraw from the Organization, the Health Conference, following the example set at San Francisco, inserted into the record of its proceedings a "declaratory statement" that "a Member is not bound to remain in the Organization if its rights and obligations as such are changed by an amendment to the Constitution in which it has not concurred and which it finds itself unable to accept."

It is further provided that the Secretary-General, or the United Nations in an organic sense, shall be consulted before the Health Assembly may

make certain procedural and organizational arrangements. Such consultation is mandatory with regard to fixing the date of the sessions of the Assembly (Art. 15), determining the location of the permanent administrative seat of WHO (Art. 43), and preparing an agreement which will define the privileges and immunities to be accorded to the Organization by its Members (Art. 68). The procedure controlling entry into force of the Constitution, moreover, requires that each instrument of acceptance shall be deposited with the Secretary-General who in turn must register the Constitution in accordance with Art. 102 of the UN Charter and inform the states parties to it of the date it comes into force (Arts. 70, 81, and 82).

On the substantive side the Health Assembly is specifically directed to consider any recommendations bearing on health made to the Organization by the UN General Assembly, the Economic and Social Council, the Security Council, or the Trusteeship Council, and to report to these bodies on the steps taken by WHO to give effect thereto (Art. 18, par. i). The obligation to report is reaffirmed in the next clause relating to the provisions of any agreement entered into by WHO with the Economic and Social Council in accordance with Art. 63 of the UN Charter (par. j), while Art. 69 makes it mandatory upon the Organization to conclude such an agreement.

Clearly it is the intent of all these provisions that WHO shall function as one of the "planets" in the "solar" system of the United Nations. Even so, the founders of the Organization gave emphatic expression to their conviction that it must retain substantial operational autonomy. This point of view was notably reflected in the name they selected for the new institution, in the position they took as to the location of its permanent seat, and in the character of the agreement they had in mind for its affiliation with the UN.

Four different verbal combinations were considered for the name of the new organization. The United Kingdom and Australia, ardent apostles of "centralization," urged that the phrase "United Nations" should appear in the title, either as "UNHO" or as "HOUN." China, taking a contrary position, stressed the idea of universality conveyed by the term "World." The Netherlands, in a move designed to satisfy both camps, suggested a cumbersome combination of words: "United Nations World Health Organization" (UNWHO). The vote on this proposal showed seventeen for and thirty against. Having thus rejected what amounted to a *reductio ad absurdum*, the Conference then adopted the simplest and shortest name as best symbolizing the new "world age" and expressing the conviction that "health is a fundamental heritage of all peoples."

When the question of permanent headquarters arose in committee, most of the European and Latin-American members went on record in favor of a European city, preferably Geneva or Paris. While it was admitted that certain administrative advantages would result from locating WHO

at the seat of the United Nations special considerations weighed heavily against any decision which might bind the Organization a year or so later to establish its headquarters in the same place as the UN Secretariat. Among such considerations were the difficulties then being experienced by UN in securing adequate office and housing facilities in New York, the uncertainty as to where the eventual location of UN headquarters would be, and, not least, a strong feeling that since the Pan American Sanitary Bureau would presumably serve as WHO's regional base for the Western Hemisphere, its central office should be situated elsewhere. The fact that the epidemiological work of the Organization could be more conveniently handled from a European center also influenced many of the delegates. The upshot was the acceptance of a text which leaves the task of determining the location of the permanent headquarters to the Health Assembly "after consultation with the United Nations" (Art. 43).

Prior to the first session of the Health Assembly, the Interim Commission is instructed to make studies of possible sites and to submit recommendations thereon to the Assembly. During the second session of the Interim Commission in Geneva (November 1946), the conflict of views as to site broke out afresh. Then the point at issue was the location of *interim* headquarters. The problem was temporarily resolved by the adoption of a resolution (1) which took "note of the establishment of a headquarters office in New York capable of assuring indispensable liaison with the United Nations and the fulfilment of other functions of the Interim Commission," but (2) which authorized "the Executive Secretary to set up an office in Geneva to facilitate the activities" of the Commission. Administratively this was not an entirely happy solution: New York is the nominal headquarters but most of the Commission's work is being performed on the other side of the Atlantic.

The final point calling for comment concerns a provision in the Arrangement setting up the Interim Commission. Article 1 (c) of this instrument prescribes that any agreement (or agreements) negotiated with the UN, while providing for "effective coördination between the two organizations in pursuit of their common purposes," shall "at the same time recognize the autonomy of the Health Organization within the field of its competence as defined in its Constitution." Here again may be noted a persistent desire that the functional independence of the new agency should not be jeopardized—a desire likely to be asserted with considerable force when the UN-WHO negotiations actually get under way.²⁶

²⁶ It should be noted, in passing, that until WHO itself comes into being the preparatory work is being financed from sums advanced by the Secretary-General of UN from his Working Capital Fund. The General Assembly, on 14 December 1946, approved a recommendation from the Economic and Social Council that a sum not exceeding \$1,300,000 be lent to the Interim Commission to meet its budgetary needs for 1946-47,

It would be premature to attempt to make here any final appraisal of the accomplishments of the International Health Conference of 1946—let alone hazard a prediction as to the long-range prospects for WHO. Suffice it to say that, given a world politically at peace, an orderly coördination of coöperative efforts in the international health field now becomes possible. The unfortunate confusion of jurisdiction and responsibility among separate agencies which handicapped inter-governmental health work during the inter-war period will no longer exist. The new "Magna Carta" of health, if it receives sustained and generous support from the major countries of the world, and if it succeeds in escaping the curse of bureaucratic timidity, should afford a powerful impetus for progress in man's unceasing struggle against disease, stunted growth, and social maladjustment.

on condition that the amount actually spent will be repaid to the United Nations within two years after WHO comes into being. Preliminary estimates for 1948, approved by the Interim Commission in April 1947 "as the best available index to the possible cost" of financing the permanent Organization during its initial year, call for an expenditure budget of \$4,800,000, of which \$1,175,000, however, would be earmarked for repayment of a portion of the UN loan and the first instalment of a working capital fund. The World Health Assembly will in no way be legally bound to accept these estimates.

THE CHARTER OF THE UNITED NATIONS AND THE LODGE RESERVATIONS

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I. INTRODUCTION

The prompt adoption of the Charter of the United Nations by the United States stands in bold relief against the failure to ratify the Covenant of the League of Nations twenty-five years ago. The causes responsible for the success of the Charter and the failure of the Covenant are probably diverse in character and varying in importance. The indorsement of the Charter by a virtually unanimous vote in the Senate was probably due in no small measure to the decision of the Roosevelt Administration to place the issue of American participation in an international security organization, almost from the very beginning, on a non-partisan basis.¹ The issue, however, was not one of joining an international organization of the Woodrow Wilson type. The vote in the Senate, accordingly, does not necessarily represent a belated conversion to the idealism of Wilson. It would seem, on the contrary, that the Roosevelt Administration, drawing on the rich experience of international coöperation during the interwar period, and more particularly during World War II, had taken care to keep from the Charter all the important matters to which the majority of the Senate, in voting on the Covenant with the Lodge Reservations on March 19, 1920, had taken exception. It may be that this policy was merely part of an over-all strategy aiming at bringing the United States into some sort of international security organization rather than running the risk of a repetition of the 1919/1920 drama. It may be, on the other hand, that the Roosevelt Administration, together with the other sponsoring governments, had become genuinely convinced that the League Covenant represented a type of international organization which, under the prevailing circumstances, was unattainable or undesirable or unworkable in practice.

These are questions which are here posed without any attempt to answer them. Without entering into the merits of the Wilson-Lodge controversy, this paper will examine the extent to which, in several of its essential aspects, the Charter actually conforms to the pattern of international organization discernible in the Lodge Reservations, taken in conjunction with the Covenant to which they relate. The avowed over-all objective of Senator Henry Cabot Lodge was to make the League "safe" for the United

¹ *Report to the President on the Results of the San Francisco Conference*, Department of State, Publication 2342, Conference Series 71, 1945, p. 24.

States.² The Charter of the United Nations was apparently also devised so as to make it safe for the United States to participate therein. This at any rate was acknowledged by Mr. John Foster Dulles when he urged upon the Senate's Committee of Foreign Relations the view that: "Actually, the document before you charts a path which we can pursue joyfully and without fear. Under it we remain the masters of our destiny."³ Senator Vandenberg expressed a similar view when he assured the President of the Senate that "the flag stays on the dome of the Capitol."⁴ As space limitations make it impossible to review the Charter in the light of all the relevant Reservations, the drawing up of a "safe" international security organization will be illustrated by reference to the more important and apparently still relevant reservations, namely those bearing upon voting strength, the Monroe Doctrine, domestic jurisdiction, the right of withdrawal, and the preservation of territorial integrity and political independence.⁵ For the same reason emphasis will be placed upon the international aspects of the reservations under consideration rather than upon their domestic implications.

II. VOTING STRENGTH AND THE PEACEFUL SETTLEMENT OF DISPUTES

The fourteenth Lodge Reservation related to the voting strength of the British Empire and the Dominions in the League. Senator Lodge apparently assumed that the vote of the four British Dominions and of India which were to become Members of the League in their own right would be controlled by the Empire and that as a consequence England would dispose of six votes in the League as against one vote of the United States. It would have made little difference in the Council of the League whether the Empire disposed of one or six votes since, under Article 5, paragraph 1,

² Henry Cabot Lodge, *The Senate and the League of Nations*, 1925, p. 209.

³ *The Charter of the United Nations*, Hearings before the Committee on Foreign Relations, U. S. Senate, Seventy-Ninth Congress, First Session on the Charter of the United Nations for the Maintenance of International Peace and Security, Submitted by the President of the United States on July 2, 1945, p. 641.

⁴ See Congressional Record, 79th Congress, First Session, Vol. 91, No. 147, July 23, 1945, p. 8089; but see Senator Fulbright, at p. 8095. The following is the context: "The United States retains every basic attribute of its sovereignty. We cannot be called to participate in any sort of sanctions, military or otherwise, without our own free and untrammelled consent. We cannot be taken into the World Court except at our own free option. The ultimate disposition of enemy territory which we have captured in this war is dependent solely upon our own will so far as this Charter is concerned. Our domestic questions are eliminated from the new organization's jurisdiction. Our inter-American system and the Monroe Doctrine are unimpaired in their realities. Our right of withdrawal from the new organization is absolute, and is dependent solely upon our own discretion. In a word, Mr. President, the flag stays on the dome of the Capitol."

⁵ The text of the reservations will be found in 59 Congressional Record, Part V, March 19, 1920, p. 4599.

all decisions required the agreement of all the Members and the United States was to be a permanent member of the Council. With reference to cases submitted to the Council or the Assembly under Article 15 of the Covenant it has been said "that Reservation 14 covers certain cases which conceivably might happen, but which are so remote in probability as to be nearly impossible."⁶ It was believed accordingly that this reservation was "of almost no practical importance."⁷

The question raised by the Lodge Reservation with regard to the voting strength of the British Empire in the League might conceivably have been raised again in connection with the voting strength of the U.S.S.R. in the United Nations. It is true, of course, that, pursuant to Article 18, paragraph 1, each Member of the General Assembly, and, pursuant to Article 27, paragraph 1, each Member of the Security Council, has one vote. Following the Yalta Conference two constituent republics of the Soviet Union, namely the Ukrainian and the Byelorussian Soviet Socialist Republics, were admitted to the San Francisco Conference and consequently to membership in the United Nations.^{7a} The question might well be asked whether in their conduct of foreign affairs these two Soviet Republics possessed a "free will" of their own comparable to that possessed by other states of like magnitude. By the Soviet Law of February 1, 1944, all of the Union Republics were given "the right to enter into direct relations with foreign states, to conclude agreements with them, and exchange diplomatic and consular representatives with them." But, according to Article 14, paragraph (a), of the Constitution of 1936, as amended, the jurisdiction of the U.S.S.R. extends to: "The representation of the Union in international relations, conclusion and ratification of treaties with other states, the establishment of the general procedure in the mutual relations between the Union Republics and foreign states."⁸

Aside from considerations arising from the structure and the role of the Communist Party in the Soviet Union it may be doubted whether, having regard to the above quoted article of the Soviet Constitution, the Union Republics are endowed with complete independence in the exercise of the powers conferred upon them by the Law of February 1, 1944. It remains to be seen, of course, to what extent the Ukrainian and Byelorussian Soviet Republics will conduct themselves within the framework of the United Nations, independently from the U.S.S.R.

⁶ Miller, D. H., *My Diary at the Conference of Paris*, n. d., Vol. XX, p. 591.

⁷ Miller, p. 592.

^{7a} See Sohn, L. B., "Multiple Representation in International Assemblies," in this JOURNAL, Vol. 40 (1946), p. 71.

⁸ Constitution (Fundamental Law) of the Union of Soviet Socialist Republics as amended and supplemented by the First, Second, Third, Sixth, Seventh and Eighth Sessions of the Supreme Soviet of the USSR. Published by Information Bulletin, Embassy of the USSR, Washington, D. C., December 1945.

It is rather interesting to note that no apprehension comparable to that of Senator Lodge was voiced in view of the potential unequal voting strength of the U.S.S.R. and the U.S.A. This may be explained, at least partially, by the structure of the United Nations. Under the Charter the Security Council has no power to take decisions binding on any of the five Great Powers except in matters of procedure. The situation is somewhat different in the General Assembly where decisions may be made by a simple or by a two-thirds majority. This would seem to give to the Soviet Union an advantage over the other Members. In some matters of political consequence, however, such as the admission of new Members, suspension of the right and privileges of membership, and expulsion of Members, the General Assembly cannot act without the Security Council where the Great Powers are in a controlling position under the principle of unanimity. In others, such as those concerning maintenance of international peace and security, the decisions of the General Assembly will be in the form of recommendations which are not legally binding upon Member States. The powers of the Economic and Social Council may be exercised by a simple majority vote but they are generally speaking of a preparatory, advisory or scientific character. Similarly, the powers of the Trusteeship Council are narrowly circumscribed although exercisable by a majority vote. Furthermore, the position of the administering authorities will be largely defined and safeguarded in the Trust Agreements entered into pursuant to Article 79 of the Charter.

In the matter of procedures for the pacific settlement of disputes which were a prime concern to Senator Lodge in the fourteenth Reservation the position of the United States is fully protected and that is so irrespective of the voting strength of any Member. For under the Charter the Security Council or the General Assembly can at best formulate recommendations which are not legally binding. They do not, moreover, produce the limited legal effect attributed to recommendations of the Council and the Assembly of the League under Article 15, paragraph 6 and 10, respectively. In the Security Council it is a moot point whether the operative provision of Chapter VI could be applied without the prior voluntary admission by a permanent Member (a) that it was involved in a dispute rather than a situation or (b) that it was a party to the alleged dispute or (c) that the dispute was of the nature defined in Article 33 of the Charter.⁹ It is also open to discussion, at present, whether the Security Council can be validly seized under Article 37, paragraph 1, without prior and voluntary agreement between both parties to the dispute.¹⁰ It may well be that the self-

⁹ *Proceedings of the American Society of International Law*, 1946, p. 79: remarks by Judge Hudson, Mr. Wilcox and Professor Quincy Wright. See also Clyde Eagleton "The Jurisdiction of the Security Council over Disputes," this JOURNAL, Vol. 40, 1946, p. 528.

¹⁰ Goodrich, L. M., and Hambro, E., *Charter of the United Nations*, 1946, p. 152.

denying ordinance of Article 27, paragraph 3, cannot begin to display its beneficial effect until some vital preliminary questions are cleared up by the affirmative vote of all the permanent, and of at least two other, Members of the Security Council. Such a result would, of course, deprive Chapter VI of a good deal of its apparent strength though by no means of all its usefulness. It would also reveal that at the bottom, though not on the surface, the Charter represents a less radical departure from the voluntary character of peaceful procedures for the settlement of international disputes which prevails in general international law than was the case in the League of Nations. Whether this is so the future practice of the Security Council may reveal. In any case, the essentially advisory nature of the Security Council's function under Chapter VI obviated, presumably, any need for special safeguards for the United States in case the Byelorussian or the Ukrainian Soviet Republics were to be among the elected Members of the Security Council and thus perhaps increase the voting power of the U.S.S.R.

III. THE MONROE DOCTRINE

The fifth Reservation related to Article 21 of the Covenant which was intended to safeguard "the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace." Although this article was inserted at the urgent request of President Wilson,¹¹ it was apparently construed by Senator Lodge as submitting the Monroe Doctrine to the jurisdiction of the League. This danger the fifth Reservation was intended to remove. It is unnecessary to make a detailed examination of Article 21 or of the fifth Reservation. It was said that Article 21, on the one hand, "neither weakens nor limits any of the safeguards provided in the Covenant," and that, on the other, "it cannot have the effect of giving them (viz. the engagements referred to in Article 21) a sanction or validity which they did not previously possess."¹² The interpretation was also advanced that while Article 21 could not completely eliminate the jurisdiction of the League in disputes involving the Monroe Doctrine, the League was bound to grant to the United States a free hand as soon as it determined that the dispute in question was related to the Monroe Doctrine.¹³

With such interpretations the Lodge Reservation was not inconsistent. It may be doubted whether it was necessary.¹⁴ The League of Nations

¹¹ Miller, *The Drafting of the Covenant*, 1928, Vol. I, p. 444.

¹² Telegram from the President of the Council of the League to the Government of Costa Rica, September 1, 1923, *Official Journal*, 1928, p. 1608.

¹³ Schücking, W., and Welberg, H., *Die Satzung des Völkerbundes*, 1924 (2d ed.), p. 679; Göppert, Otto, *Organisation und Tätigkeit des Völkerbundes*, Stuttgart, 1938, pp. 60, 314.

¹⁴ Miller, *My Diary*, Vol. XX, p. 580; Fleming, D. F., *The United States and the League of Nations*, 1918-1920, 1932, p. 425.

could not pass upon policies. The League was concerned, in Articles 10, 11, and 15, with external aggression, any threat or danger of aggression, any war or threat of war, and disputes likely to lead to rupture. Neither Article 21 nor presumably the fifth Reservation, if accepted, would have precluded the League from the application of Articles 10 and 11.¹⁵ In the case of Article 15 a situation might have arisen in which the United States or another member would invoke Article 21. In that case, as submitted above, Article 21 might have produced a situation similar to that produced by Article 15, paragraph 8, of the Covenant relating to disputes arising out of a matter which by international law is solely within the domestic jurisdiction of one of the parties. In actual practice, however, Article 21 constituted no impediment to the procedure under Article 15 in disputes relating to or between Latin American Republics members of the League. In support of this conclusion it is possible to refer to the Tacna Arica dispute between Bolivia, Chile, and Peru, 1920, the Leticia dispute between Columbia and Peru, 1933, and the Chaco dispute between Bolivia and Paraguay, 1934.¹⁶

No explicit reference to the Monroe Doctrine has been included in the Charter of the United Nations. In recent years, however, the Monroe Doctrine has frequently been defined as a doctrine or policy of self-defense or self-protection.¹⁷ Now the Charter of the United Nations recognizes in Article 51 the right of individual and collective self-defense. To the extent that it expresses no more than the right of self-preservation or self-defense, the Monroe Doctrine, it has been said, is implicitly recognized in Article 51. The same has been said of "the hemispheric policy of self-defense against non-American powers" as voiced in the Declaration of Lima of 1938, the Act of Havana of 1940, and the Act of Chapultepec of 1945.¹⁸ It was so explained in the Senate Foreign Relations Committee where the Chairman, Senator Tom Connally, insisted that "the Monroe Doctrine survives in its entirety, unless the Charter somewhere specifically limits it, and (that) the purpose of the Charter is to strengthen the Doctrine rather than to weaken it."¹⁹ Similarly, Mr. Dulles maintained that "there is nothing in the Charter which impairs a nation's right of self-defense" and "that there is nothing whatsoever in this Charter that impairs the Monroe Doctrine as a doctrine which has been proclaimed, sustained, and recognized by the world as a doctrine of self-defense."²⁰

¹⁵ Fleming, D. F., *The United States and the League of Nations, 1918-1920*, 1932, p. 424.

¹⁶ Hackworth, Green Haywood, *Digest of International Law*, Vol. I, 1940, p. 752; Vol. V, 1943, p. 455; Vol. VI, 1943, pp. 50, 51.

¹⁷ See statements quoted in Hackworth, *work cited*, Vol. V, pp. 440-462.

¹⁸ Report to the President, p. 107.

¹⁹ Hearings, p. 307. Senator Milliken expressed the view "that that Doctrine goes much further than self-defense against an actual act of aggression": same, p. 304.

²⁰ Hearings, p. 650.

In spite of the determined effort made in San Francisco to obtain for the Monroe Doctrine complete recognition²¹ and thus to realize to the fullest extent the idea which animated Senator Lodge in the fifth Reservation, there remains some doubt whether this was really achieved. As Article 51 of the Charter now stands, it provides (a) for the inherent right of individual or collective self-defense if an armed attack occurs against a member and (b) for a procedure subordinating, in a sense, the exercise of this right to the authority of the Security Council under Chapter VII of the Charter. Self-defense, as widely understood, is "that form of self-protection which is directed against an aggressor or contemplated aggressor."²² In the same order of ideas, the Act of Chapultepec of March 3, 1945, envisages the use of armed force and of measures short of force "to prevent or repel aggression."²³ It would seem therefore that traditionally, and particularly within the American system, the right of self-defense is regarded as being applicable in cases of actual as well as of potential aggression.

The Charter of the United Nations, in Article 51, accepts the right of self-defense but only in case an armed attack occurs against a Member State. This may be construed as excluding resort to self defense against contemplated or impending aggression.²⁴ In this sense Article 51 may be deemed to limit somewhat the Monroe Doctrine even if it were understood to cover no more than the policy of the United States to resort to self-defense whenever the peace and integrity of the new world is threatened.²⁵ On the other hand, even if the United States invoked properly the right of self-defense under the Monroe Doctrine—and perhaps under an extended Act of Chapultepec—but did so improperly under Article 51 or any other pertinent provision of the Charter, no action could be taken against it on account of its veto in the Security Council. It is owing to this circumstance, it is believed, rather than because of Article 51 that the Monroe Doctrine may be said to survive "in its entirety."²⁶ And that as a further consequence the "Doctrine is to be interpreted by the United States alone" as postulated in the fifth reservation.²⁷

²¹ Statement by Mr. Dulles, *Hearings*, p. 650.

²² Hyde, C. C., *International Law*, 1945 (2d ed.), Vol. I, p. 237.

²³ See Part I, paragraph 6 and Part II of the Act of Chapultepec. Inter-American Conference on Problems of War and Peace, Pan-American Union, Congress and Conference Series, No. 47, 1945, p. 33. See also the Declaration of Lima of 1938 and the Declaration of Habana of 1940 referred to in the Preamble of the Act.

²⁴ Hans Kelsen, "Organization and Procedure of the Security Council of the United Nations," 59 *Harvard Law Review* (1946), p. 1114; Goodrich and Hambro, work cited, p. 178.

²⁵ See Secretary Hull's statement quoted in Hackworth, work cited, Vol. V, p. 458.

²⁶ Senator Tom Connally's statement, *Hearings*, p. 307.

²⁷ Goodrich and Hambro, p. 180.

IV. DOMESTIC JURISDICTION

The fourth reservation of Senator Lodge related to Article 15, paragraph 8, of the Covenant. Its purpose was to take the determination of the domestic character of a dispute to which the United States was a party out of the hands of the Council and the Assembly and to reserve to the United States "exclusively, the right to decide what questions are within its domestic jurisdiction."²⁸ While this Reservation was deemed merely to reiterate "the antagonism to international arbitration which exists in the Senate" and while it was recognized that "the language used is logically indefensible," it was believed at the time that "it sounds much worse than it will prove to be in operation."²⁹ It may well be that this judgment would have been borne out had the United States joined the League of Nations. Perhaps the Reservation did not go far enough in order to achieve complete protection for the domestic affairs of the United States. This can hardly be said of the sweeping reservation which found its way into Article 2, paragraph 7, of the Charter. Before discussing this clause it may be useful to recall briefly the meaning of the corresponding provision of the Covenant to which Senator Lodge took exception.

The right of a party to a dispute to claim that the Council or the Assembly of the League lacked jurisdiction because of the domestic character of the substance of the dispute was limited by the Covenant to the procedure under Article 15. This exception, therefore, did not affect the powers conferred upon the Council or the Assembly or the corresponding duties imposed upon Members by other Articles of the Covenant. It did, in particular, not apply to Articles 10, 11, 12, or 16. Thus the Council's mediatorial mission under Article 11 and the Members' obligation under Article 12 to submit disputes likely to lead to a rupture to arbitration or to judicial settlement or to inquiry by the Council was in principle unaffected by the exception contained in Article 15, paragraph 8.

Furthermore, the exception of domestic jurisdiction in Article 15, paragraph 8, related by its terms to the power of the Council or the Assembly to make recommendations in regard to the dispute. As the making of recommendations was only one aspect of the Council's powers and only one part of the Council's report under Article 15, the exception could not be said to apply to the mediatorial action of the Council under Article 15, paragraph 3, and to the inquiry into the facts of the dispute made by the Council under paragraph 4 of Article 15. Correspondingly, Members were not exempt from the duty laid down in Article 15, paragraph 2, to communicate to the Council "as promptly as possible statements of their case with all the relevant facts and papers."

Moreover, the Covenant limited the exception in several ways: It could validly be raised only with reference to a matter which was solely within

²⁸ Lodge, work cited, p. 185.

²⁹ Miller, *My Diary*, Vol. XX, pp. 577, 578-580; Fleming, pp. 422-424.

the domestic jurisdiction, which, secondly, was so by international law and which, thirdly, was found to be so by the Council. All these questions were strictly questions of international law which lent themselves to juridical determination. It was in this spirit that the Council interpreted the exception laid down in Article 15, paragraph 8, in disputes which came before it. Thus in the dispute between Finland and Sweden relating to the Aaland Islands the Council referred the question to a committee of jurists and in two other cases—the Franco-British dispute concerning the Nationality Decrees in Tunis and Morocco and the Greco-Turkish dispute relating to the Expulsion of the Ecumenical Patriarch—the Council referred the question to the Permanent Court of International Justice. In the first two cases the objection founded in Article 15, paragraph 8, was overruled. In the third case the dispute was settled through negotiations between the parties.

By contrast, the reservation of domestic jurisdiction as formulated in Article 2, paragraph 7 of the Charter, with one exception to be noted later, embraces the whole of the field of action of the United Nations. It may be said to restrict the power of all organs of the United Nations and to limit the duties assumed by the Members. In particular, it relieves the Members from the duty "to submit such matters to settlement under the present Charter." They would seem to be released not merely from their duty under Article 37 to submit a dispute to the Security Council for action under Article 36 or for recommendation of terms of settlement but also from the basic duty assumed in Article 33, to "seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or arrangements, or other peaceful means of their own choice." The Security Council, on the other hand, it may be argued, is restrained in the exercise of the powers conferred upon it by Article 33, paragraph 2, and of the basic power conferred upon it by Article 34 to investigate any dispute for the purpose of determining whether a certain dispute or situation "is likely to endanger the maintenance of international peace and security." These are some of the significant inroads of the traditional sovereignty of states into the security system established by the Charter. They do not, however, exhaust the import of Article 2, paragraph 7. It has been pointed out³⁰ that Article 2, paragraph 7, differs from Article 15, paragraph 8, of the Covenant in the omission of international law as the yardstick of domestic questions; in the omission of the Security Council as the organ competent to determine the validity of an objection founded on Article 2, paragraph 7, and in the substitution of the adjective "essentially" for "solely."

The elimination of international law was justified on the ground that it was "indefinite and inadequate" and "antiquated."³¹ This view stands

³⁰ Goodrich and Hambro, work cited, p. 72.

³¹ Report to the President, p. 45.

in marked contrast to the current notion that international law is a growing and expanding body of law. It stands, in particular, in contradiction with the extremely dynamic conception of international law relied upon by Mr. Justice Jackson in his defense of the United States' position with reference to the Nuremberg War Crimes Trial.³² The dynamic concept was stressed by the Permanent Court of International Justice in the Franco-British nationality dispute when the Court declared that "the question whether a certain matter is or is not within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations."³³ Those who advocated the deletion of a reference to international law may be disappointed in actual practice. As the domestic character of a question can hardly be justified in terms of the municipal law of either party to the dispute, international law as the legal order common to both parties in fact must be resorted to in order to resolve the controversy.³⁴

The reason advanced for the substitution of the word "essentially" for "solely" disclosed the great desire for a flexible and wider interpretation of domestic matters.³⁵ The Permanent Court of International Justice held, on the other hand, that while the question was a relative one, the exception of Article 15, paragraph 8, did not lend itself to extensive interpretation. The existence of a conventional or of a customary rule of international law was deemed sufficient to overrule the contention that a matter was "solely" within the domestic jurisdiction of a state.³⁶ In the future a party to a dispute, without denying the existence of a pertinent form of international law, may nevertheless be in the position to deny the applicability of the procedures for the settlement of international disputes laid down in the Charter. All it has to do is to maintain that in spite of existing international obligations the matter is one that falls "essentially" although perhaps not "solely" within its domestic jurisdiction.

The extension by comparison with the Covenant of the sphere within which states may claim unfettered freedom of action and avoid essential obligations flowing from the Charter is still further emphasized by the absence of a named organ competent to decide whether Article 2, paragraph 7, was properly invoked by a Member Government. Admittedly such an organ would have been faced with a difficult though by no means impossible task. Its mere existence, however, would probably have operated as a

³² Mr. Justice Jackson's remarks in his Report to the President of June 7, 1945, "Trial of War Criminals," Department of State Publication 2420, 1945, p. 9; also statements quoted in Hackworth, Vol. I, pp. 39-43.

³³ Permanent Court of International Justice, *Publications*, Series B, No. 4, p. 24.

³⁴ Preuss, Lawrence, "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction," this JOURNAL, Vol. 40, 1946, p. 724.

³⁵ "A Commentary on the Charter of the United Nations," in *British Parliamentary Papers*, Misc. No. 9 (1945), Cmd. 6666, paragraph 20 at p. 6.

³⁶ Permanent Court of International Justice, *Publications*, Series B, No. 4, p. 24.

restraint upon member governments in making use of Article 2, paragraph 7. It has been contended that in spite of the absence of a reference to a specific organ in Article 2, paragraph 7, each organ of the United Nations and notably the International Court of Justice would be competent to decide whether it had jurisdiction.³⁷ On the other hand the view has also been advanced that each member would decide for itself whether, having regard to Article 2, paragraph 7, it could decline to accept the jurisdiction of an organ of the United Nations.³⁸ It was perhaps with a view to avoiding all future controversy that the United States in accepting the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute made the reservation that it and it alone would determine whether a dispute concerned a matter which was essentially within its domestic jurisdiction.³⁹ Such would have probably been the result of the operation of Article 2 paragraph 7. For this reason this reservation, assuming that it is a valid exercise of the powers conferred upon states by Article 36 of the Statute, was said to have added little to the broad exception already contained in Article 2 paragraph 7 of the Charter.⁴⁰

The view that it is for each state to determine in appropriate circumstances whether the exception of Article 2, paragraph 7, applies may be supported by the following reasoning: (1) The Organization, according to Article 2, paragraph 1, is based on the principle of the sovereign equality of all its Members. One of the elements of sovereignty included in that principle is "that each state enjoys the right inherent in full sovereignty."⁴¹ One of the rights inherent in full sovereignty is the right of each state to interpret for itself the nature, extent, and meaning of the obligations assumed in the Charter insofar as this right has not been explicitly surrendered.⁴² It may be apposite to recall here the dictum of the Permanent Court of International Justice in the *Lotus Case* that "restrictions upon the independence of states cannot . . . be presumed."⁴³ (2) The Charter confers upon no organ of the United Nations the general competence to interpret the Charter authoritatively, that is with binding effect upon all member governments as well as organs of the United Nations. It has been

³⁷ Statement of the Belgian Delegate, M. Dehousse, in Commission I of the San Francisco Conference, UNCIO, Documents, Vol. VI, p. 112.

³⁸ Statement of the Uruguayan Delegate, M. Payssé, in same, p. 110. See also Clyde Eagleton, "Covenant of the League of Nations and Charter of the United Nations: Points of Difference," 13 *Department of State Bulletin* (1945), at p. 268.

³⁹ 15 *Department of State Bulletin* (1946), p. 452.

⁴⁰ Wilcox, Francis O., "The United States Accepts Compulsory Jurisdiction," this *JOURNAL*, Vol. 40, 1946, p. 710.

⁴¹ Report of Rapporteur of Committee I to Commission I, Doc. 344 (E) I/1/34 (1). UNCIO, Documents, Vol. VI, p. 457.

⁴² Lauterpacht, H., *The Development of International Law by the Permanent Court of International Justice*, 1934, p. 34; Goodrich and Hambro, p. 64.

⁴³ Permanent Court of International Justice, *Publications*, Series A, No. 10, p. 18.

said that each organ will interpret for itself those parts of the Charter which are applicable to its functions.⁴⁴ This presumes, of course, that all Members will accept such an interpretation. On the other hand "it is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding effect."⁴⁵ Thus if a member state objected to the action of any organ of the United Nations including, presumably, the International Court of Justice, on the ground that it constituted an infringement of Article 2, paragraph 7, as interpreted by itself, it could refuse to be bound thereby. The only legal method by which to invest an interpretation with binding force is the procedure of amendment laid down in Chapter XVIII of the Charter. However, in virtue of an accepted understanding a Member may withdraw from the Organization if it disapproves of an amendment.⁴⁶ It would seem, therefore, that ultimately each state member of the United Nations may interpret for itself the scope and applicability to a given dispute of the exception contained in Article 2, paragraph 7. (3) This view finds further support in the deliberate departure from the precedent of Article 15, paragraph 8, of the Covenant and the resulting omission of an organ competent to decide whether a Member properly invoked the exception of Article 2, paragraph 7. (4) A possible exception might be construed for disputes brought before the International Court of Justice. According to Article 36, paragraph 6, of the Statute, the Court has power to determine whether it has jurisdiction. In passing upon the preliminary objection to its jurisdiction the Court, it is believed, would have to consider the provisions of the Charter including notably Article 2, paragraph 7, along with the Statute and applicable treaties and declarations. A party to a dispute which disagrees with the Court's interpretation of Article 2, paragraph 7, may find some justification in the conclusions of the Committee referred to above for refusing to submit to its jurisdiction and for regarding any action taken by the Court as exceeding the scope of its authority. It seems doubtful whether any ruling of the Court could be properly construed as an "intervention" within the meaning of Article 2, paragraph 7. It may be, however, that in the absence of a clarifying interpretation of this ambiguous term each member state, unless willing to submit to the Court's jurisdiction, will deem itself warranted in adhering to its own view of Article 2, paragraph 7, and notably of the meaning of the term "intervention" which did not appear in Article 15, paragraph 8, of the Covenant of the League.

The exception of domestic jurisdiction, pursuant to the explicit terms of Article 2, paragraph 7, cannot be invoked in case of the application of

⁴⁴ Report of the Rapporteur of Committee IV/2. UNCIO, Documents, Vol. XIII, p. 709.

⁴⁵ Same, p. 710.

⁴⁶ Report to the President, p. 48.

enforcement measures under Chapter VII. The phrasing of this provision was, of course, deliberate. It was intended to exclude, in the first place, the use of the power conferred upon the Security Council in Article 39 to make recommendations. This was an important concession made at San Francisco to the view held by the Australian delegation.⁴⁷ Thus the Security Council's power to deal preventively by way of recommendations with threats to the peace would seem to be seriously curtailed. In the second place, the use of the power conferred upon the Security Council by Article 40 seems also to be excluded. It was made clear at the San Francisco Conference that the exception in favor of enforcement measures should be interpreted strictly.⁴⁸ As the provisional measures which the Security Council may enjoin upon the parties cannot, strictly speaking, be classified as enforcement measures within the meaning of Articles 41 and 42, they may become inapplicable whenever a party claims that the matter falls essentially within its domestic jurisdiction. This interpretation cannot, it is believed, be ruled out in case of a threat to the peace as distinguished from a breach of the peace or an act of aggression.⁴⁹ By comparison with the League's broad powers under Articles 10 and 11, to deal preventively with a threat or danger of aggression and a threat of war, the Security Council's powers in similar cases appear significantly limited.

In conclusion it may be said that whereas the Covenant, in Article 15, paragraph 8, attempted to strike a balance between the legitimate claims of state sovereignty and the minimum requirement of collective security to restrict the discretionary element inherent in that sovereignty, the Charter, in Article 2, paragraph 7, appears, by contrast, to safeguard that discretionary element at the expense of restrictions which are essential to any workable system of international security. By placing the domestic jurisdiction clause among the Principles of the Organization, which constitute, in a sense, its fundamental law, the Charter gives expression to the desire of the member governments to extend the application of this clause "to the activities of the Organization as a whole."⁵⁰ By eliminating the yardstick of international law, by substituting "essentially" for "solely," by neglecting to name an organ with power to determine the applicability of the exception of domestic jurisdiction in international disputes, the Charter may be said to be fully in line with the principle of Senator Lodge's fourth Reservation. It was Senator Lodge who objected to the term "solely" by stating that domestic or political questions "relating wholly or in part to its internal affairs" should be considered "solely"

⁴⁷ Report to the President, p. 44.

⁴⁸ Statement of the Rapporteur of Committee I/1 to Commission I. UNCIO, Documents, Vol. VI, p. 487.

⁴⁹ "A Commentary on the Charter of the United Nations," in *British Parliamentary Papers*, Misc. No. 9 (1945), Cmd. 6666, paragraph 34 at p. 8.

⁵⁰ Report to the President, p. 44; *Hearings*, p. 310.

within the jurisdiction of the United States. It was Senator Lodge who desired that the United States and not the Council of the League should have the right to determine what these questions were. It was Senator Lodge who desired that all questions so determined should be withdrawn from the basic obligation to submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the Council or the Assembly. Article 2, paragraph 7, fulfills all these desires and goes beyond them by seriously curtailing the range and effectiveness of the Security Council's preventive activities in discharging its chief responsibility for the maintenance of international peace and security. For all of these reasons it may be difficult to disagree with Mr. Payssé of Uruguay who observed in the First Committee of the San Francisco Conference that with Article 2, paragraph 7, as adopted, "a great jump backwards will be taken."⁵¹

V. THE RIGHT OF WITHDRAWAL

The first Lodge Reservation related to Article 1, paragraph 3, of the Covenant which provided for the right of withdrawal after two years notice and subject to the fulfillment of certain obligations. Under the Covenant the right of withdrawal, made explicit at the insistence of President Wilson,⁵² was not to be exercised lightly nor was it to be exercised in such a manner as to bring about sudden changes in the legal relations between the Members of the League.⁵³ The first Lodge Reservation would have excluded any jurisdiction by the League and established the United States as "the sole judge as to whether all of its obligations under the said Covenant have been fulfilled." It has been said that this Reservation "was as correct as it was unnecessary,"⁵⁴ for Article 1, paragraph 3, conferred upon every Member of the League "an absolute right of withdrawal."⁵⁵ Although the intended purpose of Article 1, paragraph 3, was to confer no such absolute right upon the Members and, in particular, to make "withdrawal attempted in spite of unfulfilled obligations ineffective,"⁵⁶ in actual practice Members exercised the right of withdrawal without any effective control by the League.⁵⁷

⁵¹ UNCIO, Documents, Vol. VI, p. 110.

⁵² Miller, *The Drafting of the Covenant*, Vol. 1, pp. 293, 296, 305, 342-348.

⁵³ "Question of the Universality of the League: Participation of all States in the League," Report by Lord Cranborne. Doc. A.7.1938. VII, p. 60. See also "The Covenant of the League of Nations with a Commentary Thereon" in *British Parliamentary Papers*, Misc. No. 3 (1919), Cmd. 151, p. 13.

⁵⁴ Fleming, p. 421.

⁵⁵ Miller, *My Diary*, Vol. XX, pp. 480, 482, 569-571; but compare Miller, *The Drafting of the Covenant*, Vol. I, p. 343.

⁵⁶ Lord Cranborne's Report, p. 60. See also Engel, S., *League Reform*, 1940, pp. 73-74.

⁵⁷ Cranborne Report, p. 60.

The Charter of the United Nations, unlike the Covenant contains no regulations in respect of withdrawal. The San Francisco Conference after an exhaustive discussion approved a commentary on withdrawal included in the Report of Commission I. According to this statement Members may withdraw from the Organization (a) if exceptional circumstances occur; (b) if the Organization reveals itself unable to maintain peace or if it could do so only at the expense of law and justice; (c) if a Charter amendment were adopted changing the rights and obligations of Members and (d) if an amendment, adopted by the General Assembly or a General Conference, failed to enter into force because of lack of the required number of ratifications.⁵⁸

Assuming that this interpretation will actually guide the Organization and the Members desirous of withdrawing from it, it must be said that the right of withdrawal is absolute with the possible qualification that the withdrawing Member will be expected to state its reason.⁵⁹ It was so explained and understood in the Senate's Foreign Relations Committee.⁶⁰ It was particularly underscored that each Member remained judge of the circumstances motivating its withdrawal⁶¹ and that no sanctions could be employed against a withdrawing Member.⁶² The only penalty said Senator Vandenberg, could be an "adverse public opinion."⁶³

The Charter thus legalized, tacitly, the practice of League Members in the matter of withdrawal. In this respect it goes to the full extent of the first Lodge Reservation. It should be noted, however, that it goes beyond that Reservation and the League Covenant and practice in two ways. First, it fails to make withdrawal conditional upon the fulfillment of Charter and other international obligations. Senator Lodge did not object to this aspect of the Covenant although he desired it to be clearly understood that the United States would alone "determine as to the fulfillment of its obligations."⁶⁴ Secondly, both the Charter and the Committee statement fail to lay down a time interval for the withdrawal to become legally effective. Senator Lodge did not object to the requirement of a two years' notice. In the absence of a rule to the contrary, withdrawal from the

⁵⁸ "Report of the Rapporteur of Commission I to Plenary Session," Doc. 1179, I/9 (1), p. 5, UNCIO, Documents, Vol. VI, p. 249; "Verbatim Minutes of the Ninth Plenary Session," 1210. P/20, in same, Vol. I, pp. 616, 620; Report to the President, p. 49; *Hearings*, p. 232.

⁵⁹ Report to the President, p. 49; statements by Mr. Dulles, *Hearings*, p. 649, and by Dr. Pasvolosky, p. 235.

⁶⁰ *Hearings*, pp. 234 f., 240, 246, 324, 348, 646, 647, 648.

⁶¹ Statements by the Chairman, Senator Tom Connally, *Hearings*, p. 649, and by Mr. Dulles, p. 648.

⁶² Statements by the Chairman, *Hearings*, p. 234, and Dr. Pasvolosky, pp. 235, 236.

⁶³ *Hearings*, p. 237; also statements by the Chairman, pp. 234, 649; Senator George and Dr. Pasvolosky, p. 235.

⁶⁴ Lodge, work cited, p. 173.

United Nations will become presumably effective immediately, that is, even if it were announced on the eve of crucial decisions in the Security Council in connection with the settlement of a dispute or the employment of preventive or enforcement measures. No protection is afforded to the Members of the United Nations against sudden changes in the membership and the attendant changes in the burdens and benefits of membership. This is hardly an improvement on the Covenant. Thus in connection with the right of withdrawal as in the matter of domestic jurisdiction the principle of sovereignty has prevailed over and against what many would regard as the minimum requirements of an international security organization.

VI. PRESERVATION AND TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE

The second Lodge Reservation, the most controversial of all, related primarily to Article 10, the "cornerstone" or the "heart" of the Covenant as conceived by Woodrow Wilson. As to the meaning of Article 10, there was hardly ever a general agreement beyond the statement that it contained two distinct obligations, first, the negative duty to respect, and secondly, the positive duty to preserve as against external aggression the territorial integrity and the political independence of member states. The first duty was hardly open to discussion and it should be noted that Senator Lodge raised no objection on this score.⁶⁵ It was the positive duty which almost from the very beginning had become the center of controversy. In the view of some writers it implied an absolute, automatic, and unlimited obligation to assist the victim of aggression and to reestablish the *status quo*.⁶⁶ Others denied that it had any legal meaning at all.⁶⁷ Some decried it as a guarantee of existing territorial alignments,⁶⁸ while others contended that, far from "freezing" the territorial situation resulting from the Paris Peace Treaties, Article 10 merely had the legal effect of making wars of conquest illegal.⁶⁹

⁶⁵ Miller, *My Diary*, Vol. XX, p. 573.

⁶⁶ M. Scialoja (Italy) in the Second Assembly, 1921, First Committee, *Minutes*, p. 111.

⁶⁷ Sir John Fischer Williams, *Some Aspects of the Covenant of the League of Nations*, 1934, p. 122; Kelsen, Hans, *Legal Technique in International Law*, 1939, p. 70.

⁶⁸ Memoranda submitted by the Canadian Government in support of the proposal of the Canadian Delegation at the Assembly to strike out Article 10. Doc. C. 215. M. 154. 1921 (A.C. 28). Memorandum of Sir Robert Borden of March 13, 1919, p. 8.

⁶⁹ M. Rolin in the Second Assembly, First Committee, *Minutes*, p. 110; Belgian Memorandum of May 28, 1923, Doc. A.17.1923, V, p. 2; Kunz, J. L., "L'Article 11 du Pacte de la Société des Nations," *Recueil des Cours de l'Académie de Droit International*, 1932, Vol. I, p. 707. The Draft Treaty of Mutual Assistance of 1923 stipulated in Article 1 that even in case of a legitimate war the political independence and territorial integrity of the opponent must not be violated. Similarly Article 15, paragraph 2, of the Geneva Protocol for the Pacific Settlement of International Disputes.

The prevailing sentiment within the League was opposed to the Canadian proposal made at the very first meeting of the Assembly to simply strike out Article 10 from the Covenant.⁷⁰ But the overwhelming majority of the League Members in 1923 supported an interpretation which was designed to adjust the weight and scope of obligations assumed under Article 10 to the situation created by the absence of the United States from the League. Accordingly, Members remained bound by the basic obligation of Article 10, but it was for the constitutional authorities of each Member to decide in what degree it was bound to assure the execution of this obligation by the employment of military forces. The Members also agreed to take into consideration the recommendations of the Council. On the other hand, the Council, in recommending military measures, was to be bound to take into account the geographical location and the special conditions of each member state.⁷¹ It may be said that the League followed the line of thought developed by the Committee of Jurists of 1920. This Committee, it may be recalled, for the first time laid down the view that in Article 10 the Covenant incorporated a principle the implementation of which was to be sought for in the following Articles and notably in Article 16.⁷² As Article 16 was not understood to create an obligation to apply military sanctions, there appeared no valid reasons for assuming that the draftsmen of the Covenant intended to lay down so far reaching an obligation in Article 10. Although lacking support in the actual language of Article 10, the restrictive view prevailed in the practice of the League.⁷³ In no small measure the absence of the United States from the League may be credited with this result.

The second Lodge Reservation was far from clear.⁷⁴ It could be interpreted as simply restricting the commitment of the United States to those means for enforcing Article 10 which were not specifically reserved to Congress.⁷⁵ It could also be interpreted as denying the binding character of the Council's action under Article 10. This was a position which was taken by all but one Member of the League in 1923. But the Lodge Reservation could also be understood as simply denying any obligation to take

⁷⁰ League of Nations. The Records of the First Assembly, Plenary Meetings, p. 275.

⁷¹ Assembly, 1923, Plenary Meetings, Text of Debates, p. 77.

⁷² "Report of the Committee of Jurists addressed to the Committee on Amendments to the Covenant," June 28, 1921, Doc. 24 (1). 1921. V. (A.C. 40 (a)), Annex I, pp. 10-14; "Report of the Committee on Amendments to the Covenant," September 7, 1921, pp. 3-4. Both reports are reprinted in Doc. C.S.P. 26, pp. 43-47. See also "Article 10 of the Covenant. Report submitted to the Committee by M. Nasrollah Entezam." Doc. A.7. 1938. VII. p. 96: "It would appear, however, that, in practice, Article 10 has hardly been treated as other than a general rule of principle, for the application of which resort has been had to the procedure provided by other articles."

⁷³ M. Nasrollah Entezam's Report quoted above, p. 96.

⁷⁴ Fleming, p. 435.

⁷⁵ Miller, *My Diary*, Vol. XX, pp. 572.

appropriate, that is military, measures for the purpose of upholding the sanctity of the political independence and territorial integrity of member states. The acceptance of this duty has rightly been regarded as the most far-reaching single step yet taken in the development of collective security. If it were Senator Lodge's intent to eliminate "any opportunity of charging the United States with bad faith"⁷⁶ then certainly the way to do so was to refuse from the outset to accept the affirmative duty of Article 10 and this is precisely what the second Reservation declares in its opening words. On this vital point no compromise appeared possible. Even under the 1923 interpretation the Members of the League were bound to take into consideration the recommendations of the Council. Moreover, it was made quite clear at the time that while the Members had the right to decide upon the method of implementing their duty under Article 10, there could be no tampering with the duty itself.⁷⁷ It would seem, therefore, that the chief objective of the second Lodge Reservation must have been the nullification of the basic duty to preserve League Members against aggression. The excision of the positive duty from Article 10 would have wrought an important transformation of the League of Nations although it may be doubted that it would have deprived the League of all its usefulness as an instrument of collaboration.

The Charter of the United Nations contains no single provision comparable to Article 10 of the Covenant. Insofar as the first duty of Article 10 is concerned it has been said that such a duty to respect the territorial integrity and political independence of states was implicit in Article 2, paragraph 1.⁷⁸ Efforts aiming at the inclusion in the Charter of a specific statement "emphasizing respect for territorial integrity and political independence of states" failed at the San Francisco Conference. Agreement was reached, however, on Article 2, paragraph 4.⁷⁹ Presumably, there is a difference between the positive duty to respect in Article 10 of the Covenant and the negative duty in Article 2, paragraph 4, of the Charter to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other

⁷⁶ Lodge, work cited, p. 174.

⁷⁷ "Application of the Principles of the Covenant. Article 10 Memorandum prepared by the Secretariat," Doc. C.S.P. 26, p. 33. See also statement by M. Rolin, Rapporteur of the First Committee, in the 1923 Assembly, Plenary Meetings, p. 77.

⁷⁸ Official British Commentary on the Charter of the United Nations, paragraph 19 at p. 6; Report to the President, p. 40; Congressional Record, 79th Congress, First Session, Vol. 91, No. 147, July 23, 1945, p. 8096; "Report of the Rapporteur of Committee I to Commission I," Doc. 944, I/1/34 (1) p. 12, UNCIO, Documents, Vol. VI, p. 457; Doc. 1123, I/8, pp. 5-6, "Verbatim Minutes of Second Meeting of Commission I; "Report of the Rapporteur of Commission I to the Plenary Session," Doc. 1179, I/9 (1), p. 2, UNCIO, Documents, Vol. VI, p. 246; also UNCIO, Documents, Vol. VI, pp. 69, 70.

⁷⁹ Report to the President, p. 41.

manner inconsistent with the Purposes of the United Nations." Perhaps if disrespect for the integrity and independence of states can be shown in some other manner or in a manner not inconsistent with the purposes of the Charter, then the Members may pursue such policies.

Several attempts were also made at San Francisco to introduce into the Charter the idea of protecting or preserving the existence of member states against aggression. The Charter is, of course, quite explicit in stating the chief purpose of the Organization, the maintenance of international peace and security. This has been described as the "overriding and unqualified purpose" of the Charter.⁸⁰ And so it is. All attempts to attach some condition or qualification to this purpose have been systematically defeated.⁸¹ Attempts were made, for instance, to add after "security" in Article 1, paragraph 1, the word "justice" or the words "in conformity with the principles of justice and international law." Both proposals carried in Committee by a majority failed to obtain the necessary two-thirds vote. It was said that justice and international law should wait until peace and security were restored.⁸² Law and justice, of course, constitute the indispensable basis of a sound international organization. Unfortunately, however, the Organization under the present Charter is neither bound, nor equipped with sufficient power, to restore or maintain law and justice in all circumstances.

Another proposal sought to insert after "security" in Article 1, paragraph 1, the words "and to preserve as against external aggression the territorial integrity and political independence of every member of the Organization." This proposal was defeated, ostensibly on the ground that it would have overloaded the text of the Charter and that a similar idea was expressed in Article 2, paragraph 4.⁸³ The New Zealand delegation moved to add to Article 2, paragraph 4, the following clause: "All members of the Organization undertake collectively to resist any act of aggression against any member."⁸⁴ This motion was lost as it fell short by a few votes of the necessary two thirds majority. The chief purpose of the New Zealand amendment like that of the other proposals was to qualify the overriding purpose of the Organization and to limit the discretion-

⁸⁰ Same, p. 39.

⁸¹ Same, p. 36.

⁸² "Report of Rapporteur of Committee I to Commission I," Doc. 944, I/1/34 (1), p. 8, UNCIO, Documents, Vol. VI, p. 453; "Report of Rapporteur of Commission I to Plenary Session," Doc. 1179, I/9 (1), p. 1 f, UNCIO, Documents, Vol. VI, p. 245 f; and "Report of Rapporteur of Subcommittee I/1/A to Committee I/1," Doc. 723, I/1/A/19, p. 7, UNCIO, Documents, Vol. VI, p. 702.

⁸³ "Report of Rapporteur of Subcommittee I/1/A to Committee I/1," Doc. 723, I/1/A/19, p. 7, UNCIO, Documents, Vol. VI, p. 702.

⁸⁴ "Report of Rapporteur of Committee I to Commission I," Doc. 944, I/1/34 (1), p. 14, UNCIO, Documents, Vol. VI, p. 459. The delegation of Panama submitted a similar proposal.

ary powers of the Security Council. But the Great Powers were opposed to any amendment which would have qualified the purpose and limited their freedom of action under Chapter VII. It was fully realized at the San Francisco Conference that some of the Great Powers would have refused to accept a Charter which imposed upon them a duty comparable to that contained in Article 10 of the Covenant.⁸⁵ The battle over Article 10 was fought this time on the floor of the San Francisco Conference rather than on the floor of the Senate. The price for the entry of certain of the Great Powers into an international security organization, now as then, is the elimination of what is widely believed to be the basic notion of collective security from its constitution.

The deliberate rejection of all proposals to impose upon the Organization and its Security Council the duty to preserve against aggression the integrity and independence of member states, does not, however, constitute as radical a departure from the League as may appear from this verbal comparison. Obviously, there is a great discrepancy between the Covenant and the Charter. But the practice of the League was not always in harmony with its Covenant. The practice of the League gradually came to be characterized by the disinclination of member governments to execute their far-reaching obligations under the Covenant and particularly under Article 10 in cases "not directly affecting their own immediate interests."⁸⁶ Thus in practice the member governments while paying lip service to the Covenant, have shown themselves extremely reluctant to abandon their liberty of action in examining each case on its merits. The Charter, it will be said, takes note of this attitude and wisely abstains from imposing limitations upon the liberty of governments which they were unwilling to assume again. This, at any rate, seems true of the Great Powers. Theirs is a great responsibility. But it is not part of their responsibility to preserve the integrity and independence of their fellow members. They did not wish to assume such a great responsibility. At least it cannot be said that they create illusions about collective security.

VII. CONCLUSIONS

Both the Covenant of the League and the Charter of the United Nations belong to the same genus of international organization. They are conceived within the framework of the existing state system. They are based on the principle of state sovereignty. They provide for collaboration in

⁸⁵ Same, p. 3; "Report of Rapporteur of Subcommittee I/1/A to Committee I/1," Doc. 723, I/1/A/19, p. 5, UNCIO, Documents, Vol. VI, p. 700; and Fox, William T. R., "Collective Enforcement of Peace and Security," 39 *American Political Science Review* (1945), p. 970.

⁸⁶ Lord Cranborne's report on the "Participation of all States in the League of Nations," Doc. A.7.1938.VII, paragraph 27 (2) at p. 48.

the maintenance of peace. Within this genus it is possible to distinguish different types of organizations. Taking the objective as criterion, multi-purpose organizations may be distinguished from single-purpose organizations and political organizations may be distinguished from non-political organizations and so on. According to membership, universal and non-universal, regional and global organizations may be distinguished. With reference to the problem of enforcing peace three types of organizations have been distinguished: the coercive, the non-coercive, and the intermediate type.⁸⁷ In the coercive type of international organization there are definite obligations to apply sanctions; in the non-coercive type there are no such obligations; and in the intermediate type there is no more than the obligation to consult but sanctions are possible as a result of consultation.

The League was conceived as an international organization of the coercive variety: Articles 16 and 10 were originally intended to impose upon the Members the obligation to employ force in certain cases. The Lodge Reservations, if generally adopted, would have transformed the League into a non-coercive or an intermediate type of international organization. But President Wilson refused to have his League reduced to "an influential debating society."⁸⁸ It is a moot point whether had the United States joined the League with the Lodge Reservations the League would have turned into a mere debating society. It is an historical fact, however, that in the absence of the United States and owing to some other factors, the League did degenerate into a debating society and not a very influential society at that. Whereas Senator Lodge opened the attack on the coercive features of the League on the floor of the Senate, the Canadian proposal in 1920 to strike out Article 10 of the Covenant was the next major step in whittling down the League's collective security system and the first made of the floor of the League Assembly. This was followed in 1921 by the adoption of certain "Resolutions Concerning the Economic Weapon" and other "Resolutions for the Amendment of Article 16."⁸⁹ The Council of the League declared in 1921 that it would be guided by these resolutions which had never formally come into force.⁹⁰ The long-drawn process of whittling down collective security alternated with efforts to strengthen it. Among the latter, the Draft Treaty of Mutual Assistance, the Geneva

⁸⁷ Same, p. 41.

⁸⁸ U. S. Congress. Senate. Foreign Relations Committee. *Treaty of Peace with Germany, Report of Conference between Members of Senate Committee on Foreign Relations and President of the United States at White House, Aug. 19, 1919*; presented by Mr. Lodge, 1919. Senate Document 76, 66th Congress, 1st Session, p. 6; also Lord Grey's letter to the *London Times* published in *The New York Times*, February 1, 1920, in which he urged the acceptance of the Lodge Reservations. The letter is reprinted in Fleming, work cited, p. 411.

⁸⁹ "Reports and Resolutions on the Subject of Article 16 of the Covenant," Doc. A.14.1927.V. p. 42.

⁹⁰ Same, p. 44.

Protocol, and others are worthy of note. In the end, however, the Copenhagen Declaration of July 24, 1938, by the states of the Oslo Group, and the United Kingdom Declaration of September 28, 1938,⁹¹ clearly indicated that the unconditional undertaking to apply sanctions had given place to a system of consultation. No change, to be sure, was made in the terms of the Covenant. But in fact by the unilateral action of individual governments and groups of governments, the League had been transformed from a coercive into a non-coercive or perhaps an intermediate type of security organization. Indeed in 1938 the majority of the Members were of the opinion that the League had acquired an intermediate character.⁹² Thus the Members themselves under pressure of circumstances brought about that change in the League structure which Senator Lodge in the interest of the security of the United States had deemed necessary from the outset.

It will be argued that the fatal course of events has vindicated the basic philosophy of the Lodge reservations, that the member states of the League were unprepared for the Wilsonian Covenant, and that, in practice, the idealism of Wilson gave place to the realism of Lodge. Judgments on these matters are not attempted here, for what happened at Geneva took place in an atmosphere far different from that which presumably would have prevailed if American membership in the League and Wilsonian leadership had materialized. It should be noted, however, that if the realism of Lodge is admitted, nothing is granted save the impossibility of establishing a coercive-type league, and this admission does not deny the realism of Wilson that an intermediate or a non-coercive type league would not be sufficient to prevent aggression and to preserve peace. Confining the discussion, therefore, to events that occurred, no matter for what causes and with what disastrous results, it is true that the Geneva League largely adopted in practice the limitations advocated by Lodge. In this sense, and possibly in this sense only, it may be said that the "realism" of Lodge prevailed.

Viewed against the background of the League experience, characterized as it was by a sharp dualism between theory and practice, the United Nations seem to have adjusted at San Francisco the "law in the books" to the "law in action." There are no automatic obligations to apply sanctions. There is, however, an obligation for Members of the Security Council to consult. In the event that as a result of consultation seven Members of the Security Council, including all five permanent members agreed to apply force, the obligations of Chapter VII become operative and Members are bound to participate in enforcement or preventive action to the extent limited in the Charter and in the military agreements. Thus the United

⁹¹ "Questions Relating to Article 16 of the Covenant," Doc. C. 444. M. 257. 1938. VII. p. 2, 15; Engel, work cited, p. 147.

⁹² "Report Submitted by the Sixth Committee to the Assembly," Doc. A.74.1938. VII; Engel, work cited, p. 154.

Nations on the whole appears to conform closely to the intermediate type of security organization. One important qualification is called for at this point. The consultation required by the Charter and the principle of unanimity in the Security Council exclude all possibility of enforcement or preventive action being decided upon against a Great Power. The Great Powers are subject of course, to the obligations of membership on a footing of equality with all the other Members. But they are beyond the pale of enforcement action; nor can they be subjected to milder forms of disciplinary action such as expulsion or suspension. In short, there is no obligation to employ sanctions against any of the Great Powers. To that extent it appears that the United Nations partakes of the non-coercive type of security organization.

The partly intermediate and partly non-coercive character of the United Nations explains, of course, the high degree of universality which has already been achieved. Faced with the choice between a universal security organization with limited powers and a limited security organization with unlimited powers the delegates at the San Francisco Conference, admittedly exposed as they were to some pressure from the Great Powers, including the United States, voted for the former. In so doing they followed unwittingly, it may be presumed, the pattern of international organization broadly outlined in the course, or as the byproduct, of a political controversy of the first order by Senator Henry Cabot Lodge, in his fourteen Reservations to the Covenant. His price for the participation of the United States in the League was the scrapping of some of the League principles in order to secure for the United States a greater measure of liberty of action and a lighter load of commitments. President Wilson, rightly or wrongly, refused to pay the price. It is a matter of historical record, however, that the League Members themselves in order to maintain a degree of universality have found it imperative to neglect in practice many an important League principle. The separation of the Covenant from the Peace Treaties, a futile gesture, in the interest of universality, may, however, be mentioned here.

When the delegates met at San Francisco they found that in spite of the declared willingness of all the nations to participate in an international security organization, there was still a price to be paid for inducing the essential powers, that is, the Great Powers, to join the Organization as Members. It was the old price and they paid it. By sacrificing some of the principles on which the League was founded and by thus removing the chief obstacle to the participation of some of the essential powers including the United States, at any rate, they secured an impressive degree of unanimity and universality. It is too early yet to say that Litvinov was wrong when he said that a League without universality was better than universality without League principles. It would be premature also to say that the establishment of a League without League principles, of which

Senator Lodge was one of the earliest champions, will secure peace for a longer span of time than did the first League.

An organization so constituted presents no dangers to its members. It is safe. It neither guarantees security nor does it endanger security. This at any rate would seem to hold true for the five great powers. The Charter does not commit the members to preserve the territorial integrity and political independence of any state, and it should create no dangerous delusions on this score. It imposes no onerous obligations on peace-loving states, members of the United Nations. It encroaches to no dangerous degree on the liberty of action of the Great Powers while it confers upon them the right to act under certain conditions. The overriding commitment is to consult. If the Great Powers fail to agree they remain free to act inside and perhaps even outside the scope of the Principles and Purposes of the Charter.

As Mr. Dulles stated before the Foreign Relations Committee of the Senate, the Charter "engages our Nation to honorable cooperation for peace and justice and, at the same time, protects those precious American traditions of which the Senate is our principal custodian." "That is why," Mr. Dulles said, "this Charter can be, and I hope will be approved by the Senate without reservation and without dissent."⁹³ Without going into the question of custodianship, it is possible to believe that many Senators would have welcomed a different type of Charter, but it is scarcely possible to doubt that Mr. Dulles correctly indicated the reasons why the Senate approved the Charter without reservations and almost without dissent.

⁹³ *Hearings*, p. 645.

IMMUNITY OF OFFICERS AND EMPLOYEES OF THE
UNITED NATIONS FOR OFFICIAL ACTS:
THE RANALLO CASE

By LAWRENCE PREUSS

Of the Board of Editors

The first judicial interpretation of the immunities of staff members of the United Nations is contained in the decision of the City Court of New Rochelle, New York, in the case of *County of Westchester* on complaint of *Walter Donnelly*, Complainant, v. *William Ranallo*, Defendant.¹ The opinion in this case, delivered on November 8, 1946, by Acting City Judge Sol Rubin, also contains the first judicial construction of the International Organization Immunities Act of December 29, 1945,² which was designed, in part, to implement the provisions of Articles 104 and 105 of the Charter of the United Nations and any future conventions or agreements which might be concluded pursuant thereto.³

¹ 67 N. Y. S. (2d) 31; for text of opinion see also *United Nations, General Assembly*, Document A/C.6/57 (Nov. 9, 1946). The name of the defendant appears as "Ranallo" in the letter of Secretary-General Lie, dated Nov. 29, 1946 (note 9, below).

² Public Law 291, 79th Cong.; 59 Stat. 669; this JOURNAL, Vol. 40 (1946), Supplement, p. 85 (hereinafter referred to as the "Immunities Act").

³ The General Assembly on Feb. 13, 1946 approved and proposed for accession by each Member of the United Nations a *General Convention on Privileges and Immunities of the United Nations* (hereinafter referred to as the "General Convention"). On the same date it transmitted to the Secretary-General a draft *Convention between the United Nations and the Government of the United States of America*, to be used as the basis of the negotiations required as a result of the establishment of the seat of the United Nations in the United States. See *Privilege and Immunities of the United Nations, Report of the Sixth Committee to the General Assembly* (Rapporteur: W. E. Beckett [United Kingdom]), Doc. A/43 (Feb. 9, 1946), with texts as Annexes I and II; texts also in Doc. A/64, pp. 25, 28. On the drafting of Arts. 104, 105 of the Charter, and of the two conventions, see Henry Reiff, "Work of the United Nations 'Legal Committees,'" *Department of State Bulletin*, Vol. XV, No. 366 (July 7, 1946), pp. 9-10; same, No. 372 (Aug. 18, 1946), pp. 305-306; same, No. 373 (Aug. 25, 1946), pp. 349-350.

Negotiations which took place at Washington on June 10-15, 1946, on the basis of the Draft Convention of Feb. 13, resulted in a revised draft of June 20, 1946 (hereinafter referred to as the "Draft Agreement"). See the *Joint Report by the Secretary-General and the Negotiating Committee on the Negotiations with the Authorities of the United States of America concerning the Arrangements Required as a Result of the Establishment of the Seat of the United Nations in the United States of America*, Doc. A/67 (Sept. 1, 1946). Annex I contains the text of the *Convention/Agreement between the United Nations and the United States*. This revised draft was merely tentative in view of the fact that the exact site of the headquarters of the United Nations had not yet determined. See, in general, "The United Nations under American Municipal Law: A Preliminary Assessment," *Yale Law Journal*, Vol. 55 (1946), pp. 778-793.

The defendant in the instant case was employed by the United Nations as chauffeur for the Secretary-General, and his appointment had been duly notified to and accepted by the Secretary of State in conformity with the provisions of Section 8(a) of the Immunities Act.⁴ On October 17 he was charged with exceeding the speed limit on the Hutchinson River Parkway while operating a car owned by the United Nations. Mr. Trygve Lie was himself in the car, and was proceeding to a conference with officials of the city of New York concerning business of the United Nations. At a hearing held on November 8 Mr. Oscar Schachter, Legal Counsel, United Nations, appeared for the defendant⁵ and challenged the jurisdiction of the Court on the ground that the defendant at the time of the alleged offense, had been performing an act in his official capacity and falling within his functions, and that he was therefore entitled to the immunity provided in Section 7(b) of the Immunities Act.⁶

Judge Rubin's ruling, the grounds for which will be discussed below, was, in effect, that

... Where immunity is claimed by personnel of the United Nations, this Court cannot hold as a matter of law that the defendant so claiming immunity was engaged in an official act which justified the granting of immunity, and that such a determination can only be made after the trial of an issue of fact; and if the trial of that issue of fact produces a conclusion that the defendant was, at the time of the commission of the offense charged, engaged in such an activity as was necessary to the proper functioning of the United Nations Organization, then and only then should immunity be granted, and this,

Although the Immunities Act was intended primarily to meet the requirements of international organizations other than the United Nations, it serves also as a temporary measure for fulfilling the obligations imposed by the Charter, pending accession of the United States to the General Convention and conclusion of the special agreement or convention with the United Nations. See Lawrence Preuss, "The International Organizations Immunities Act," this JOURNAL, Vol. 43 (1946), pp. 332-345.

⁴ Mr. Charles Fahy to Mr. Trygve Lie, Nov. 28, 1946. *United Nations, Press Release M/178* (Nov. 29, 1946), p. 3.

Sec. 8(a) provides: "No person shall be entitled to the benefits of this title unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted representatives, officers, or employees."

⁵ The law of New York provides that in prosecutions for a misdemeanor the defendant need not be present, but may appear by counsel. *Gil. Crim. Code* (1945), *Cr. Pr.*, Secs. 297, 356, 434.

⁶ Sec. 7(b): "Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned."

regardless of whether the defendant was a member of the Security Council or a minor employee.⁷

The decision of the Court, therefore, was that "upon the facts in this case the defendant is not entitled to immunity as a matter of law without a trial of the issue of fact and is accordingly required to plead to the Information before the Court."⁸

An adjournment having been granted, the Secretary-General on November 27 addressed a communication to the Legal Adviser of the Department of State, in which he recited the facts of the case as stated above and requested an opinion as to whether, under the circumstances, the defendant was entitled to the immunity provided in Section 7(b) of the Act.⁹ Mr. Fahy replied on the following day that the employee in question was in his opinion entitled to the immunity claimed, but added that, "of course, . . . the matter is now pending in Court and my opinion is only that and nothing more."¹⁰ Judge Rubin had in his opinion suggested that this procedure be followed, and had implied that he would view an opinion or suggestion of the Department of State as conclusive upon the Court.¹¹

Notwithstanding Mr. Fahy's reply, which was favorable to the claim of immunity despite the caution of its language, Counsel for the United Nations (Mr. Schachter) on November 28 wrote to Judge Rubin as follows:

It will be noted that the legal adviser of the Department of State has expressed the opinion that the defendant, William Ranallo, is entitled to the immunity provided in Section 7(b) of the Immunities Act under the facts of this case. The opinion thus covers the issue of principle presented. However, the Secretary-General has no desire to press the principle of immunity in the instant case, and he has, therefore, requested me to inform the Court that he is prepared, on behalf of the defendant, to pay such fine as the Court may levy.¹²

The grounds for this *volte face* on the part of the Secretary-General can only be conjectured. It is true that waiver of immunity in this particular case was in conformity with the general policy of the United

⁷ For the above statement, which is in amplification of his opinion of November 8, the writer is indebted to a personal letter from Judge Rubin, dated Feb. 19, 1947.

⁸ 67 N. Y. S. (2d) 31, 35.

⁹ *United Nations, Press Release M/178* (Nov. 29, 1946), p. 2.

¹⁰ Same, p. 3.

¹¹ "This Court feels strongly that the question of immunity under these circumstances should be entrusted not to the whim or caprice of any individual or committee that might speak for the United Nations, but rather that such immunity should be available only when it is necessary to assure the proper deliberations of the Organization—a circumstance that could be readily brought about if the granting of immunity were restricted to those cases where our own State Department certified that the exemption from prosecution or suit was in the public interest."

¹² *United Nations, Press Release M/78* (Nov. 29, 1946), p. 1.

Nations as expressed in the Provisional Staff Regulations¹³ and in Section 20 of the General Convention, which provides:

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. . . .¹⁴

It may be surmised, however, that the decision not to press the claim of immunity in this case, while reserving the principle at stake, may have been influenced also by a desire to avoid a controversial issue which would endanger the successful conclusion of negotiations on larger issues involving the legal position of the United Nations and its personnel in the United States. Several traffic cases involving employees¹⁵ and representatives of Members¹⁶ of the United Nations had arisen before New York

¹³ Regulation 4: "The immunities and privileges attaching to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations. In any case where these privileges and immunities arise, the staff member concerned shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived." Resolution of the General Assembly, Feb. 13, 1946, on Organization of the Secretariat, Annex II, Doc. A/64 (July 1, 1946), p. 18.

¹⁴ Section 21 further provides: "The United Nations shall coöperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article."

¹⁵ The following cases are reported in the press: (1) Andrew Jackson, a United Nations employee, was charged with speeding in Yonkers, and, no plea of immunity having been raised, was fined \$35 by City Judge C. W. Boote on Nov. 1, 1946 (*The New York Times*, Nov. 5, 1946); (2) David Sisson, a chauffeur employed by the United Nations, was charged with speeding in New Rochelle, and was fined \$5 on Nov. 4 by Magistrate J. B. Hockert, after an assistant to the Security Officer of the United Nations, appearing before the Court, had stated: "The United Nations does not intend to ask immunity for chauffeurs and other staff employees. They are subject to the laws as well as anyone else" (same, Nov. 5, 1946); (3) Rafik Asha, stated to be an employee of the United Nations, was fined \$10 for speeding by Justice of the Peace Louis Gangano in the Greenburgh Police Court, after the Court had been notified by the Security Officer that the defendant was prepared to pay any fine assessed (same, Nov. 16, 1946).

¹⁶ (1) Dr. José Arce, Ambassador of Argentina to the United States, and Chief Representative of Argentina to the General Assembly, having received a summons for speeding in Irvington-on-Hudson, offered in a letter to Judge James J. Lyden to pay any fine which might be imposed, in stating: "I do not know whether, in my capacity of Ambassador, any specific privileges are granted to me by the laws of the State of New York. Nor am I interested in knowing whether this is so or not, since I am a strict observer of the law, within or outside of my country." Construing this as a plea of guilty, Judge Lyden imposed a fine of \$15 (same, Nov. 14, 1946). (2) On Nov. 8, Mikhail Ruhachev, driver of a Soviet Embassy car with a diplomatic license,

courts at about the same time as the Ranallo case, and the public reaction to the latter must have indicated the possibility of the growth of a strong attitude adverse to a liberal interpretation of the immunities already granted, and opposed to the concession of any further exceptions to the uniform application of the local law.¹⁷ Such a public opinion, always sensitive when the creation of a "privileged class" appears to be threatened, would undoubtedly have had unfavorable repercussions in Congress, which will be called upon to approve the results of the negotiations in progress for the purpose of settling definitively the legal position which the United Nations and its personnel shall enjoy in this country.

Although the waiver of immunity by the Secretary-General left the principal issue unsettled the reasoning of Judge Rubin's opinion has thereby lost little of its interest and importance since it touches upon problems which will be recurrent and possibly adumbrates the judicial attitude which will be assumed in future cases presenting similar or analogous circumstances.

It is apparent that Judge Rubin felt himself free to proceed to a judicial determination of the question of immunity only in the absence of an authoritative ruling by the political branch of the United States Government which would foreclose such action. The certification by the Legal Adviser that the defendant had been duly registered in conformity with the requirement of the Immunities Act was doubtless conclusive upon the Court, and would have been so held had it been presented at the time the claim of immunity was initially raised, or subsequently, had the case gone to trial.

The binding character of an executive ruling under the circumstances of the instant case would further have been supported by reference to the established practice in analogous cases involving certification by the Department of State of the status of foreign diplomatic agents and mem-

pleaded guilty to speeding in Glen Cove, and was fined \$5 by City Judge Reginald Moore. The Court in this case indicated that it was prepared to assume jurisdiction even in the event that the plea of diplomatic immunity had been raised (same, Nov. 9, 1946). (3) On Nov. 22, a Dutch Representative to the United Nations (apparently Dr. M. P. L. Steenberghe, President of the Economic, Financial and Shipping Mission of the Netherlands at Washington, D. C.) pleaded guilty by telegram to speeding in Pelham. Justice Stott, in imposing a fine of \$15, stated in reply that "These immunities, which must of necessity be granted, should not be used lightly. Like the veto power in your own [Security] Council, it should only be resorted to under circumstances of the most unusual nature. Our community is based upon the theory that all men are equal before the law . . ." (same, Nov. 22, 1946).

¹⁷ It is reported in *The New York Times* of Nov. 16, 1946, that Judge Rubin had on the preceding day "displayed a thick sheaf of letters received from all parts of the country. Each letter, without exception, protested against the granting of immunity in the Ranallo case and all similar legal action involving United Nations personnel." It is not, of course, to be presumed that the Court would have been influenced by this novel form of *Gallusjurisprudenz*, had the case gone to trial.

bers of their staff. The executive has customarily confined its statement to the question whether the defendant had or had not been received in a diplomatic capacity by the Government of the United States, thus leaving the legal consequences to be derived from the status thus recognized to judicial determination in the usual way.¹⁸ Such a statement, which assumes to decide only the status of the defendant, has properly been held to be conclusive, and can be justified on obvious grounds of public policy.¹⁹ Chief Justice Fuller expressed the accepted principle when he stated, in the case of *In re Baiz*, that:

... We do not assume to sit in judgment upon the decision of the Executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.²⁰

In cases involving claims of immunity by foreign states and their instrumentalities the Department of State has in recent years, however, frequently gone beyond the mere certification of the status claimed, and

¹⁸ Among the cases which established this principle, see *United States v. Liddle*, 26 Fed. Cas. 936, No. 15, 598 (C.C.Pa. 1808); *United States v. Ortega*, 27 Fed. Cas. 359, No. 15,971 (C.C.Pa. 1825); and *United States v. Benner*, 24 Fed. Cas. 1084, No. 14,568 (C.C.Pa. 1830).

¹⁹ The contentions of the Attorney-General, approved by the House of Lords in *Engelke v. Musmann* [1928], A.C. 433, are so cogently stated, and are of such obvious applicability in the situation under discussion in the present article that they merit quotation *in extenso*: "... The Attorney-General submits that a statement that recognition has been accorded made on behalf of His Majesty either by the Secretary of State or by H. M. Attorney-General in person must necessarily be conclusive on the diplomatic status of that person. It must be admitted, however, that such a statement is conclusive upon the question of diplomatic status alone; and it is still for the Court to determine as a matter of law whether, the diplomatic status having been conclusively proved, immunity from process necessarily follows. The Attorney-General desires to point out that there may be cases in which, though the diplomatic status is conclusively proved in the manner indicated, yet immunity from process may still not exist. . . . In no sense, therefore, . . . is the jurisdiction of the Court to determine the existence of immunity ousted merely because, as the Attorney-General submits, a particular form of proof of diplomatic status is conclusive and cannot be questioned. . . . If the Court can go behind the statement and themselves seek to investigate the facts, compelling the person on behalf of whom the immunity is claimed to submit to legal process for that purpose, it would be impossible for His Majesty to fulfil the obligations imposed upon him by international law and the comity of nations, since the steps taken to investigate the claim would in themselves involve a breach of diplomatic immunity which in the event the Court might decide to have been established. . . ." Lord Phillimore observed that "where an applicant is claiming that he is privileged from litigation it seems a strange result if he is forced to litigate in order to obtain his exemption from litigation." [1928], A.C. 433, 449. See also, *The Amazone* [1940], P. 40 (C.A.).

²⁰ 135 U. S. 403, 432 (1890). Also, *Lehigh Valley E. Co. v. State of Russia*, 21 F. (2d) 396, 400 (C.C.A. 2d, 1927).

has undertaken to pass conclusively upon the issue of substantive law before the courts. It might have been expected that this expansion of the executive power would have encountered some judicial resistance, or, at least, that the application of executive rulings would be subjected to restrictive interpretation. On the contrary, executive intervention in what is normally deemed to be the judicial sphere has been so unreservedly accepted by the courts, both federal and state,²¹ that it may be suspected that they have in some cases welcomed the relief from the necessity of judicial inquiry which was afforded by an authoritative executive ruling. The courts have on occasion experienced difficulty in ascertaining the intent of the State Department, in view of the sibylline language which its spokesmen sometimes affect; but they have expressed no doubt as to the oracular nature of its pronouncements, once its intent has been discovered.²²

It was, perhaps, with this recent trend in mind that Judge Rubin suggested that immunity should be granted to officers and employees of the United Nations only in "those cases where our own State Department certified that the exemption from prosecution or suit was in the public interest." His acknowledgement that certification by the executive would be conclusive, not only as to the status of the defendant, but further as to the basic legal issue raised by the plea of immunity, is in conformity with a recent decision of the New York Court of Appeals,²³ as was his ruling

²¹ In *Republic of Mexico v. Hoffman*, 324 U. S. 30 (1945) [this JOURNAL, Vol. 39 (1945), p. 585], Chief Justice Stone stated: "It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." The decision in this case has led Philip C. Jessup, in a trenchant criticism of the recent trend, to answer affirmatively the question: "Has the Supreme Court Abdicated One of Its Functions?" This JOURNAL, Vol. 40 (1946), pp. 168-172.

²² Compare the writer's remarks concerning the varying forms of State Department suggestions of immunity, with citation of cases, in this JOURNAL, Vol. 36 (1942), pp. 44-46.

²³ *United States of Mexico v. Schmuck*, 294 N. Y. 265 [this JOURNAL, Vol. 40 (1946), p. 205], in which Lehman, Ch.J., stated (at p. 272) that: "An extraordinary situation calling for extraordinary remedy may be presented . . . when a court assumes to try issues which are beyond its competency or to exercise a jurisdiction which, in accordance with well established rules of policy which have the force of law, it should decline to exercise. (*Ex parte Peru*, 318 U. S. 578, . . .) [this JOURNAL, Vol. 38 (1944), p. 132]. . . . Judicial inquiry may be precluded of claims of immunity previously determined by a competent political branch of the Government upon the request of a foreign sovereign State. In such cases, as the courts have frequently pointed out, the courts follow the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." (*United States v. Lee*, 136 U. S. 196, 209). Then judges who assume a jurisdiction which may embarrass the Department of State in the conduct of foreign relations may be commanded to relinquish jurisdiction upon the request or suggestion of the political branch of the Government." Also, *Miller v. Ferrocarril del Pacifico de Nicaragua*, 137 Maine 251 (1941); *Stone Engineering Co. v. Petroleos Mexicanos*, 352 Pa. 12 (1945).

that in default of such certification the Court could proceed to a trial of the issue of fact.²⁴

The case of *Trost v. Tompkins*, decided in 1945 by the Municipal Court of Appeals for the District of Columbia,²⁵ although not referred to in Judge Rubin's opinion, is clearly in point. The Assistant Commission for Shipping and Emigration of the Yugoslav Government, defendant in a civil suit, raised the plea of diplomatic immunity on the grounds that he performed his official duties under the supervision of the Yugoslav Ambassador, and that his name had been included in the so-called "White List" of the Department of State.²⁶ The Assistant Chief of the Protocol Division testified as a witness for the defendant and identified the list in evidence, but did not appear in behalf of, or claim to represent, the Department of State. In affirming the judgment of the court below, which was adverse to the claim of the defendant, the Court of Appeals, speaking through Richardson, Ch.J., stated (at p. 223):

We recognize the importance of the rule that diplomatic immunity is essentially a political question; that considerations of policy, often involving delicate relations between our government and friendly powers, are so potent that courts properly refuse to look beyond a determination by the executive branch of government.

The Court found that the duties of the defendant were not of a diplomatic character and that he was not, therefore, entitled to immunity. Like Judge Rubin, however, Judge Richardson acknowledged that a ruling by the State Department, had such been presented, would have been conclusive as to the substantive question at issue:

The delicacy of the question, involving as it does the relations of our government with a friendly foreign nation, is such that the absence of a decision by the executive department charged with responsibility for the conduct of our affairs abroad, is to be regretted. The usual rule is that 'Courts have no jurisdiction to decide political questions.' [Citing *Sevilla v. Elizalde*, 72 App. D. C. 108, 112 F. (2d) 29.] But where, as here, the issue is raised as an affirmative

²⁴ Judge Lehman continued (294 N. Y. 265, at p. 273): "The question whether a court has acquired jurisdiction over the person of a defendant or the subject matter of an action, and the question whether a court should relinquish jurisdiction, are judicial questions which ordinarily must be decided by the court whose jurisdiction is challenged. Where such challenge is made . . . , the court must relinquish a jurisdiction based upon service of such process when it appears that the claim of immunity has been recognized and allowed by a competent political branch of the government . . . ; but the judicial branch, even in such case, retains jurisdiction to determine any question left open by the political branch of our government for decision by the judicial branch. . . ."

²⁵ 44 A. (2d) 226 (1945).

²⁶ This is the "List of Employees in the Embassies and Legations in Washington Not Printed in the Diplomatic List." Since it is apparently prepared without investigation or verification, it is not conclusive evidence of the diplomatic character of those whose names are listed. Same, at p. 228-230.

defense in an action over which the court has jurisdiction and there is no executive ruling, the situation requires judicial determination.²⁷

Still more directly in point is the decision of the Appellate Division of the Supreme Court of New York in the case of *Girardon v. Angelone*, in which a motion to dismiss a civil action against the Commercial Attaché of the Italian Embassy was granted on reargument of the defendant's appeal.²⁸ The appellant had, upon application for a reargument, produced two certificates from the Department of State, the first of which stated: "This is to certify that Signor Romolo Angelone is Commercial Attaché to the Italian Embassy at Washington, and that he is therefore entitled by the laws of the United States to the diplomatic privileges and immunities corresponding to his office." The second certificate was to the same effect, and was merely submitted as official proof of the recognized diplomatic character of the appellant, which was not disputed by the respondent. Subsequently the Italian Ambassador requested of the Department of State "its authoritative intervention in the case, in order to obtain the dismissal of these proceedings against a member of the Italian Embassy." The United States Attorney having communicated to the Court a request of the Department of State that its opinion that the defendant was immune from process be "taken into consideration," the Court applied to the Department for a clarification of its views, whereupon the latter replied through the Attorney General that: "As such attachés are considered to be exempt from judicial process under our laws, it is believed that the legal proceedings against Signor Romolo Angelone should be dismissed." The Court, having at last received an unequivocal statement, held that it must "respect the request of the Department of State" and dismiss the complaint.

In this case the executive departed from its earlier practice of merely certifying the status of the defendant, and further undertook to determine the substantive legal issue, in conformity with the general trend which has already been noted. Such was possibly the intention of the Legal Adviser in stating, in response to the request of the Secretary-General in the *Ranallo* case, that the defendant was, in his opinion, entitled to immunity from legal process. This statement, without more, would have disposed of the case at the trial, had not the Secretary-General elected to waive immunity, since it could be interpreted as meaning that the executive had "recognized and allowed" the claim of immunity as a conclusion of law.²⁹ The addendum, that as "the matter is pending in court . . . my opinion

²⁷ Same, at p. 231.

²⁸ 254 N. Y. Supp. 657 (1932).

²⁹ See *Ex parte Muir*, 254 U. S. 522, 535 (1921); *The Navemar*, 303 U. S. 68, 74-75 (1938), this JOURNAL, Vol. 32 (1938), p. 381; *Ex parte Peru*, 318 U. S. 578, 581 (1942), this JOURNAL, Vol. 38 (1944), p. 132; *The Janko*, 54 F. Supp. 241, 243 (1944); and the cases cited in notes 21 and 23, above.

is only that and nothing more," was, however, expressed in language which the courts have in similar cases uniformly interpreted as meaning that the Department has merely "acted as a conduit" in transmitting a claim of immunity to the court for "its respectful consideration," leaving the substantive issues open for judicial determination.³⁰

The Legal Adviser's letter in the instant case achieved such a precise balance of opposing and irreconcilable opinions that it is difficult to extract from it any conclusion whatsoever. Courteous and diplomatic deference was paid both to the United Nations and to the independent judiciary of the State of New York, but the solution of the basic issue was scarcely advanced, nor were any guideposts set up for the future. It may be hoped that the Department of State will be able to resolve its internal hesitations and doubts and that it will either evolve some adequate machinery—which it does not now possess—for passing upon matters which are essentially of a judicial nature,³¹ or, alternatively and preferably,

³⁰ In response to a request by the Spanish Ambassador for intervention to secure the release of *The Navemar*, the Department of State replied that its practice in such cases was "to refrain from taking any action which might constitute an interference by the executive authorities of this Government with regard to the merits of the controversy," a statement which the Supreme Court construed as meaning that the legal questions at issue were "appropriate subjects for judicial inquiry upon proof of the matters alleged." 303 U. S. 68, 74-75 (1938). In *Lamont v. Travelers Insurance Co.*, 281 N. Y. 362, 373-374 (1939), the Department stated, in transmitting a claim of immunity, that "the United States does not intervene as an interested party," and only presented its suggestion "as a matter of comity between the Government of Mexico and the United States Government for such consideration as the Court may deem necessary and proper." The Court of Appeals, thus left free to examine the claim, denied the motion to dismiss. Also, *Hannes v. Kingdom of Roumania Monopolies Institute*, 20 N. Y. Supp. (2d) 825, 828 (1940); *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 24 N. Y. Supp. (2d), 201, 204; *The Katingo Hadjipierera*, 1941 A.M.C. 581, 583; *The Anghyra*, 1941 A.M.C. 1495.

³¹ See *Girardon v. Angelone*, above. The confusion and prolongation of litigation which may result from indecision on the part of the State Department in questions relating to claims of immunity may further be illustrated by reference to *Sullivan v. State of São Paulo*, 36 F. Supp. 503 (E.D.N.Y., 1941), *aff'd*, 122 F. (2d) 355 (C.C.A. 2d, 1941), this JOURNAL, Vol. 36 (1942), p. 131; *The Ioannis P. Goulendaris*, 39 F. Supp. 630 (S.D.N.Y., 1941), *rearg.*, 40 Supp. 924 (1941); and *The Maliakos*, 41 F. Supp. 697 (S.D.N.Y., 1941). In the *São Paulo* case, the Department stated that "it is the practice of the Department to leave such questions of immunity for determination by the courts, applying the principles of international law, to the facts and circumstances of the particular cases." Subsequently, however, it stated that the Department had not intended to indicate that it had "recognized and allowed" the claim, but that transmittal of the claim had "necessarily implied an acceptance, as true, of the statements of fact made by the Brazilian Government"; "the ultimate decision of the question of immunity," nevertheless, "should be left to the court." 36 F. Supp. 503, 505. The court by labored exegesis was able to conclude that the Department intended that immunity be granted. Compare, however, *The Maliakos*, in which the Department "accepted as true" the facts contained in the statement of the claim of immunity. This was intended, the Secretary of State later explained, "to convey

permit the courts to develop their own body of jurisprudence and judicial policy, while reserving its power of intervention for cases in which there may be an obvious threat of abuse or denial of justice.

The immunity from "suit and legal process" relating to acts performed by officers or employees of international organizations "in their official capacity and falling within their functions," as provided by Section 7(b) of the Immunities Act, is not defined therein. The Executive Order which extended the benefits of the Act to the United Nations also failed to define, limit, or condition the immunities granted, although the President was so empowered under Section 1 of the Act. In the absence of statutory definitions Judge Rubin considered that he was free to examine the contentions urged on behalf of the defendant in the light of general principles of interpretation, and with a view to the political and social consequences which would flow from an acceptance of such contentions. The guiding principle Judge Rubin found in Section 21 of the New York *Penal Law*, which provides:

The rule that a penal statute is to be strictly construed does not apply to this chapter [General Provisions] or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law.

Mr. Schachter had contended, in a memorandum for the Court,³² that

There can be no doubt that the defendant was acting in his official capacity when he was driving the Secretary-General on the Hutchinson River Parkway on 17 October. Mr. Lie was at that time on his way to a conference with officials of the city of New York concerning business of the United Nations. The act of driving the Secretary-General was, of course, performed by the chauffeur in his "official capacity" and fell within his functions. Accordingly, it is clearly covered by Section 7(b) of the Immunities Act.

To accept this contention, Judge Rubin held, would be to recognize the existence of "a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity, even though the individual's function has no relation to the importance or success of the Organization's deliberations." To reach such a result, he concluded, would be to carry the principle of immunity "completely out of bounds." The necessity of "a certain amount of immunity" to ensure the organs of the United Nations and "their necessary personnel against harassment by way of court proceedings, civil or criminal," was conceded by "every right-thinking American citizen," but it was evident from the Charter

the understanding that I recognized as warranted the claim of immunity made by the Greek Minister. . . ." 41 F. Supp. 697, 699.

³² Unpublished, but quoted *in extenso* in *The New York Times* (Nov. 11, 1946).

itself that immunities should be restricted to those which are essential to "the independent exercise or . . . functions in connection with the Organization." That an unqualified and unrestricted immunity in respect to all official acts, without regard to the circumstances of the individual case, had been intended neither by the Charter, by the Act of Congress, nor by the Presidential Order is evident, Judge Rubin maintained, from the fact that it would, if granted, lead in effect to the creation of "a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment," a consequence which "does violence to the American sense of fairness and justice and flouts the very basic principle of the United Nations itself, which in its preamble to its Charter affirms that it is created to give substance to the principle that 'the rights of all men and women are equal,'"³³ The interests of the United Nations, therefore, can be recon-

³³ Judge Rubin further observed that "Our state and national legislators enjoy a measure of immunity so as to insure the proper functioning of the Congress and of the State Legislators, which falls far short of that measure of immunity contended for on behalf of the personnel of the United Nations, and no valid reason exists why the immunity accorded to the United Nations should be greater in scope than that found necessary to insure the proper functioning of our own Congress."

This argument is without point, since it is the evident intent of the Immunities Act to confer exemption from suit and from legal process in respect of official acts in all cases, both civil and criminal. The congressional immunity to which Judge Rubin refers provides only that members of Congress, during a session, and in going to or returning from the same, shall be exempt from "arrest," except in cases of "treason, felony or breach of the peace." The Supreme Court has held that the expression "breach of the peace" excludes from the constitutional exemption all indictable criminal actions, and that a member of Congress is not, therefore, privileged from arrest for an indictable offense. *Williamson v. United States*, 207 U. S. 425 (1908). This limits the exemption merely to arrest in aid of civil process, and, in view of the present unimportance of civil arrest, reduces the immunity almost to a nullity. The exemption from civil arrest, moreover, does not confer immunity from the service of civil process. *Long v. Ansell*, 293 U. S. 76 (1934). The Immunities Act, on the other hand, grants an exemption from "legal process" in cases relating to official acts.

The interpretation which has been placed by the United States courts on congressional immunity from arrest may offer some guidance in construing the provisions of the General Convention that representatives of Members of the United Nations in or to the United Nations (Sec. 11(a)), and experts on mission for the United Nations (Sec. 22(a)), shall enjoy "immunity from personal arrest or detention." Compare the conflicting interpretations placed by the Department of State and by the French Foreign Office upon the expressions "personal immunity" and "arrest" in the *King* case (1912) and the case of *Princess Zistanooff v. Kahn and Bigelow* (1927). Hackworth, *Digest of International Law*, Vol. IV, pp. 739-745. Compare *United States v. Tarcuani*, 10 F. Supp. 445 (S.D.N.Y., 1935), in which it was held that a consul's "personal immunity from arrest, except in case of crime" involves only immunity from civil arrest, but confers no exemption from civil process. The Supreme Court of Austria in 1928 held that the "personal immunity" of a consul confers no immunity from prosecution and conviction for a criminal offense, but only from arrest and execution. *Annual Digest of Public International Law Cases* (1927-1928), Case No. 267.

ciled with the general interest only if

... the application of the principle of immunity [is interpreted as being limited] to those personnel whose activities are such as to be necessary to the actual execution of the purposes and deliberations of the United Nations as distinguished from those household servants and personnel who merely serve the personal comfort, convenience or luxury of the delegates and Secretariat who actually perform the true functions of the Organization.

Judge Rubin maintained in further justification of a restrictive interpretation that acceptance of a general and unrestricted immunity for all official acts would involve the concession to officers and employees of the United Nations of a more privileged position than that granted to foreign diplomatic agents and their staffs. The latter, he observed, are "at least, theoretically" subject to return to their own countries for prosecution and punishment,³⁴ while the former would enjoy universal impunity, since the United Nations possesses no tribunal and no criminal jurisdiction over its personnel. This argument somewhat overestimates the importance of the jurisdiction which sending states assert, to greater or lesser degree, over members of their diplomatic missions abroad;³⁵ and it minimizes the significance of the settled policy of the United Nations to waive even the limited immunity which its personnel possess whenever this can be done without interference with the work of the Organization.³⁶ It further

³⁴ Citing Sec. 25, New York *Penal Law*, which provides: "Ambassadors and other public ministers from foreign governments, accredited to the president and government of the United States, and recognized according to the laws of the United States, with their secretaries, messengers, families and servants, are not liable to punishment in this state, but are to be returned to their own country for trial and punishment."

³⁵ There are probably no countries, including those which assert an extensive jurisdiction under the principle of active personality, which would undertake to prosecute a national for committing abroad so minor an offense as that charged in the *Ranallo* case. See Harvard Research in International Law, *Jurisdiction with Respect to Crime*, this JOURNAL, Vol. 29 (1935), Supplement, pp. 519-527. In an exceptional case, the Rumanian High Court of Cassation and Justice in 1928 upheld the conviction of a former Rumanian commercial attaché for accepting and offering bribes in Italy in connection with government purchases. *Silesco v. Ministry of Industry and Commerce*, *Revue de droit international privé*, Vol. 25 (1930), p. 512. The Government of the United States has been disposed to place little reliance upon the possible trial in their home countries of persons charged with the commission of offenses in the United States. Secretary of State Hughes to Ambassador Jusserand, Jan. 21, 1934, Hackworth, *Digest of International Law*, Vol. IV, p. 59.

³⁶ Judge Rubin's statement that the question of immunity should not be entrusted "to the whim or caprice of any individual or committee that might speak for the United Nations Organization" appears to be wholly gratuitous in view of this policy, which was restated in the *Memorandum* presented by Mr. Schachter as follows: "The Secretary-General is aware that even the limited immunity enjoyed by the United Nations entails a serious responsibility to prevent its abuse. He fully recognizes that the existence of an immunity cannot be permitted to countenance wilful or reckless violations of the law. To this end, he has directed that strict measures be taken to assure

ignores the fact that all governments, in granting to foreign diplomatic officers and personnel immunity in respect of both official and private acts,³⁷ consider the possibility of prosecution following waiver or dismissal from the service as constituting a sufficient safeguard against abuse.³⁸ Officers and employees of the United Nations, on the other hand,

compliance with the laws of the community on the part of all officers and employees of the Organization. The Court may be assured that the violations of local laws, and in particular of laws relating to safety, are viewed most seriously and that appropriate action is taken by the Secretary-General in such cases. These facts are drawn to the attention of the Court so that it may be clearly understood that this statutory immunity based on accepted international law has not operated, and will not operate, to sanction or encourage disregard of the laws of the community."

There is, furthermore, no reason to believe that this policy will be carried out any less conscientiously by the United Nations than it was by the League of Nations. According to a former member of the League Secretariat, "The waiver of diplomatic rights hung like a permanent threat over the heads of officials who might otherwise have been inclined to abuse their position. It was as a whole sufficient to prevent any tendency to hide behind immunities." Egon F. Ranshofen-Wertheimer, *The International Secretariat*, Washington, 1945, p. 266. See also the summary of League practice by a former Legal Adviser of the League Secretariat, H. McKinnon Wood, "Legal Relations between Individuals and a World Organization of States," *Transactions of the Grotius Society*, Vol. 30 (1945), pp. 163-164.

³⁷ Mr. Schachter's *Memorandum* pointed out that "it may not be irrelevant to call attention to the fact that the immunity involved here is not the same as the broad unrestricted immunity enjoyed by diplomatic officials all over the world. A foreign diplomat, as is well known, cannot be subjected to legal process for any act performed by him, even though such act is performed wholly in a private capacity. Even the family and servants of a diplomatic official enjoy this sweeping immunity. The United Nations, it must be emphasized, has neither requested nor received such unrestricted immunity. Under the law, as already noted, this immunity is limited solely to acts performed by officers of the United Nations acting in their official capacity. A United Nations official engaged in personal and private activities is subject to legal process to the same extent as any private citizen in this country. It is only where, as in the instant case, the official is carrying out his duties, that the immunity is involved. Thus, it can be seen that there is no claim of 'extra-territoriality' here; on the contrary, it is an immunity much more limited than that granted traditionally and without question to the hundreds of diplomatic officials in this country."

³⁸ The United States has accorded diplomatic immunity to the subordinate employees of foreign diplomatic missions, even when they are of American nationality, as is frequently the case. Since such employees are subject solely to the jurisdiction of the United States, they can be prosecuted only if their immunity be waived, or after their diplomatic services have been terminated. See the numerous incidents involving the chauffeurs of diplomatic agents collected in Hackworth, *Digest of International Law*, Vol. IV, pp. 522-533, and especially the *Mahoney* case (p. 525); and *District of Columbia v. Paris* (Police Court, D. C., 1939), this JOURNAL, Vol. 33 (1939), p. 787.

Under the Immunities Act the Government of the United States has an additional safeguard, since it is therein empowered to limit the enjoyment by officers and employees of any privilege, exemption or immunity provided by the Act (Sec. 1), to refuse to accept any person as entitled to the benefits of the Act (Sec. 8(a)), and to withhold such benefits from any person whose "continued presence" in the United States "is not desirable" (Sec. 8(b)). The General Convention, which will supersede inconsistent

do not now enjoy such extensive exemptions in the United States,³⁹ and the fact that their immunity is restricted to official acts, and that the scope and application of the immunity is subject to judicial determination, should, in addition to the assurance that waiver will be given in all appropriate cases, afford ample protection for the local legal order.^{39a}

In referring to the possibility that officials and employees of the United Nations might everywhere enjoy impunity, if exemption from jurisdiction were granted in such cases as the present, Judge Rubin apparently had in mind the situation of persons who are nationals of the countries in which they exercise their functions. This may be implied from his reference to the case of *Avenol v. Avenol*, in which the Secretary-General of the League of Nations unsuccessfully pleaded immunity in a civil action before a court of his own country.⁴⁰ The *Avenol* case presents no analogy with that before the Court, since it involved a claim to diplomatic immunity in an action arising out of a purely personal relationship, that is, in a suit by Mme. Avenol for payment of an allowance for separate maintenance. The Secretary-General, and any other higher League official (if not of Swiss nationality), would have been entitled to immunity even in such a

provisions of the Immunities Act, confers no such exceptional rights upon any Member state. Retention of such rights by the headquarters state would seem to be contrary to the principle of the equality of Members and to the spirit of Sec. 41 of the Draft Agreement, which provides: "This convention/agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States of America, fully and efficiently to discharge its responsibilities and fulfill its purposes."

³⁹ The General Convention provides that representatives of Members (Sec. 11), and experts on missions for the United Nations (Sec. 22) shall enjoy, in addition to immunity for official acts, "immunity from personal arrest or detention." By Sec. 19, the Secretary-General and all Assistant Secretaries-General shall, with their families, be accorded diplomatic privileges and immunities. Such immunities are also provided in Section 27 of the Draft Agreement for senior resident representatives of Members designated by their governments with diplomatic rank, and members of their families and staffs. These provisions are probably self-executing, although they do not, of course, extend to any of the above the special protection afforded to members of accredited diplomatic missions by the penal provisions of the Act of April 30, 1790, 22 U.S.C. § 253.

^{39a} Additional protection to the public interest is provided in the resolution adopted by the General Assembly on Feb. 13, 1946, instructing the Secretary-General "to ensure that the drivers of all official motor-cars of the United Nations and all members of the staff, who own or drive motor-cars, shall be properly insured against third party risks." Doc. A/64 (July 1, 1946), p. 33. See *Dickinson v. Del Sclar* [1930], 1 K.B. 376, this JOURNAL, Vol. 23 (1929), p. 858; *Norton v. General Accident, Fire and Life Assurance Co.* (Eire, High Court, 1940), 74 Ir. L.T.R. (1940), p. 123.

⁴⁰ *Tribunal de paix du XVI^e arrondissement de Paris* (1935), *Recueil général périodique et critique des décisions . . . relatives au droit international . . .* (1935), Part III, p. 38. For a brief report of President Massé's lengthy and tempestuous opinion, see *Annual Digest and Reports of Public International Law Cases* (1935-1937), Case No. 185.

personal action as this in Geneva, and, probably, in the territory of all Member states other than France.⁴¹ On the other hand, he would have been entitled to immunity, had the act in question been of an official character, even in his own country,⁴² since this restricted immunity is deemed to attach not so much to the person as to the entity of which he represents. It is not, therefore, dependent upon the nationality of the person concerned.⁴³

The issue in the *Ranallo* case, however, involved no question of diplomatic immunity for private acts. The contentions on behalf of the defendant were based entirely upon Section 7(b) of the Immunities Act, which

⁴¹ See *Parlett v. Parlett* (1927), in which the Tribunal of First Instance of Geneva held that it had jurisdiction in divorce proceedings against an official of the International Labor Office of British nationality, after the Deputy Director of the ILO had waived the diplomatic immunity which he enjoyed as a member of the first or "extra-territorial" category of officials. *Annual Digest of Public International Law Cases* (1929-1930), Case No. 207. Compare *Assurance Générale des Eaux et Accidents v. F. B.* (Court of Civil Justice, Geneva, 1929), in which the court held that it lacked jurisdiction in a civil action against a first category official of the ILO, the Director having asserted, and having declined to waive, the immunity of the defendant. Same, Case No. 206.

⁴² Note that the Swiss Government, which declined to accord diplomatic immunity to Swiss nationals, expressly agreed, in Art. IX of the *Modus Vivendi* of 1926, that "Officials of Swiss nationality may not be sued before the local courts in respect of acts performed by them in their official capacity and within the limits of their official duties." *League of Nations, Official Journal*, 7th year, No. 10 (Oct., 1926), p. 1422; Hudson, *International Legislation*, Vol. I, p. 225. This restricted immunity was, in other words, granted to all League staff members, irrespective of their nationality. Officials of the first category, if not of Swiss nationality, enjoyed diplomatic immunity, that is, immunity from civil and criminal jurisdiction, including immunity in respect of private acts. Compare the original Diplomatic Privileges (Extension) Act, 1944 (note 39, above), which granted diplomatic immunities to designated higher officials of international organizations, if not of British nationality, but gave to all other officers "immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of official duties." Sec. 1(2) b, and Schedule, Part II(1) and Part III(1). But see the amendment of 1946 (note 39, above). In the "Study on Privileges and Immunities," annexed to Ch. VII of the *Report of the Preparatory Commission of the United Nations* (Doc. PC/20, Dec. 21, 1945), p. 62, it is stated that "it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of their official duties, whether in the country of which they are nationals or elsewhere. . . ." See L. Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," this JOURNAL, Vol. 25 (1931), pp. 703-707; and Martin Hill, *Immunities and Privileges of International Officials: The Experience of the League of Nations* (to be published shortly by the Carnegie Endowment for International Peace).

⁴³ See L. Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," *New York University Law Quarterly Review*, Vol. 10 (1932-1933), pp. 179-180; Harvard Research in International Law, *Diplomatic Privileges and Immunities*, this JOURNAL, Vol. 26 (1932), pp. 97-99.

relates solely to official acts, a restriction which is made doubly certain by Section 8(c), which provides that:

No person shall, by reason of the provisions of this title, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set fourth herein.

Furthermore, the question of the nationality of the defendant is irrelevant in the instant case. Ranallo is presumably an American citizen, although it is nowhere so stated. That it was not the intention of Congress to limit to aliens the immunities granted in Section 7(b) is evidenced by the fact that such limitation is expressly stated in other provisions of the Act.⁴⁴

It is possible to draw from Judge Rubin's opinion the further inference that an act, in respect of which immunity may be asserted, must be that of an official of such rank and importance as to give rise to the presumption that its performance has a very direct and necessary connection with the successful functioning of the Organization. This inference is suggested by Judge Rubin's assertion that he was not prepared to accede to the view that immunity must be granted so long as the defendant, at the time of the commission of the offense or the incurring of the liability, be acting in his official capacity, "without regard to the question as to whether the one so involved is the Secretary-General himself or an accredited delegate to the Organization's deliberations, or the humblest servant attached to the personnel of the Organization, and without regard to the importance or unimportance of the functions of the particular individual defendant in the deliberations and workings of the Organization. . . ." ⁴⁵ This view is certainly not an unreasonable one,⁴⁶ and cases in which the claim of im-

⁴⁴ This is stated expressly in Senate Report No. 861, 79th Cong., 1st Sess. (to accompany the bill for the Immunities Act), p. 5: "Under section 7 (b), all officials of international organizations, including American citizens, and representatives of foreign governments therein, would be granted immunity from suit and legal process for acts performed in their official capacity."

⁴⁵ Compare the statement by M. Massé, *Juge de paix*, in the *Atenol* case (cited, note 40, above) that acceptance of the defendant's contentions would be "*violemment contraire à toutes les notions du Droit qui péniblement se sont imposées à la conscience humaine depuis les origines barbares et qui sont devenues la charte universelle de toutes les actions civilisées, qu'É. . . , placé au-dessus des juges, plus haut que les Chefs d'Etat, . . . serait dégagé, ainsi au surplus et au même titre que la plus modeste des dactylographes et le plus anodin garçon de bureau de toute responsabilité quelconque . . . ; qu'il n'est donc pas possible que . . . le Pacte qui régit la plus haute autorité morale et juridique du monde, chargé de fonder le droit des Nations, donne au monde cet exemple décevant de reposer sur un statut en contradiction aussi flagrante avec le sentiment profond et sacré de la Justice, cette noblesse infinie de l'homme, et qui est inscrit et reste vivant au fond de tous les coeurs; Attendu que le Pacte de la Société des Nations ne mérite pas qu'on lui inflige cette injure. . . .*"

⁴⁶ Although it would seem to be fully justified on the basis of the passage quoted above, this inference, according to Judge Rubin, is an erroneous one. "It is not the

munity might appropriately be raised on behalf of a minor employee, except in circumstances similar to those of the instant case, must necessarily be rare. It was, however, the intent of the Immunities Act to provide immunities for all staff members irrespective of their rank, a purpose which is made evident by the addition of the phrase "or employees" to the term "officers." The General Assembly, furthermore, has, by a resolution adopted unanimously on December 7, 1946, approved the granting of the privileges and immunities provided by Articles V and VII of the General Convention to "all members of the staff of the United Nations with the exception of those who are locally recruited and are assigned to hourly rates."⁴⁷ Both factors must be present in order to bring an employee within the excepted categories,⁴⁸ and according to lists subsequently issued, employees such as the defendant in the instant case, are not included within this group.⁴⁹

In making provision for exempting United Nations officers and employees from the local jurisdiction in respect of official acts the Member states had available alternative procedures for determining the jurisdictional issue raised by the plea of immunity: (1) by granting complete immunity while imposing upon the United Nations the obligation to waive immunity in respect of private acts; (2) by providing that court action should be stayed whenever the plea of immunity in respect of an official act is raised and that any resulting dispute be settled by negotiations between the United Nations and the government concerned; or (3) by providing that the local courts should be empowered to decide the issue with provision for the settlement of any disputes which might arise from their decisions.

The case for the first method has been forcefully argued by C. Wilfred Jenks, who considers that

If the official acts of world authorities are open to question in national courts in proceedings against the officials of those authorities, every attempt to establish an effective world organization is liable to be completely nullified by the interference of national agencies. In the nature of things, however, a guarantee of independence from national control can never be complete unless it is unqualified. If a national court can assume jurisdiction over the private acts of an international official without a waiver of immunity by the international institution concerned, the determination of the official or private character of a particular act passes from international to national

title of the position held that would determine immunity," he states, "but the nature of the duties being performed at the time of the commission of the offense. Those are the questions that would have to be tried, had the Secretary in the *Ranollo* case not elected to waive immunity." Letter cited, note 7, above.

⁴⁷ *United Nations, Journal* No. 75: Supplement A-64, Add. 1 (Jan. 15, 1947), p. 897.

⁴⁸ Report of the Joint Subcommittee on the Fifth and Sixth Committees, Doc. A/C.5/99 (Nov. 28, 1946).

⁴⁹ Docs. A/116 and A/116/Add. 1 (Nov. 9, 1946).

control. . . . In the case of international as in that of diplomatic immunities the only principle which affords real protection is that of complete immunity from jurisdiction.⁵⁰

Mr. Jenks acknowledges, however, that so wide an exemption would involve as its counterpart the establishment of adequate machinery for the settlement of disputes in cases in which the international organization had not elected to waive immunity. Any proposal to create such machinery, which might possibly take the form of a United Nations Tribunal⁵¹ endowed with a jurisdiction far wider than that envisaged for the projected Administrative Tribunal,⁵² would certainly encounter general opposition, and cannot be considered a practicable plan.

Some precedent for the second method might be found in exceptional treaty provisions, as, for example, Article 4 of the Consular Convention between France and Poland, December 30, 1925:

Should an agent put forward this plea [of immunity in respect of acts done by him in the exercise of his functions] before an authority of the country in which he resides, such authority shall not take any decision on the matter, since all difficulties of this character must always be settled through the diplomatic channel.⁵³

This method is also objectionable, since it would immobilize every situation in which the plea is raised, pending the outcome of possibly protracted and inconclusive negotiations.⁵⁴

The third method, which reserves to the local courts the authority to determine the issue, is that which has been adopted by the Immunities Act and by the General Convention. Since the immunity is based upon an international engagement, any action by the local courts alleged to be in

⁵⁰ "Some Problems of an International Civil Service," *Public Administration Review*, Vol. 3 (1943), p. 103.

⁵¹ Mr. Jenks suggests that: "In the postwar world there should be a single World Administrative Tribunal . . . competent in cases in which some official act performed on behalf of an international institution is alleged to violate a private right; in cases in which international institutions are involved in legal relationships governed by municipal law, such as disputes relating to real estate, building contracts, and such matters; and in any case involving the private affairs of officials in respect of which an international should be thought preferable to a national jurisdiction." Same, pp. 103-104.

⁵² The proposed Administrative Tribunal, which is modelled upon that established by the League of Nations in 1927, would have jurisdiction over complaints alleging the non-observance of the conditions of appointment of United Nations officials and employees. See Report of the Advisory Committee on a Statute for a United Nations Administrative Tribunal, Doc. A/91 (Oct. 16, 1946),

⁵³ *League of Nations Treaty Series*, Vol. 41, No. 1719. Also, A-t. 15, Convention on Consular Officers, adopted at Havana, Feb. 20, 1928, and Hackworth, *Digest of International Law*, Vol. IV, p. 738.

⁵⁴ Harvard Research in International Law, *The Legal Position and Functions of Consuls*, this JOURNAL, Vol. 26 (1932), Supplement, p. 341.

violation thereof will give rise to a dispute between the United Nations and the government concerned. By Section 30 of the General Convention it is provided that such disputes shall be settled on the basis of an advisory opinion of the International Court of Justice, which the United Nations and the state party to the dispute agree to accept as decisive.⁵⁵

The local courts, therefore, will have the primary responsibility for determining the scope and application of the immunity for official acts. Assuming that the Department of State will not in every instance pass authoritatively upon the claim of immunity, this will, in the majority of cases, leave the issue to depend upon the result of an investigation by the local judge of difficult questions of international law. It may be pointed out that courts of lesser jurisdiction are not adequately equipped to deal with the novel and complex legal problems which have been raised as the result of the establishment in the United States of the headquarters of the United Nations and of several of its related agencies.⁵⁶ Guideposts are

⁵⁵ The Draft Agreement with the United States provides in Sec. 38 for settlement of disputes by arbitration or by other mode of settlement agreed upon by the party. Sec. 39 provides for requests for an advisory opinion by the International Court of Justice, and "Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter the arbitral tribunal shall render a final decision having regard to the opinion of the Court." These provisions of the Draft Agreement apply to disputes as to the immunities of resident representatives of Members of the United Nations (Sec. 27), but appear to leave disputes concerning the immunities of officers and employees to be settled by the means provided in the General Convention.

Sec. 29 of the General Convention also provides that "The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character, to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General."

⁵⁶ It should be noted that the benefits of the Immunities Act have been extended by successive Executive Orders to a wide range of international organizations, in addition to the United Nations, and that the problem of immunity for official acts will arise in connection with all of them. The projected coordination of the privileges and immunities of the United Nations and its specialized agencies, in conformity with the resolution of the General Assembly of Feb. 13, 1946 (Doc. A/64 (July 1, 1946), p. 33), may result in a reduction of the privileged status enjoyed by certain organizations and their personnel now designated under the Act, but it will doubtless not affect the basic immunity for official acts. It will not, of course, apply to designated organizations unrelated to the United Nations, such as the Pan American Union.

The following are the organizations now entitled to the benefits of the Act:

By Executive Order 9698, Feb. 19, 1946, *Fed. Reg.*, Vol. 11, No. 36, p. 39:

The Food and Agriculture Organization

The International Labor Organization

The Pan American Union

The United Nations

The United Nations Relief and Rehabilitation Administration

By Executive Order 9751, July 11, 1946, *Fed. Reg.*, Vol. 11, No. 136, p. 7713:

The Inter-American Coffee Board

needed in a field in which the law is undeveloped and uncertain. It is to be hoped that these will be furnished at an early date in the form of an advisory opinion of the International Court of Justice, or of a general statement by the Department of State setting forth the circumstances in which it would be prepared to recognize and allow claims of immunity.

There will be general agreement that any exemption from the operation of the local law enacted for the protection of the peace and security of the community should be strictly construed, and that any wilful disregard of the criminal law by an officer or employee of an international organization is presumably not an act within the scope of his functions.⁵⁷ In view of the controversial nature of the problem it is somewhat unfortunate that the first case to arise before an American court should have involved a question of criminal jurisdiction and that the waiver should have left unresolved the principle at issue. Despite the categorical assertion made on this point by the Secretary-General, the grounds for classifying the alleged act of the defendant as an official act covered by immunity are not altogether convincing. Strong arguments could be advanced in support of the contention that the boundary line between an official act and a personal act involving individual responsibility had been crossed in the instant case. It is of interest to note, as indicating the opposing views which may be taken in such a case, that Mr. W. E. Beckett, Rapporteur of the committee which drafted the General Convention and the proposed Agreement with the United States,⁵⁸ when envisaging on an earlier occasion a hypothetical case closely analogous to the present, denied that immunity should be allowed. In asserting that it would be for the courts to decide, in appropriate cases, whether a given act fell within a consul's functions and was therefore covered by the recognized consular immunity for official acts, he submitted that there would be "no danger of any undue extension being given to consular duties such as would lead to a consul being held exempt from penalties for driving a motor-car contrary to the

The Inter-American Institute of Agricultural Sciences
 The Inter-American Statistical Institute
 The International Bank for Reconstruction and Development
 The International Monetary Fund
 The Pan American Sanitary Bureau

By Executive Order 9823, Jan. 24, 1947. *Fed. Reg.*, Vol. 12, No. 19, p. 551:

The Intergovernmental Committee on Refugees
 The International Wheat Advisory Committee (International Wheat Council)

By Executive Order 9863, May 31, 1947. *Fed. Reg.*, Vol. 12, No. 108, p. 3559:

The United Nations Educational, Scientific, and Cultural Organization
 The International Civil Aviation Organization
 The International Telecommunication Union

⁵⁷ See Harvard Research in International Law, *Diplomatic Privileges and Immunities*, this JOURNAL, Vol. 26 (1932), Supplement, p. 98.

⁵⁸ See note 3, above.

law because he was on his way to his office and not on the return journey home."⁵⁹

The clearest justification for immunity from the local jurisdiction will be found (1) in cases in which the immunity of the United Nations itself covers the official acts of its officers and employees, as, for example, in actions based upon a contract which an officer has concluded as an agent of the Organization; and (2) in cases concerning the relationship of the United Nations and its staff members as regards conditions of service and discipline.⁶⁰ The General Convention in effect confers upon the United Nations a status, as to jurisdictional immunities, identical with that possessed by states, and Section 2(b) of the Immunities Act provides that

International organizations [designated under authority of the Act], their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments. . . .

In determining the scope and application of the immunity for official acts, therefore, analogies drawn from the immunity of states and their non-diplomatic agents, such as consuls, are permissible. In view of the scarcity of precedents bearing directly upon the immunities of international organizations and their personnel,⁶¹ these analogies will afford guidance to courts called upon to deal with unfamiliar and apparently novel problems. That any question relating to the contractual relations between the United Nations and its employees lies outside the competence of the local courts may, for example, be regarded as established on the basis of principles laid down in a series of decisions in cases involving suits against consuls arising from the dismissal of employees, from various claims under local labor laws, and from attempted garnishment of official salaries.⁶² The

⁵⁹ "Consular Immunities," *British Yearbook of International Law*, Vol. 21 (1944), p. 50.

⁶⁰ For a review of the jurisprudence of the Administrative Tribunal of the League of Nations and of other League bodies, see McKinnon Wood, work cited (note 36, above), pp. 147-152.

⁶¹ But see *International Institute of Agriculture v. Profili* (Italy, Court of Cassation, 1931), *Annual Digest of Public International Law Cases* (1929-1930), Case No. 254.

⁶² See cases collected in Hackworth, *Digest of International Law*, Vol. IV, pp. 729-735. Also, *Mazzucchi v. Consul-General of the United States in Naples* (Italy, Court of Naples, 1930), *Annual Digest* (1929-1930), Case No. 214; *Mazzucchi v. American Consulate* (Italy, Court of Appeal of Naples, 1931), *Annual Digest* (1931-1932), Case No. 186; *Little v. Riccio and Fischer* (Italy, Court of Cassation, 1934), *Annual Digest* (1933-1934), Case No. 68. See Beckett, work cited (note 59, above), pp. 38-48 for a full review of cases, treaty provisions, and official statements, and, for earlier cases and national legislation, see Irvin Stewart, *Consular Privileges and Immunities*, New York, 1926, pp. 147-155. As to the limits of consular immunity for official acts in courts of the United States, see *Lyders v. Lund*, 32 F. (2d) 308 (N.D. Cal., 1929), and *Landley v. Republic of Panama*, 31 F. Suppl. 230 (S.D.N.Y., 1943).

immunity granted by Section 18(a) of the General Convention to officials of the United Nations "in respect of words spoken or written . . . by them in their official capacity"⁶³ may also be interpreted in the light of cases involving prosecution or suits against consuls for defamatory or libellous statements alleged to have been uttered by them in their personal capacity, and, therefore, not covered by their immunity in respect of official acts.⁶⁴

It is a tribute to the ability and willingness of the officials of the United Nations and of the local authorities to coöperate in a spirit of tolerance and tact that no serious difficulties between them have resulted from the complex and novel legal situation created by the establishment of the seat of the United Nations in the United States. The presence of a numerous class of persons possessing a special status which sets them apart from the general population may readily give rise to mutual misunderstanding and antipathies which could only prejudice the successful operation of the United Nations in this country. The Government of the United States could make a contribution toward averting such a consequence by early accession to the General Convention and approval of the Draft Agreement, and by accompanying its action with a full public statement of the reasons why the officials of an international organization are in no less need of protection from interference in the performance of their important functions than are those of national governments. It may be expected that the United Nations, in its relations with the public at large, will make the

⁶³ Compare Section 11(a) which accords a like immunity to representatives of Members to organs of the United Nations and to conferences convened by the United Nations; and Section 12, which further provides that in order to secure for them "complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members." It is not clear why a similar provision for survival of immunities for official acts was not accorded to officers and employees under Section 18, and to experts on mission for the United Nations under Section 22. The *raison d'être* would be the same in all cases, and the principle has been held to apply to consuls. *Dessouki Moustapha v. A. Petroff* (Egypt, Mixed Court of Appeal, 1927), *Annual Digest (1927-1928)*, Case No. 268. Diplomatic officers, furthermore, are entitled to continued immunity for official acts after the termination of their functions, although their immunity for private acts lapses. Harvard Research in International Law, *Diplomatic Privileges and Immunities*, this JOURNAL, Vol. 26 (1932), Supplement, p. 137.

⁶⁴ See *Murphy v. Lee Jortin* (France, Civil Tribunal of Dieppe, 1900; Court of Appeal of Rouen, 1900 (two cases)), *Clune*, Vol. 27 (1900), pp. 130, 358; *Princess Zizianoff v. Kahn and Bigelow* (Correctional Tribunal of the Seine, 1927; Court of Appeal of Paris, 1928), this JOURNAL, Vol. 21 (1927), p. 811; Vol. 23 (1929), p. 172; and *United States, to Use of Parravicino v. Brunswick*, 69 F. (2d) 383 (App. D. C., 1934). Compare cases involving congressional immunities for official utterances such as *Kilbourn v. Thompson*, 103 U. S. 168 (1840), and *Cochran v. Couzens*, 42 F. (2d) 783 (App. D. C., 1930).

special position accorded to its officials as little conspicuous as possible, for, as an experienced international civil servant has said, it is "not desirable that the organization should present itself to the populations of its constituent States as something alien, privileged and ceremonious, but rather that it should be accepted as something necessary and natural which exists to serve their interests and in which they have as much a part as in their national institutions."⁶⁵

⁶⁵ H. McKinnon Wood, work cited (note 36, above), p. 162.

WAR CRIMES BY ENEMY NATIONALS ADMINISTERING JUSTICE IN OCCUPIED TERRITORY

By ALWYN V. FREEMAN *

I. INTRODUCTORY

Shortly after termination of the now historic Nuremberg trial of Nazi Germany's arch war criminals, formal proceedings were instituted against several other classes of major offenders against the laws of war in Western Europe. This second phase of the program included war crimes committed in S.S. laboratories, in the name of medical experimentation, and the so-called "economic" war crimes. Simultaneously with these proceedings preparations were made for still a third class of offenders to be brought to international justice, and it is this group which has recently been indicted. Here the charges are predicated upon illegal activity of enemy nationals engaged in administering justice in territories under military occupation, frequently involving the execution of inhabitants after a summary hearing, or after no trial at all. For the international lawyer this third category of war crimes contains many stimulating and significant elements. It raises highly challenging questions as to the extent to which criminal responsibility may be held to exist in cases where enemy nationals performing functions of a judicial or a quasi-judicial character have participated in the pronouncement and execution of sentences, including the death penalty, against nationals of the occupied areas.

The alleged irregularity may be drawn from the fact that (a) a given court was illegally constituted, or (b) that gross violations of recognized principles of justice took place during the conduct of the trial itself. The first category is illustrated by the purported annexation of Luxembourg and Czechoslovak territory by the Germans early in the war. Inasmuch as the attempted annexation was a wrongful usurpation of sovereignty, were the pronouncements of German criminal courts instituted pursuant thereto, illegal? And, in consequence, were the judges rendering them subject to prosecution and punishment as war criminals? Another category, more characteristic of military occupation in the usual sense of the term, is found in the action taken by civilian criminal courts and military tribunals established in other areas under occupation, likewise staffed by enemy officials, for the trial of persons charged with violations either of local laws or of proclamations of the enemy military authorities. This activity may have taken the form of subjecting relatives of an accused to punishment, including the death penalty, for violations of military proclamations (as, for example,

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the prohibition against the appearance of male Poles and Czechs on the streets at certain hours). In many such cases relatives were tried, sentenced, and put to death. One line of inquiry which immediately suggests itself here would ask whether this judicial and administrative action may be classified as criminal either (a) because it constituted the imposition of a collective penalty in defiance of Article 50 of the Regulations annexed to Hague Convention IV; or (b) because it violated the more obvious prohibition of a punishment which is outrageously excessive. Further grounds of complaint against such tribunals might be found in the fact that they imposed sentences in excess of the maximum set by the local law (again, as in Czechoslovakia) or by the proclamations themselves, that proceedings were conducted in accordance with National Socialist doctrines of law and justice, and in derogation of fundamental principles of civilized criminal administration, as, for example, prohibiting an accused to plead not guilty, to introduce evidence, or to present witnesses.

Basically, the issues in all of these cases are derived from one principal inquiry, namely whether legislative and judicial action of a belligerent, in violation of that part of the law of nations governing occupation of enemy territory, constitutes a war crime for which officials of the occupying state may be brought to the bar of justice. Stated somewhat differently, it must first be inquired whether specific uses of power in the administration of criminal and civil justice are proscribed by the laws of war. While the present paper is primarily concerned with wrongs arising out of the administration of justice it is obvious that the subject cannot remain wholly divorced from certain aspects of the occupant's general legislative powers. Violation of some new decree, culminating in criminal proceedings, may provide the very basis for charging that the consequent sentence of death or imprisonment constituted a violation of international law. A clear example of this interlocking effect is furnished by the indisputable power which an occupant enjoys to suspend local laws on conscription and recruiting, and to provide severe penalties for infractions in such cases. Here it may be the severity of the penalty which is questioned, while the legislative prohibition itself is valid. On the other hand, it may be the enactment or decree which transcends the limitations of the law of nations.

II. LEGISLATIVE POWERS UNDER THE HAGUE REGULATIONS

The principles governing a military occupant's powers in this domain of judicial and legislative action are stated very generally in the preamble to Hague Convention IV of 1907 on the Laws and Customs of War on Land¹ and in Articles 43, 46, 50, and 23h of the regulations annexed

¹ Inasmuch as the Hague Regulations on military occupation are largely declaratory of customary international law as it had developed prior to World War I, the present writer is of the view that the principles which they embodied were applicable during

thereto.² The preamble declares that "in cases not included in regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."³ The other provisions are as follows:

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, so far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

Art. 23h. [It is especially forbidden] to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

Article 43 does not signify that the occupying authority may introduce any legislative change which appears to be desirable or expedient. From the proceedings of the Hague Conference of 1899, as well as of the earlier conference at Brussels in 1874, it is clear that the phrase "unless absolutely prevented" was meant to require genuine military necessity, not mere expediency. Arbitrary changes would constitute an unlawful usurpation of sovereignty, whereas the sole justification in all cases was considered to be a necessity related to the military requirements of the occupant. The original version of the provision in the Russian draft presented at Brussels as the basis of discussion had declared (Section I, Chap. I, § 2) that the occupant can, "according to the requirements of war and in the public interest, either maintain in full force the laws existing there in time of peace; modify them in part; or suspend them altogether."⁴ A substitute

that war irrespective of whether the "si omnes" clause (Article 2) rendered inoperative either the 1899 or the 1907 convention on land warfare because of the non-adherence thereto of all the belligerents. See Oppenheim, *International Law*, 6th ed., Vol. II, pp. 185-186. The judgment of the International Military Tribunal at Nuremberg expressly rejected the contrary view. *Nazi Conspiracy and Aggression*, Washington, 1947, p. 83.

² War Department Technical Manual, TM 27-251, *Treaties Governing Land Warfare*, 7 Jan. 1944, pp. 15 ff.; Field Manual, FM 27-10, *Rules of Land Warfare*, pars. 282, 299, and 343; Malloy, *Treaties & etc.*, Vol. 2, p. 2281 ff.

³ Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 101-102; Malloy, work cited, p. 2272.

⁴ *Correspondence respecting the Conference at Brussels, Miscellaneous No. 1 (1874)*, p. 12. See also *Notes de la Conférence de Bruxelles*, Paris, 1874, p. 4.

text presented by Baron Jomini (as new § 3) would have permitted the laws to be changed only if the occupant "was obliged to do so."⁵ The German delegate (Voigts-Rhetz) proposed that this formula be replaced by the phrase "in case of necessity," a view supported by the Swiss and Belgian delegates⁶ and finally adopted in the Draft Declaration.⁷ Count Lanza of Italy argued that in principle "civil and penal laws, not of a political character, should remain in effect in occupied territory; modifications of the legal regime, exceptionally admitted, would be confined to laws of a political, administrative, and financial character."⁸ The Belgian delegate (Baron Lambertmont) distinguished between laws of a general or public interest, and those of a private nature dealing with family matters, inheritance, sales, and the like. Only the former would be affected by § 3, as the latter were of no concern to the occupant.⁹ The distinction was endorsed by the German delegate, who did not feel that the principle of "necessity" should be extended to civil laws, it being rather the criminal laws which might justify resort thereto.¹⁰ Debate in a similar vein was continued at the Hague Conference in 1899. Article 2 of the text then under consideration vested the occupant with authority "to take all measures in his power to restore and ensure, as far as possible, public order and safety." Article 3 added: "With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend them, or replace them unless necessary." To the suggestion of the Belgian delegate (Beernaert) that the provision "afforded only an apparent guaranty since the invader will have the privilege of modifying, extending, and superseding the existing laws" as he pleases, M. Rolin (Siam) observed that " * * * the idea which predominates in these articles is to set limits which the victor shall not exceed, except in case of the necessities of war."¹¹ Adoption of the words "unless absolutely prevented" as the definitive text of Article 43 reflected a compromise between these two extremes.

But Article 43 failed to draw a clear line between what is permissible and what is not. Premature annexation—that is, while hostilities are still being conducted and wartime precariousness of control continues—is illegal. So, in the glib idiom frequently encountered, is action which amounts to

⁵ *Correspondence, Miscellaneous No. 1* (1875), p. 228; *Actes de la Conférence*, p. 58.

⁶ Same, p. 23.

⁷ Same, p. 61.

⁸ As cited.

⁹ As cited.

¹⁰ Baron Blanc took a similar view. Same, p. 49.

¹¹ J. B. Scott, *Proceedings of the Conference of 1899*, p. 515. For an excellent discussion of the meaning of the phrase "unless absolutely prevented" see Schwenk in 54 *Yale Law Journal* (1945), pp. 399 ff. Mr. Schwenk's article contains an exhaustive analysis of the occupant's powers under Article 43.

an "exercise of sovereignty" over the area,¹² a vague standard of dubious utility when it is realized that many of the powers claimed and exercised by belligerents in the past are not readily distinguishable from attributes of sovereignty. Likewise proscribed by Article 43 is the occupant's introduction of his national legislation into territory under his provisional control, a point underscored by several delegates at Brussels.¹³ The test of legitimate action has been whether the laws and regulations enacted are justified by military necessity, or by the occupant's duty to maintain law and order. Changes in the institutions, laws or administration not reasonably related to these purposes are violative of international law. To this extent writers are generally in agreement. Oppenheim is typical:

Although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, as he is not the sovereign of the territory he has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and existing rules of administration; he must ensure public order and safety, must respect family honor and rights, individual lives, private property, religious convictions and liberty. It is clear that these and other obligations of the occupant cannot be avoided by dint of the additional illegality of prematurely annexing the occupied territory.¹⁴

Overtones of discord appear in the literature, however, when an attempt is made to reduce this general principle to more precise terms. Wheaton, for example, declares that the local civil and criminal laws "ought not to be interfered with, unless they are contrary to the martial law enforced."¹⁵ De Louter comments on Article 43 as follows:

The exception "unless absolutely prevented," however rigidly formulated, nevertheless permits the occupant to take legislative measures which it deems necessary for its military or political interests * * * In the War of Secession the victorious Northern armies, penetrating into the revolted States, immediately promulgated the law of June 1, 1863, on the abolition of slavery.¹⁶

¹² Feilchenfeld, *The International Economic Law of Belligerent Occupation*, pp. 7, 110; Oppenheim, *International Law*, Vol. II, 6th ed., § 169; Spaight, *War Rights on Land*, p. 322; Fauchille, *Droit International Public*, Vol. II, p. 216; Kunz, *Kriegsrecht und Neutralitätsrecht*, p. 92; Ruiz Moreno, *Guerra Terrestre y Aerea* (1926), pp. 191-194.

¹³ *Actes*, pp. 35 and 39.

¹⁴ Oppenheim, work cited, § 169, pp. 342-343. Accord: Garner, *International Law and the World War*, Vol. II, p. 77; Pillet, *Les Lois Actuelles de la Guerre*, p. 243; Mérignhac, *Le Droit des Gens et la Guerre de 1914*, Vol. I, p. 355; Wheaton, *International Law*, 7th ed., Vol. II, p. 97. Bustamante y Sirven, *Droit International Public*, Vol. IV, p. 366.

¹⁵ Work cited, p. 244.

¹⁶ *Droit International Public Positif*, Vol. II, p. 290; italics supplied. Compare Feilchenfeld, p. 39: " * * * new laws * * * must be sufficiently justified." The Rus-

Feilchenfeld declares that the general rule of respect for fundamental institutions would seem to prohibit an occupant from transforming a liberal into a communistic or fascist economy except so far as military or public-order needs should require individual changes; and that consequently Soviet Russia was not free to transform the Baltic countries into Soviet Republics during the war.¹⁷ Disputing this view Schwenk points out that the Hague Regulations "express nowhere the principle that the occupant must blindly respect the institutions of the occupied country," and observes that there may be an "absolute necessity" to abolish a political system which offers a continuous threat to the security of the occupant's forces.¹⁸ But justification of particular measures solely because they serve the "ends of the war," or on the basis of an "absolute necessity," evokes familiar memories of the German doctrine of necessity (*Kriegsraison*) whose logic conduces inevitably to the abrogation of all restraints upon belligerent activity.¹⁹ The same action which might be legitimate when hostilities terminate in a subjugation or an approximation thereof (such as in Germany after destruction of the Doenitz government), may be illegal so long as belligerent occupation exists, whether it represents a war aim or not.

sian military authorities, during their occupation of Turkish territory in 1877, reorganized the administration of justice in a very fundamental manner, to adapt it to the usual level of European customs then prevailing. Korovine justifies this action on the ground that the war had been waged precisely to free the Balkan area from the "archaic and intolerable forms of Turkish domination." *Internationalrechtliche Abhandlungen*, Vol. III, p. 134.

The principle stated by De Louter was given application by the Office of the Judge Advocate General of the United States in an opinion rendered in 1945 holding that the United States, upon occupying Japan, could lawfully take such measures of education and public enlightenment as might be necessary to eliminate fanatical Japanese militarism, as this was not only one of the ends of the war, but would be necessary in the interest of the occupant's security. Similar grounds were invoked to approve reforms in the administration of Japanese justice which would provide greater protection for the rights of an accused (*Opinions of the Judge Advocate General*, SPJGW 1945/270, 24 Feb. 1945). Furthermore, in an earlier opinion of that office it was held that changes in German law designed to destroy the privileged status of members of the Nazi party and the inferior position of the Jews come within this category (Same, SPJGW 1943/18261, 1 Jan. 1944).

¹⁷ Work cited, par. 331. Davidonis similarly contends that the abolishment of Fascism in Sicily and the occupied provinces of Italy during the Italian campaign constituted a violation of the Hague Regulations. "Some Problems of Military Government," in *American Political Science Review*, Vol. 38 (1944), p. 467.

¹⁸ Work cited, p. 403.

¹⁹ Compare the authorities listed in Oppenheim, work cited, p. 18, note, and Magoon, *Reports on the Law of Civil Government under Military Occupation*, 1902, p. 15: "When a military government continues as an instrument of warfare, used to promote the objects of the invasion by weakening the enemy or strengthening the invader, its powers are practically boundless." But *New Orleans v. Steamship Co.*, 20 Wall. 387, 394, recognizes that limitations on this power exist in the laws and usages of war.

Surely genocide could never be reconciled with the Hague rules on the ground that it was a Nazi war aim!

Less controversial are other measures obviously necessary to the occupant's security. There is no doubt that local laws on conscription and recruiting may be suspended and severe penalties provided for their violation. During the Franco-Prussian War decrees were issued in Alsace-Lorraine subjecting any person leaving the occupied provinces to join the French armies to banishment and confiscation of goods.²⁰ In other areas, if persons subject to conscription left their place of residence clandestinely, or without sufficient motive, their relatives were fined 50 francs for each day of absence.²¹ Spaight²² and Hall²³ consider these measures as warranted by the acts punished, which were a direct danger to the occupant's military interests. Abettors and principals could be punished alike. Hall asserts that if milder means are first tried, it is hard to say that any ultimate harshness is too great,²⁴ adding that recourse to vicarious punishment (such as punishment of relatives) should be had only in the last extremity. Fauchille considers the penalties of banishment and confiscation to have been "iniquitous and exorbitant," but is silent as to the penalty against relatives.²⁵

It is also clear that where the local law is temporarily bankrupt due to anarchical conditions, the occupant may create laws to govern the country. A rare example of this situation, which was comparatively uncommon prior to World War II, is provided by the creation of a completely new social and political regime in Bulgaria during the period 1877-1878.²⁶

III. CHANGES IN JUDICIAL ORGANIZATION

It is generally recognized that, when necessary, military courts may be set up in place of the ordinary courts; and even where the occupant allows the ordinary courts to administer justice he may, observes Oppenheim "so far as it is necessary for military purposes, or for the maintenance of public order and safety, temporarily alter the laws, especially the Criminal Law, on the basis of which justice is administered as well as the laws regarding procedure."²⁷ That the penalties for violation of the local law may be made more severe by the occupant is admitted by some writers²⁸ with the qualification that such changes should not be applied retroactively.

²⁰ Hall, *International Law*, 7th ed., pp. 507-508, note.

²¹ As cited.

²² *War Rights on Land*, pp. 355-356.

²³ As cited.

²⁴ Work cited, p. 508.

²⁵ *Droit International Public*, Vol. II, p. 226.

²⁶ Spaight, work cited, p. 357.

²⁷ *International Law*, 6th ed., Vol. II, p. 349.

²⁸ Thus Fairman, *Law of Martial Rule*, p. 275.

Westlake appears to accept the view stated by the drafting committee at the Brussels Conference, that civil and penal laws affecting the relations of the inhabitants with each other "should" not be touched; but the relation between the invaders and the population, so far as it falls within the criminal department "whether by the intrinsic nature of the acts done or in consequence of the regulations made by the invader," may be referred to martial law.²⁹ The distinction taken is supported by the *British Manual of Military Law* of 1929³⁰ and by the *United States Rules of Land Warfare*,³¹ No. 288 of which declares that the occupant

may create such new laws and regulations as military necessity demands. In this class will be included those laws which come into being as a result of military rule; that is, those which establish new crimes and offenses incident to a state of war and are necessary for the control of the country and the protection of the army.

Halleck asserts that crimes which are not of a military character, and are not provided for in the military code of the conquering state, may be punished by the ordinary courts, or they may be referred to special tribunals administering martial law.³² Fauchille flatly states that the jurisdiction of the local courts must not be destroyed; that retention of the criminal laws of the invaded state is more necessary than other laws; and that the inhabitants are not subjected to the criminal laws of the invading State, except as concerns crimes and delicts against the occupying army, its soldiers, and officers.³³ Even the *Kriegsbrauch im Landkriege* of the German General Staff recognized that the promulgation of new laws or the abolition or modification of existing laws is justified only when imperatively demanded by the requirements of war. Since civil and criminal jurisdiction continues in force—adds the *Kriegsbrauch*—extraordinary justice (martial law and courts-martial) is to take place "only where behavior of the inhabitants makes it necessary"; and any sentence of these courts must be based "upon the fundamental laws of justice after they have first impartially examined, however summarily, the facts and have allowed the

²⁹ *International Law*, Vol. II, p. 96. Also, Rolin, *Le droit moderne de la guerre*, Vol. I, p. 436, and compare Travers, *Le droit pénal international*, Vol. III, pp. 415 and ff.

³⁰ Par. 364.

³¹ War Department Field Manual, FM 27-10.

³² *International Law*, 3rd ed., Vol. II, p. 439.

³³ *Droit International Public*, Vol. II, pp. 227, 232. Accord: Jacomet, *Les lois de la guerre continentale*, Art. 77, who, however, admits an exception for cases involving injury to the security of the occupant's army. For Rolin, unless the occupied territory is of an inferior civilization, there can never be an "absolute necessity" to modify either its civil judicial organization, or its penal laws, except where harsher measures are required for the protection of its troops. Work cited, p. 437. He consequently condemns the institution by Germany in Belgium during the last war of special courts to adjudicate the damage claims of German subjects. Under this view judges of the local criminal courts must be retained; arbitrary removal of civil causes to special courts would violate international law. Compare Holland, *Laws of War on Land*, p. 53.

accused a free defense."³⁴ American practice has generally been to rely upon the existing tribunals, so far as possible, to administer the ordinary civil and criminal laws.³⁵ But, says Hyde:

It must not be inferred that the occupant is deterred by any rule of international law from pursuing a different course if the conduct of the inhabitants, or any other consideration, should render such a step indispensable to the maintenance of law and order. In such a case he may replace or expel native officials in part or altogether, or he may substitute new courts of his own constitution for the existing ones, or create such new and supplementary tribunals as may be necessary.³⁶

These divergences reflect the uncertainties inherent in the language of Article 43, which must always provoke varying interpretations as to what constitutes military necessity. On the other hand, Article 43 could only trace the broad theoretical principles, no matter how phrased. It remained for state practice to breathe more definite meaning into its provisions. In the light of this practice, Hyde's position appears as an accurate portrayal of present law.³⁷

IV. BELLIGERENT PRACTICE PRIOR TO WORLD WAR I

Prior to the War of 1914-1918 the practice in modern wars was generally to leave such laws in force as were not irreconcilable with a state of occupation. During the Mexican War (1846-1848) General Scott organized special criminal tribunals called "military commissions" in the territory under his occupation and vested them with jurisdiction over specified offenses of the civil law (such as murder, rape, assault and the like), whether committed by Mexicans or other individuals against members of his armed forces, or the reverse.³⁸ General Scott's action was an application of the

³⁴ "Fundamentalgesetzen der Gerechtigkeit beruhendes Urteil zu sprechen, nachdem sie vorher den Tatbestand, wenn auch nur summarisch, so doch unparteiisch geprüft, und dem Angeklagten eine freie Verteidigung gestattet haben." *Kriegsgeschichtliche Einzelschriften*, 1902, p. 65.

³⁵ See par. 6 of the *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100, 24 April 1863; President McKinley's *Letter of Instructions* to General Shafter, 18 July 1898; Moore, *Digest of International Law*, Vol. 7, p. 262; Magoon, *The Law of Civil Government under Military Occupation*, p. 198; *Ketchum v. Buckley*, 99 U.S. 188; and for the present rule, FM 27-10, *Rules of Land Warfare*, par. 285.

³⁶ *International Law*, 2nd ed., § 690, and compare Korovine's extreme view in *Internationalrechtliche Abhandlungen*, Vol. III, p. 134.

³⁷ The right of an occupant to control or close the local criminal and civil courts, and to modify or suspend local criminal and civil laws, is affirmed in the *U.S. Manual of Military Government*, 22 Dec. 1943, FM 27-5, OPNAV 50-3, p. 15.

³⁸ Smith, *Military Government*, 1920, pp. 59-60; Birkhimer, *Military Government and Martial Law*, pp. 138, 147; Winthrop, *Military Law and Precedents*, 2nd ed., p. 832; and Garner, *International Law and the World War*, Vol. II, p. 85, note.

general right of a military occupant to deprive the existing courts of their jurisdiction of offenses against the occupying power's authority as well as of offenses against persons belonging to his armed forces. In *The Grapes*,³⁹ the United States Supreme Court upheld the institution in occupied territory (Louisiana) of a Provisional Court in 1862 with power to hear and dispose of all causes, civil and criminal, including suits in admiralty, and to which the litigation at issue had been referred.⁴⁰ During the Spanish-American War judicial administration at Santiago and Manila remained under the occupation much as it had been under Spain.⁴¹ While existing provincial and municipal laws were continued substantially as before in Puerto Rico,⁴² certain alterations and changes necessary to meet new conditions were ordered after consultation with prominent Puerto Ricans.⁴³ Thus the Supreme Court of Justice, which had to be reorganized due to departure of personnel when American forces took control, was given cognizance over appeals formerly devolving upon the Supreme Court of Madrid.⁴⁴ The tribunal known as the court of appeals (*Contencioso Administrativo*) was abolished, and its functions transferred to the Supreme Court.⁴⁵ The civil courts being overcrowded and unable to act effectively against bandits committing crimes of arson and murder, military commissions were appointed.⁴⁶ Such commissions also tried offenses by natives against members of the occupant's armed forces.⁴⁷ A provisional court to replace the military commissions was set up on July 1, 1899.⁴⁸ But by this time the treaty of peace had been ratified.

During the Boer War (1900) the British authorities dealt with all crimes affecting the occupying army or its interests under the Transvaal law.⁴⁹ Chinese penal law was not changed by the Japanese in Manchuria during the Russo-Japanese War, except where it clashed with "martial" law. The threat of collective punishments was frequently contained in

³⁹ 9 Wall., 129 (1869).

⁴⁰ *U. S. v. Exeter*, Fed. Cases, No. 16146 (1865), recognized the jurisdiction of this provisional court to try offenses of murder and arson committed against Louisiana law. See also *State ex rel. Kain v. Hall*, 65 Tenn. 3 (1873); *Pennywit v. Eaton*, 15 Wall. 382 (1872); and *Burke v. Miltenberger*, 9 Wall. 519 (1873). *Louisiana ex rel. O'Hara v. Heath* (20 Louisiana Annual, 518 (1868)) affirmed the military commander's power to control the exercise of criminal jurisdiction of the local civil tribunals.

⁴¹ Magoon, work cited, pp. 14, 198; Fauchille, work cited, pp. 233-234.

⁴² Gen. Orders No. 1, 18 Oct. 1898; Davis, *Report on Civil Affairs of Puerto Rico*, p. 89; and Gen. Orders No. 8, 4 Nov. 1898, *ibid.*, p. 90.

⁴³ See Capo-Rodríguez, in this JOURNAL, Vol. 9 (1915), pp. 883, 905.

⁴⁴ Gen. Orders No. 19, 2 Dec. 1898; Davis' *Report*, p. 90.

⁴⁵ Gen. Orders No. 4, 27 Oct. 1898; Davis' *Report*, as cited.

⁴⁶ Gen. Orders No. 27, 8 Dec. 1898; Davis' *Report*, pp. 93, 310.

⁴⁷ *Ex Parte Ortiz*, 100 Fed. 955.

⁴⁸ Gen. Order No. 88 dated June 27, 1899. Davis' *Report*, p. 117. And see the *Annual Report of the Military Governor of Puerto Rico on Civil Affairs*, part 13, 1902, pp. 65 ff.

⁴⁹ Spaight, work cited, p. 357.

proclamations of the Japanese First Army, an attempt being made to sidestep the prohibition in Article 50 of the Hague Regulations by relying upon a system under which all the inhabitants of a given locality were made responsible for certain acts and a collective penalty provided for such violations as were "collectively" attributable to them. One example is the proclamation under which all inhabitants had to bear the burden of preventing destruction of a telegraph or railroad line.⁵⁰

Whenever the judicial machinery has become dislocated by events of the war, as where judges have fled or declined to sit, the occupant is entitled to establish special tribunals to try common penal offenses. In 1914 when American forces landed at Vera Cruz, the *jefe politico* and all other officials fled the city. No courts functioned. General Funston, therefore, in General Order No. 3 of May 2, 1914, appointed his Headquarters Judge Advocate as Administrator of Justice. Although this order provided that the Military Governor was to establish courts for the trial of civil cases, the expedition was withdrawn before civil courts were in fact set up. Criminal (Provost) courts were established, however, with United States Army or Marine officers as judges.⁵¹ Lord Roberts found it necessary to establish courts in the Transvaal in 1900.⁵² The difficulties encountered by the Germans in 1870-1871 had produced a like problem. When some of the French courts suspended their functions on the suspicion that German military authorities wished to interfere with the freedom of the courts and the administration of justice, German judges were appointed in their place.⁵³ It is hardly necessary to emphasize that when special courts are instituted, the procedure and law applied must conform to the standards of justice envisaged in (a) those provisions of the Hague Regulations enjoining respect for inhabitants' lives, as well as in (b) the preamble to Convention IV of 1907 which states that they remain "under the protection and the

⁵⁰ Ariga, *La Guerre Russo-Japonaise et le Droit International*, p. 388, and see Fauchille, *Droit International Public*, Vol. II, § 1219. The Germans frequently, in 1914-1918, issued analogous proclamations such as that of 1916 at Noyon, under which towns and villages were to be fined in case fire-arms were found in the possession of any inhabitant after a certain date. Garner, work cited, p. 154. For German practice on this question in 1870-1871, see Spaight, work cited, p. 409.

⁵¹ Smith, *Military Government*, 1920, pp. 66-72; General Funston's *Report on Military Government*, 30 June 1914, pp. 2 ff. And see *U. S. For. Rel.*, 1914, pp. 481 ff., 600 ff. President Lincoln's Executive Order of 20 Oct. 1862, establishing the Provisional Court in Louisiana, recited that "the civil institutions of the State, including the judiciary and judicial authorities of the Union" having been swept away, "it has become necessary * * * that there shall be some judicial tribunal existing there capable of administering justice." See *Burke v. Miltenberger*, 19 Wall., 1873, p. 519.

⁵² Spaight, work cited, p. 357.

⁵³ Fauchille, work cited, pp. 232-3; Calvo, *Droit International Public*, Vol. 4, §§ 2185 ff.; Spaight, work cited, pp. 358-359. The failure of judicial organization in Thessaly during the Turco-Greek war of 1897 is a further example. Fauchille, as cited, and generally Cybichowski, "Das völkerrechtliche Okkupationsrecht," in *Zeitschrift für Völkerrecht* (1934), Vol. 18, pp. 295 ff.

rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."⁵⁴

V. PRACTICE DURING WORLD WAR I

Germany. German practice in 1914-1918 flouted these precepts in several ways apparently contrary even to the German War Manual itself,⁵⁵ and in ways which were condemned by writers on international law. In Belgium a new labor code was introduced, along with new laws on health, slaughtering of animals, education, crop harvesting, and hundreds of other matters which, according to Garner, had little or no connection with the maintenance of the public order or the protection and security of the armed forces.⁵⁶ Heavy penalties were provided for violation of these laws, and the newly established military courts were given jurisdiction of offenses against them almost without exception. As a result most of the ordinary jurisdiction previously exercised by the Belgian Courts was vested in the occupant's military tribunals. Belgian courts were even deprived of suits between landlord and tenant, special civil courts being set up to handle such cases. This assertion of sovereignty was held by the Belgian *Cour de Cassation* to be a violation of Article 43 of the Hague Regulations of 1907. However, the same court admitted that the ordinance in question was nevertheless binding upon all persons subject to the jurisdiction of the occupying power.⁵⁷ In all cases involving offenses against the German authority or against the German troops, the German military code was applied in Belgium.⁵⁸ The jurisdiction of these military tribunals, moreover was extended to all cases arising under the various ordinances, decrees and police regulations issued by the Governor-General in the field of ordinary criminal justice—which to students of military government practices in World War II might seem to parallel rather closely the authority con-

⁵⁴ Above, note 3.

⁵⁵ Above, note 34.

⁵⁶ *International Law and the World War*, Vol. II, p. 88. For other examples, see Wheaton, *International Law*, 7th ed., Vol. II, pp. 242-243.

⁵⁷ Decision in *International Law Notes*, Sept. 1916. See Clunet, *Journal de Droit International*, Vol. 44, pp. 1809 ff., and De Visscher in same, Vol. 45, pp. 1090 ff. Accord: Westlake, *International Law*, Vol. 2, p. 97; Garner, work cited, Vol. II, p. 89, and see pp. 82-84 for the same writer's view that these special courts and the withdrawal of a large part of their ordinary jurisdiction from the Belgian courts was an infraction of Article 43. See also Fauchille, work cited, § 1166; Mérignhac, *Le Droit des Gens et la Guerre de 1914*, Vol. I, pp. 387-388.

⁵⁸ While this extension of German criminal law has been criticized (De Laval in 52 *American Law Review*, 235 ff.; Dumont-Wilden, *Du terrorisme judiciaire en Pays d'Occupation Allemande*, Clunet, work cited, Vol. 44, pp. 516 ff.), Garner implies that it may not have been objectionable under international law (work cited p. 89, note).

ferred upon military courts in the American Zone in Germany.⁵⁹ The entire Belgian judicial structure was even more drastically altered after the famous court "strike" of 1918. During the course of proceedings against certain German sympathizers before the Brussels Court of Appeals, German authorities intervened, arrested the proceedings and deported several members of the Court to Germany for confinement in prison. The remaining members were prohibited from exercising their functions on the ground that they had associated themselves in a "political manifestation." As a consequence the Court of Cassation adopted a resolution declaring that the German interference with judicial administration was contrary to the law of nations and suspended its sittings. Similar action was taken by other courts until eventually almost the entire magistrature had ceased to function. Governor-General Falkenhausen thereupon issued two decrees providing that criminal justice should be administered by new Imperial German tribunals, that the language used should be German, that while Belgian substantive law should apply, the penalties prescribed were to be those of the German Imperial Criminal Code, and that the procedure should also be that of the German code. Similar courts were created for civil cases.⁶⁰ Trials before the military tribunals were secret, counsel not being permitted to see the accused before arraignment, and there was no right of appeal. The procedure followed in the *cause célèbre* of Nurse Edith Cavell was typical. There the accused, who was charged with having assisted Allied soldiers to escape, was denied all information concerning the charges against her before she was arraigned at the bar; she was not even permitted to see her attorney until brought into the courtroom; and, as the proceedings were secret, it is impossible to determine whether the trial was "fair" or not.⁶¹ Garner observes that "to an American or English lawyer, this procedure sounds like a mockery of justice,"⁶² but, before condemning it as a violation of international law, one must bear in mind that the preliminary proceedings in that case would seem less offensive to a practitioner of the civil law. More objectionable would seem to have been the execution of Miss Cavell within a few hours after the trial, to fore-

⁵⁹ Ordinance No. 2, *Military Government Regulations* (U. S. Zone), Title 23, sec. 215 (MGR 23-215).

⁶⁰ Garner, work cited, pp. 88 ff.; Wunderlich, *Der Belgische Justizstreik*, 1930, *passim*; Oppenheim, *International Law*, Vol. II, 6th ed., p. 350, note; Mérignhac, *Le Droit des Gens et la Guerre de 1914*, Vol. I, pp. 381 ff.; Wheaton, *International Law*, 7th ed., Vol. II, p. 245.

⁶¹ See Garner, work cited, pp. 97 ff.; Oppenheim, *International Law*, 6th ed., Vol. II, p. 457, note; Kunz, *Kriegsrecht und Neutralitätsrecht*, p. 97, note. For diplomatic correspondence concerning action of the American Legation in Belgium on Miss Cavell's behalf, *U. S. For. Rel.*, "The Lansing Papers," 1941-1920, Vol. I, pp. 48-67.

⁶² Work cited, p. 100; and see Mérignhac, work cited, pp. 378-388, who describes the institution of special tribunals as a kind of "judicial terrorism" under which the penal provisions were unknown, and the decisions arbitrary and unrelated to military security.

stall an appeal. Deprivation of adequate opportunity to prepare a defense is a recognized ground of peacetime, state-to-state responsibility founded upon a denial of justice,⁶³ but conducting proceedings secretly before a military tribunal during war would not necessarily stigmatize them provided it can be demonstrated that the accused was tried fairly. Where, as in the Cavell case, a foreigner is involved, full records should be furnished to his state prior to execution of the sentence. In cases affecting nationals of the territory, the lack of a protective system for civilians comparable to that furnished by the Geneva Convention of 1929 for prisoners of war should encourage judicial officers to preserve complete records for use in their defense against possible later war crimes charges.

The validity of German judicial action in occupied territories was tested in several cases arising after the war. In May, 1919, the French Court of Douai held that the action of the German military governor at Mauberge in November, 1914, in creating a tribunal charged with applying French law in civil and correctional matters was contrary to Article 43 of the Hague Regulations, and hence its judgments were invalid.⁶⁴ In *In re X*, the defendant, who was prosecuted for infanticide committed during the war in France, contended that since she had been acquitted of the same charge by a court established in the name of the German Empire in occupied France, the previous (German) judgment should bar a second trial.⁶⁵ This contention was rejected by the Court of Appeal of Nancy, which, noting that the German Court had been established for the purpose of suppressing the legally constituted court, held that its judgments could produce no legal effect in France. In its opinion Article 43 did not authorize the occupying authorities to suppress French courts which safeguarded public order. Moreover, said the court:

* * * the crime of infanticide is not among those reserved in principle by the law of war to the cognizance of the enemy as being likely to jeopardize the security of his army.⁶⁶

⁶³ Freeman, *International Responsibility of States for Denial of Justice*, pp. 277 ff.

⁶⁴ Clunet, *Journal du Droit International*, Vol. 46, p. 770.

⁶⁵ Since the military tribunals of the armies which occupied Germany during 1918-1923 were regarded as foreign courts, neither they nor the German courts themselves recognized the plea of double jeopardy as a defense. For cases dealing with this problem, see Fraenkel, *Military Occupation and the Rule of Law*, p. 164, and in particular, a decision of the Reichsgericht of Feb. 23, 1920, holding that the same criminal act was a violation of both German and occupational law.

⁶⁶ Lauterpacht, *Annual Digest of Public International Law Cases* (cited hereafter as *Annual Digest*), 1919-1922, Case No. 334; Hackworth, *Digest of International Law*, Vol. VI, p. 397. In *Milaire c. Etat allemand*, the Germano-Belgian Mixed Arbitral Tribunal "queried" whether the German Government could have introduced its law on responsibility for labor accidents into Belgium, in abrogation of the local law of 1903, without violating Article 43. *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, Vol. II, pp. 715, 719; Hackworth, work cited, p. 354.

In *Ville d'Anvers c. Etat allemand* awards had been made against the city of Antwerp by a tribunal established under a German decree of 1915. This decree modified an old Belgian law by which municipalities were made responsible for certain acts of violence committed by mobs against persons or property. The new tribunal was composed entirely of German subjects, Belgians having refused to serve. It was held by the German-Belgian Mixed Arbitral tribunal that this material change in the law under which German arbitrators favored the claimants was a violation of Article 43 since no *empêchement absolu* existed, there being no military motive for the decree.⁶⁷ On the other hand, a German decree abrogating a moratorium established by Royal Decree of the Belgian King on August 2, 1914, was held valid by the District Court of Rotterdam, which stated that Article 43 did not contemplate special laws enacted during the war, but only those in force prior thereto. The German measure was regarded as serving the reestablishment of public order.⁶⁸

By way of contrast to some of the French and Belgian decisions relative to judicial powers under Article 43, the Lithuanian Supreme Court held that a judgment by a court instituted by the Polish military authority was not invalid because the judges had been appointed by the occupant⁶⁹—a fair application of the general principle that the occupant may set up his own courts when military necessity or the maintenance of public order and safety so warrants. The German Reichsgericht in 1920 similarly recognized that while an occupant was bound "except for compelling reasons" to leave the local courts intact, it might set up its own tribunals for the prosecution of criminal acts against the occupying power, against the persons and property of the occupying authorities and of the occupation forces, or, generally, against the regulations issued for security of the occupation.⁷⁰

⁶⁷ *Annual Digest*, 1925-1926, Case No. 361; Hackworth, *Digest*, Vol. VI, pp. 395-396. See also Rolin, *Le droit moderne de la guerre*. Vol. 1, p. 438. Compare *Commune de Grace-Berleur c. Charbonnages de Gossoz Lagasse et Consorts*, *Annual Digest*, 1919-1922, Case No. 326.

⁶⁸ *Cillekens c. De Haas*, work cited, Case No. 336; Hackworth, work cited, p. 395. Compare *Mathot c. Longué* (German order prohibiting sale of vegetables before they were grown held illegal by Liège Court of Appeal, as Art. 43 gave occupant no right to legislate. *Annual Digest*, 1919-1922, Case No. 329, and the note at p. 455 to the effect that this ruling is contrary to most others); and *Malines c. Société Central . . . du Gaz* (occupant's increase in cost of gas held justified by population's wartime needs), *Annual Digest*, 1925-1926, Case No. 362.

⁶⁹ *Antanas and Jadviga Gumbiai v. Benatariciai*, 6 June 1929, *Annual Digest*, 1929-1930, Case No. 293.

⁷⁰ *Annual Digest*, 1919-1922, Case No. 325; Hackworth, *Digest*, Vol. VI, pp. 397-398. See also Fraenkel, *Military Occupation and the Rule of Law*, 1944, pp. 165-166. Compare the position of the Supreme Administrative Court of Czechoslovakia (1928), which observed that although "application of the laws of the occupying State do not * * * extend automatically to the occupied territory," the occupant, to maintain and safe-

Great Britain. British practice in World War I is illustrated by their administration of Mesopotamia and Palestine after withdrawal of the Turkish forces. When Basrah was occupied, practically all judicial officers had fled. The remaining jurists refused to exercise their functions, and personnel experienced in Turkish law was unavailable. To prevent community activities from coming to a standstill, the Army Commander in 1915 promulgated the "Iraq Occupied Territories Code," based upon the Indian Civil and Criminal Codes.⁷¹ This substitution introduced an efficiency in justice theretofore unknown to the people. But the Iraq code was not extended to Baghdad when that city was occupied. Here again, because the Turkish judges had fled with the more recent records, the courts ceased sitting. With the exception of a Court of Small Causes directed to apply existing civil law, a Mohammedan Law Court, which reopened in July, 1917, and a special administrative procedure adopted for urgent cases, there was no way of enforcing civil rights by action between the departure of the Turkish rulers and the end of 1917. Administration of the criminal law was vested in the Military Governor and political officers. Sweeping reforms in the system of justice were effected during the years 1918-1919. A Court of Appeal was established at Baghdad, and the right of appeal to the Court of Cassation in Constantinople abolished in favor of a power of revision conferred upon the Senior Judicial Officer and the Court of Appeal. Later a Judicial Department was created.

In general the civil courts continued to administer Turkish Law, procedure being governed by the Turkish Code of Civil Procedure. However, as the Ottoman Penal Code and Code of Criminal Procedure were found to be unscientific, incomplete, and over-complicated, the former was replaced by the Baghdad Penal Code (which embodied amendments based upon the Egyptian Penal Code) and the latter by the Baghdad Criminal Procedure Regulations which were based upon the Sudan Code.⁷² Sir Edgar Bonham Carter, the Senior Judicial Officer, further justified these measures as follows:

According to the theories of international law, upon the occupation of an enemy country local criminal law should be continued if this is possible and consistent with the welfare of the army of occupation.

guard his army or for prosecuting the war, could extend his own national law to the area occupied. *Annual Digest*, 1927-1928, Case No. 378; Hackworth, work cited, p. 400. Accord: *Occupation of Cavalla case*, *Annual Digest*, 1929-1930, Case No. 292. In *Republic v. Ofcynski*, the Polish Supreme Court construed Article 43 as prohibiting the occupant from trying by his own courts and within his own territory, crimes committed in occupied territory. *Annual Digest*, 1919-1922, Case No. 338.

The German practice in occupied Poland (1915-1916) of effecting penal confiscations without judicial proceedings is discussed by Sachocki, in *Revue Générale de Droit International Public*, Vol. XXXV (1928), pp. 411 ff.

⁷¹ *Review of the Civil Administration of Mesopotamia*, Cmd. 1061 (1920), p. 14.

⁷² In 1919 the system of justice in Baghdad was extended to Basrah: same, p. 96.

In Iraq this was obviously impossible both because few British officers are acquainted with Turkish and because Ottoman law requires a multitude of courts, enquiring magistrates and prosecutors, much in excess of what could be provided, whether from the army, or from the officials of the former Government.⁷³

In Palestine "martial law" (military government) was enforced by military courts, while the civil courts dealt with other offenses according to Ottoman law. Disappearance of all the Turkish judges and court records provided an occasion for improving the judicial structure. Local courts were left in the hands of judges of the country, subject to British inspection. Whereas Ottoman law prescribed a five-man court in criminal cases, the British established a three-man court. The substance of the law was, according to Bentwich, amended only slightly. Punishments were made more humane by abolishing minimum penalties prescribed by the Ottoman Penal Code, and by increasing the discretion which a judge might exercise in the case of a juvenile offender in order to keep him out of prison.⁷⁴ Among other innovations calculated to secure expeditious justice, certain features of English practice were introduced in criminal matters. Witnesses were examined in the presence of the accused; confessions had to be proven to have been made voluntarily; and commercial suits were handed over to the same courts that tried civil suits, rather than being dealt with by special tribunals. Finally, one large class of cases were withdrawn altogether from the Courts: no action concerning the ownership of land could be heard and no judgment was given for execution upon immovable property. Only possessory rights were adjudicated. The reason for this was removal of the land registers by the Turks; but the prohibition was retained even after these records had been recovered.⁷⁵

United States. American occupation of the Rhineland after hostilities ceased in 1918 has been described as "freer of abuses than any other military government ever exercised by man."⁷⁶ The Rhineland situation anticipated in some respects that now existing in Germany. Four armies of different nations, under the supreme command of Marshal Foch, wielded

⁷³ Same, p. 95.

⁷⁴ *British Yearbook of International Law*, 1920-1921, p. 147.

⁷⁵ Bentwich, work cited, p. 146. Compare the decision of the Belgian *Cour de Cassation*, cited in note 57 above. In *Ochoa v. Hernandez y Morales*, 230 U. S. (1913), the United States Supreme Court held that a judicial order of General Henry, the military governor of Puerto Rico in 1899, which retroactively reduced the prescriptive period of land ownership from twenty years to six, was a deprivation of property without due process. Said the court: " * * * our government was bound by * * * international law to * * * secure public safety, social order, and the guarantees of private property" (p. 159). United States military forces in occupation of California introduced the custom of transferring real estate by deeds commonly used in the United States, suspending the Spanish form of conveyancing. Halleck's *International Law*, 4th ed., Vol. II, p. 484.

⁷⁶ Smith, *Military Government*, 1920, p. 57.

control over four separate zones. Instructions issued by Foch on November 15, 1918, to the commanding general of each zone⁷⁷ provided that laws and regulations in force at the time of occupation were to be respected in so far as they did not affect the occupying power or compromise its security; that all German civil officials were to be confirmed temporarily in their offices, but that replacements and transfers would be permitted whenever such action was deemed necessary or advisable by the military authorities.⁷⁸ In the terms of General Pershing's proclamation of instructions for the American Army entering Germany,

* * * so long as the inhabitants conduct themselves peaceably and quietly the ordinary civil and criminal laws will be continued in force and will be administered by the local officials, * * * and private property and personal rights will be respected.⁷⁹

The German courts continued to exercise both civil and criminal jurisdiction in the American Zone, just as before the occupation. A system of Provost Courts was instituted to try offenders against the military government for violations of our laws and regulations, but the maximum penalty which they were empowered to impose was six months imprisonment and a fine of 5,000 marks.⁸⁰ This order also provided that military commissions could be convened for the trial of inhabitants violating the laws of war or of the military government.⁸¹ While the latter could impose any penalty death sentences had to be approved by the commander in chief.⁸² It was required that every person tried by a Provost Court should be informed of the charges against him, that he should be present in person at the trial, and that he should be confronted with the witnesses against him. He was permitted to be heard either in person or by counsel. Bail was denied but a speedy hearing was guaranteed. All evidence had to be given under oath. Sentences were put into immediate execution, without awaiting action by the reviewing authority. When a conviction appeared to be erroneous it could be set aside by the Commanding General, whose Officer in Charge of Civil Affairs examined the Provost Court report in all cases.⁸³ In April, 1919, the substance of this policy was adopted by Marshal Foch, who granted to each convicted person the right of informal appeal to the highest commander of the army concerned.⁸⁴

⁷⁷ *American Military Government of Occupied Germany, 1918-1919* ("The Hunt Report"), pp. 45-48.

⁷⁸ Same, p. 46.

⁷⁹ Smith, work cited, p. 31; also General Pershing's proclamation to the inhabitants, Dec. 9, 1918: *The Hunt Report*, p. 31.

⁸⁰ General Orders No. 225, Dec. 10, 1918.

⁸¹ *The Hunt Report*, p. 92.

⁸² Only a few cases were tried by commissions. Smith, work cited, p. 36.

⁸³ *The Hunt Report*, as cited.

⁸⁴ Fraenkel, *Military Occupation and the Rule of Law*, p. 22.

No special tribunals were created for civil cases during the period of the armistice. As the German courts then lacked jurisdiction over members of the occupying forces, the latter could not be sued there at all.⁸⁵ But it was found necessary to deny jurisdiction to the local criminal courts in several other instances. Thus, when treason proceedings were instituted against one Hedwig, who had been distributing Rhenish independence propaganda in Coblenz, American authorities intervened, prohibited the courts from trying cases under German and Prussian treason laws, and proceeded against the accused before the Provost Courts for violation of American regulations.⁸⁶ It will be recalled that during the German occupation Belgian courts had attempted to maintain their right to prosecute for high treason Belgian participants in the German-sponsored Flemish autonomy movement, and that German occupation officials had prohibited the local courts from exercising judicial functions in these cases, precipitating the famous "strike" of the Judges.⁸⁷ Americans are hardly in a position to condemn German officials for something which we ourselves found necessary to do in an identical situation. A recent writer has expressed the view that:—

occupation authorities enforcing a state of martial law are entitled to restrict the jurisdiction of the occupied country's courts in high treason cases. High treason proceedings represent, in legal form, political measures taken by a government against those whom it considers enemies of the state. * * * An occupying power, enforcing a regime of martial law, cannot allow its friends to be treated as enemies by the authorities of the occupied territory.⁸⁸

The position taken is believed to be sound.

Marshal Foch's basic instructions provided that no penalty should be inflicted except by ordinary court procedure.⁸⁹ This, however, did not deprive military commanders of the right to impose administrative punishments for "reprehensible" conduct, such as expulsion from the occu-

⁸⁵ Same, p. 167; Niboyet, in *Revue de droit international privé et de droit international*, Vol. 16, 1920, p. 51. See Fraenkel, work cited, pp. 167-171, for practice during the peace period under the Rhineland Agreement.

For limitations upon the jurisdiction of the Japanese courts with respect to United Nations Nationals generally, see the policy statement adopted by the Far Eastern Commission on August 15, 1946, in *Department of State Bulletin*, Vol. 25, No. 375, September 8, 1946, p. 455.

⁸⁶ *The Hunt Report*, p. 289. The right of local officials to extradite persons for the purpose of trial by courts outside the occupied area in treason cases was likewise denied. Same, p. 289.

⁸⁷ See above, note 60, and for the German position, Kohler, *The Administration of the Occupied Territories*, Vol. I (Belgium), 1942, p. 68.

⁸⁸ Fraenkel, work cited, p. 44. "Coblence was under American jurisdiction and therefore we could not recognize treason against an enemy nation as a crime in our own country": *The Hunt Report*, p. 289.

⁸⁹ De Jaer, *L'arme belge d'occupation et son droit de juridiction*, Liège, 1928, p. 72.

pied territory, the closing of shops, or the levying of a collective fine upon municipalities. None of these acts was reviewable.⁹⁰ The general policy of the Allied Forces on collective fines is indicated in a special instruction of Marshal Foch of March 26, 1919, suggesting to commanding generals that imposition of such fines be restricted to serious cases in which citizens of the municipality in question had either assisted or sympathized with perpetrators of hostile acts. In the American Zone only one instance of a collective punishment was recorded.⁹¹

VI. PRACTICE DURING WORLD WAR II

German. German practice during the present war is so familiar as to require little extended description. Some of its typical features are suggested in the opening paragraphs of the present paper. Among changes introduced into occupied areas either directly or through puppet governments were: Modification of the Dutch law on citizenship; invalidation of that provision of the Polish Criminal Code whereby a judge could defer execution of penalties or exercise mercy; changes in the family law of Luxembourg, especially as to illegitimate children; and substitution of the consent of the Reich Commissioner to marriage of Dutch girls for the parental approval required by the Netherlands Civil Code.⁹² In districts forthwith annexed by Germany German law and courts were introduced.⁹³ But the most startling innovation of all was the principle of "punishment by analogy" which was applied when German Criminal Law was introduced into the incorporated areas, and in non-incorporated areas where German law was applied by German courts when trying inhabitants of the occupied countries. Under this principle an individual might be punished for an act he could not know was a crime at the time it was committed, if that act seemed merely analogous to any other act which was punishable by law. To determine this, the judge was directed to apply "sound popular

⁹⁰ Fraenkel, work cited, p. 24.

⁹¹ In the town of Kell on three successive nights rocks were thrown at American soldiers and the culprits could not be discovered. All inhabitants were ordered to remain in their houses between 7:00 P.M. and daybreak the next morning. After two weeks no further trouble was experienced. But when a French liaison officer whose suitcase was stolen from an automobile applied to the Civil Affairs Department to have a collective fine of 300 francs levied on the town to cover his loss, the Department promptly replied that such a levy would be improper. Smith, work cited, pp. 22-23.

⁹² Lemkin, *Axis Rule in Occupied Europe*, pp. 26-27.

⁹³ Oppenheim, *International Law*, 6th ed., Vol. II, p. 343. In Poland the administrative courts which dealt with complaints against administrative abuses were suppressed. Segal, *Nazi Rule in Poland* (1943), p. 23. For measures taken by Germany in annexing portions of occupied Belgium (Eupen, Malinédy, Moresnet) and France (Alsace, Lorraine), see *The Trial of German Major War Criminals, Proceedings at Nuremberg*, London, 1946, Part 5, pp. 342 and ff.

feeling" (*das gesunde Volksempfinden*).⁹⁴ Guarantees provided by specific wording in a statute were thus destroyed and the gates thrown open to all manner of judicial caprice and arbitrariness in aid of political ends. Adoption of two decrees containing this principle in Danzig prior to World War II was held by the Permanent Court of International Justice to be inconsistent with the Danzig constitution.⁹⁵ Writers outside Germany consider that such a statute, if applied to aliens in time of peace, would violate international law.⁹⁶ There is no doubt whatsoever that it also violates the international law governing the treatment of individuals in occupied areas. As Lemkin has pointedly observed:

If the occupant considered that the local law did not give sufficient protection to his military interests, he could lawfully introduce only the provisions of the German Criminal Code aiming at the protection of such interests. He certainly was not entitled to introduce the Criminal Code *in toto* relating to non-military matters such as family relations, morality and property rights * * *

The introduction of German law into the occupied countries cannot be justified by the occupant on the ground of military necessity. The purpose [was] * * * to assimilate these areas as soon as possible with the Greater German Reich * * * [This] is obviously a political objective and has no realistic relation to the needs of the army * * * German law is not conceived as human justice * * * It has divorced law from morality and mercy."⁹⁷

He therefore concludes that this practice contravened the Hague Regulations as well as the laws of humanity. It may be added that the execution of an individual under the "analogy" principle would also violate Article 46. Lives are not "respected" thereby; they are on the contrary profaned and destroyed by processes not truly legal.

Similar drastic modifications were effected by the Germans in judicial organization. The rights of an accused were prejudiced by the absence of preliminary investigation in some cases; by denial of appeal from decisions of special courts, even from sentences of death, as in Poland; by serving notice upon a defendant in as short a period as twenty-four hours before trial; by exclusion of members of the local bar as counsel unless specially permitted by the authorities; by administrative revision of a criminal judgment;⁹⁸ and by the vesting of judicial functions in military com-

⁹⁴ See, generally, Preuss, in *Journal of the American Institute of Criminal Law*, 1936, p. 857, and also in this JOURNAL, Vol. 29 (1935), p. 217. The original German act was dated June 28, 1935, and was published in the *Reichsgesetzblatt*, Teil I, p. 844, Art. I.

⁹⁵ *Case of the Danzig Decrees*, Series A/B, No. 65, p. 51; Hudson, *World Court Reports*, Vol. III, p. 513.

⁹⁶ See Freeman, *International Responsibility of States for Denial of Justice*, pp. 551-552; Lemkin, work cited, p. 28, note.

⁹⁷ *Azis Rule in Occupied Europe*, pp. 27-31.

⁹⁸ *Opinions of The Judge Advocate General*, SPJGW 1945/2849, 6 March 1945, and Wolff, "Criminal Justice in Germany," 43 *Michigan Law Review*, 1944, pp. 171-173.

manders, in District Governors, and in S.S. Officers who could inflict penalties without judicial procedure. Special courts (*Sondergerichte*)—organized by the Gestapo and the S.S. as an instrument of terrorism—tried violations of the law requiring the wearing of Jewish insignia, and among other things, of the regulations concerning the use of the German salute. To the extent that a defendant in ordinary criminal proceedings has been shorn of the safeguards generally deemed essential to the administration of civilized justice, action of the German military authorities in destroying the local judiciary and creating new courts must, again, be regarded as a violation of Article 43.⁹⁹ Such outrageous devices as refusal of counsel and prohibition of any plea other than guilty in abrogation of essential rights guaranteed by the local law; the exclusion of entire groups of the population from legal recourse; and the application of retroactivity of the criminal law could also be viewed as a violation of Article 23(h) of the regulations.¹⁰⁰

In addition to these aspects of judicial reorganization, the Germans introduced the principle of extra-territoriality, under which German inhabitants of the occupied territories were excluded from the jurisdiction of the local courts. Thus, for example, in Poland, a system of general German courts was established covering criminal cases of citizens of the Reich and of racial Germans, acts committed by Poles against the life, property or honor of a German, and acts committed by Poles while in the service of the German administration. In civil litigation the jurisdiction of the general German courts extended primarily to cases where one of the parties was a German from the Reich, or a racial German. The German courts had jurisdiction in the case even where the other party was not a German, and no German could be sued except before a German court, which followed German law and procedure.¹⁰¹ All infractions against decrees issued by the Governor General, and all acts considered to be against the interest of the German State or nation were within the jurisdiction of the German courts.¹⁰² However, it can hardly be said that adoption of the principle of extra-territoriality *per se* contravenes the limitations imposed by Article 43. Considerations of public order and the prestige and welfare of the

⁹⁹ For an exposition of German judicial measures in occupied territory, see generally, Lemkin, *Axis Rule in Occupied Europe*, pp. 33-35, and the same writer's comments in *The Judge Advocate Journal*, Vol. II (1945), p. 10.

¹⁰⁰ See above, note 2. In the tribunals employed by the Japanese during the Russo-Japanese war, the accused was given means to defend himself, but contrary to the ordinary rule his guilt was assumed in the absence of proof of innocence. Ariga, *La Guerre Russo-Japonaise et le Droit International*, p. 385. Spaight considers this transferring of the onus of proving innocence to be a "necessary principle of martial law justice," justified in the interest of law and order. *War Rights on Land*, p. 349. *Sed quare*.

¹⁰¹ Segal, *Nazi Rule in Poland*, p. 19.

¹⁰² Work cited, p. 20.

occupying forces may justify a withdrawal of jurisdiction over the occupant's subjects from the local courts.¹⁰³ But as related to the overall aim of suppressing the rights of the inhabitants, operation of the system in Poland could well be viewed as excessive.

Allied Practice. (a). *Italy.* The occupation of Sicily afforded the Allies their first experiment in joint administration. It also gave a preview of principles later to be applied in Germany. General Alexander's first proclamation announced that existing laws would remain in effect except in so far as it might be necessary to change or supersede them by orders of the Commanding General.¹⁰⁴ A second proclamation listed criminal offenses and the penalties therefor, and provided that any offense under the Italian Penal Code might be tried by a military government court, if the Military Governor should so direct.¹⁰⁵ While this, in effect, incorporated the entire Italian criminal law into the law of military government, it was not intended that military courts should normally try offenses under Italian law.¹⁰⁶ General, Superior, and Summary military courts, differing from each other in their powers of punishment, were established under Proclamation No. 4, which also guaranteed to an accused the fundamental rights of defense later provided for cases before military government courts in Germany.¹⁰⁷ Proceedings were to be public except when otherwise ordered by the Chief Civil Affairs Officer or the Court, which was never done in Sicily.¹⁰⁸ Proclamation No. 13 prohibited the fining or imprisonment of any person by Italian officials without trial, abrogating Fascist laws to the contrary.¹⁰⁹ Members of the Allied Forces were not subject to the jurisdiction of the Italian civil or criminal courts. Proclamation No. 7 dissolved the Fascist Party,¹¹⁰ confiscated its property, and suspended discriminatory laws based on differences of race, color or creed. Finally, after unconditional surrender, the Allied Control Commission became the organ through which United Nations policy to the Italian Government was expressed.

(b). *Germany.* Effective guarantees for individual rights—the antithesis of "the laws in force in the country" were prescribed for Allied Military Government Courts when Germany was occupied during World War II. Every accused before such courts was given the right to have in advance of trial a copy of the charges upon which he was to be tried;

¹⁰³ See *Dept. of State Bulletin*, Vol. XV (1946), p. 455, for similar Allied practice in Japan.

¹⁰⁴ Paragraph 3. *Italy Gazette*, p. 1.

¹⁰⁵ Article IV. Same, p. 3.

¹⁰⁶ Smith in *British Yearbook*, Vol. XXI (1944), p. 153.

¹⁰⁷ See (b), below.

¹⁰⁸ Holmes, in *Proceedings of the American Society of International Law*, 1945, p. 24.

¹⁰⁹ *Italy Gazette*, p. 37.

¹¹⁰ *Italy Gazette*, p. 25. The corporative system was abolished in Sicily by an order of Oct. 1, 1943. *United States and Italy*, Washington, 1946, p. 225.

to be present at his trial (trials *in absentia* being permitted if the accused was believed to be a fugitive from justice); to give evidence and to examine or cross-examine any witness; to be represented at the trial by a lawyer of his own choice; to present witnesses in his defense; to have the proceedings translated if necessary; and to petition for review of any conviction.¹¹¹ The reviewing authority was given power to set aside or modify any finding of guilty, and to order a new trial, but not to set aside a finding of not guilty.¹¹² Death sentences were not to be executed unless confirmed in writing by the Supreme Commander.¹¹³

Some of the other fundamental features of present occupation practice in Germany and Japan merit particular notice. Upon the entry of Allied Forces into Germany Proclamation No. 1 vested in the Supreme Commander "supreme legislative, judicial, and executive authority within the occupied territories." All German courts therein were suspended, the *Volksgerichtshof*, the *Sondergerichte* and the S.S. Police Courts were deprived of authority; and it was announced that the criminal and civil courts would be reopened when circumstances permitted.¹¹⁴ Military Government Courts were empowered to punish by death or other penalty such offenses as espionage, communicating with the enemy, attack upon or armed resistance to the Allied Forces; acts in violation of the surrender terms; pillage, looting, and a variety of other offenses prejudicial to public order. Some 23 additional offenses were punishable by penalty less than death.¹¹⁵ Collective fines (*Gesamtgeldstrafen*) were instituted, it being provided that the Burgermeister or other principal representative of a community could be charged and tried, in his representative capacity, with any offense for which the residents or a substantial number thereof were alleged to be collectively responsible; and in the event of his conviction and the establishment of collective responsibility, a collective fine might then be imposed upon the community.¹¹⁶ A system of General, Intermediate and Summary military courts was set up and their jurisdiction defined.¹¹⁷ Various funda-

¹¹¹ Mil. Govt.—Germany, Supreme Commander's Area of Control (hereafter designated as "S.C.A.C."), Ordinance No. 2, "Military Government Courts," MGR 23-215, Article V. See also *Military Government Gazette*, 21st Army Group Area of Control, No. 2, p. 7.

¹¹² Ordinance No. 2, Article VI, as cited.

¹¹³ Article VII.

¹¹⁴ S.C.A.C., Proclamation No. 1, MGR 23-200, Section III. Law No. 2 subsequently abolished the *Volksgerichtshof*, the *Sondergerichte*, and NSDAP Courts. MGR 23-202.

¹¹⁵ Ordinance No. 1, "Crimes and Offenses," S.C.A.C., MGR 23-214, Articles I and II. See also the *Military Government Gazette*, as cited. "There have actually been very few death penalties imposed by Military Government Courts. More serious offenders have been sentenced to prison terms of from ten to twenty years." Nobleman, in *Fed. Bar Journal*, Vol. VIII (1946), p. 71, note.

¹¹⁶ Ordinance No. 1, Article IV.

¹¹⁷ Ordinance No. 2, S.C.A.C., MGR 23-215, Articles I and II. On the functions of these courts, see Nobleman, work cited, pp. 84 and ff.

mental Nazi laws were abrogated in the interest of restoring justice and equality before the law.¹¹⁸ The bringing of charges based upon *ex post facto* laws was prohibited, along with the punishment of offenses by analogy.¹¹⁹ Law No. 2 prescribed the qualifications of judges and attorneys;¹²⁰ it prohibited German Courts from exercising jurisdiction in any case involving the armed forces or nationals of any of the United Nations;¹²¹ and vested in the Military Government the power to (a) dismiss or suspend any German judicial officer and to disbar any attorney; (b) supervise the proceedings of any court and review administratively, nullify or modify any finding or judgment thereof; and (c) transfer to the jurisdiction of the Military Government Courts any case or class of cases.¹²² All German Courts-martial other than Field Courts-martial were abolished.¹²³ Parallel implementing laws were enacted in the several zones of occupation administered by the Allies.¹²⁴

With the final military collapse of Germany, the disintegration of its government and economic system, and the creation of the Control Council as the paramount governing body of all of occupied Germany, a more definitive and comprehensive program to achieve the aims of the war was put into operation. Never in the history of military occupation have such extensive powers been wielded by a military government as are now being exercised in Germany.¹²⁵ Fundamental principles of judicial reform were proclaimed on October 20, 1945, reaffirming the doctrine of equality before the law along with the independence of the judiciary, and restoring guarantees for individual rights of the type indicated above.¹²⁶ Pursuant thereto a reorganization of the entire judicial system was enacted which revived the structure of January 27, 1877, reestablishing the *Amtsgerichte*, *Landesgerichte*, and *Oberlandesgerichte*.¹²⁷ Legisla-

¹¹⁸ Law No. 1, Article I, S.C.A.C., MGR 23-201. And see the provisions of Control Council Law No. 1, repealing a list of 26 laws for all occupied Germany. *Department of State Bulletin*, Vol. XV (1946), No. 384, p. 859.

¹¹⁹ Law No. 1, Article IV.

¹²⁰ Articles I-II, MGR 23-202. See also *Military Government Gazette*, British Zone of Control, No. 3, p. 4.

¹²¹ Article VI.

¹²² Article VII.

¹²³ Law 153, Article 1. Cf. *Military Government Gazette*, No. 3, p. 132.

¹²⁴ In the British Zone of Control British civilians guilty of offenses which would have been a crime in England, were subjected to the jurisdiction of the Military Government Courts. Penalties in such cases were to be the same as those provided by English law. See Ordinance No. 5, British Zone of Control *Military Government Gazette*, No. 4, p. 5. Military Government Courts in the U.S. Zone have relinquished jurisdiction to try Soviet citizens living there. MGR 5-381.1, and for comment, Nobleman, work cited, p. 82.

¹²⁵ Or, for that matter, in Japan. See (c), below.

¹²⁶ Above, notes 111-113.

¹²⁷ Control Council Law No. 4, October 30, 1945, MGR 23-124; *Military Government Gazette*, No. 5. For the principle accepted at Potsdam on this matter see *Dept. of State Bulletin*, Vol. XIII, August 5, 1945, p. 155.

tion was likewise adopted to punish persons guilty of war crimes, as well as crimes against peace and humanity, and setting up a procedure for the prosecution of such cases.¹²⁸ Numerous provisions of the German criminal law were repealed;¹²⁹ income, corporation, excess profits, and property laws were amended;¹³⁰ and a comprehensive marriage and divorce code was enacted.¹³¹

(c). *Japan*. Similar fundamental changes are being made in the social, economic, and governmental structure of Japan, the most far-reaching of which was the promulgation of a new Constitution on November 3, 1946.¹³² The Ministries of War and Navy were dissolved; State Shintoism was abolished by depriving its priests and institutions of government support; the "thought police" was eliminated;¹³³ suffrage was broadened by lowering the voting age from 25 to 20, and by extending the franchise for the first time to women.¹³⁴ The Japanese Government has been prohibited from exercising criminal jurisdiction over United Nations nationals or organizations, as well as over acts prejudicial to the security of the occupation forces.¹³⁵ Civil jurisdiction over United Nations nationals attached to

Celebrated Law No. 5 relative to German external assets was adopted on the same date. It provided that all rights in respect of any property outside Germany which is owned or controlled by any person of German nationality whether residing inside or outside of Germany "are hereby vested in the [German External Property] Commission." Articles II and III, MGR 23-125. See also *Military Government Gazette*, No. 5. This law was aimed at divesting such assets of their German ownership to eliminate Germany's war potential in accordance with the Potsdam Declaration. See *Department of State Bulletin*, as cited, p. 156.

¹²⁸ Control Council Law No. 10, December 20, 1945. For text see *Department of State Bulletin*, Vol. XV, Nov. 10, 1946, p. 862. By Control Council Directive No. 18 of Nov. 12, 1945, the German Armed Forces were "disbanded and dissolved." *Military Government Gazette*, No. 9. Cf. also the *Journal Officiel, Gouvernement Militaire de la zone Française* (hereafter referred to as "J.O."), May 11, 1946, p. 181.

¹²⁹ Law No. 11, January 30, 1946; *Military Government Gazette*, No. 7, p. 96.

¹³⁰ Laws No. 12 and 13, February 11, 1946; work cited, p. 106.

¹³¹ Law No. 16, February 20, 1946; work cited, p. 110. For similar broad measures in the French Zone, see: *Arrêté No. 7 de l'Administrateur Général*, July 23, 1946; *J.O.*, No. 30, August 2, 1946, p. 256 (creating an administrative tribunal for the Saar); *Ordonnance No. 6*, September 10, 1945 (reestablishment of law relative to trade-unions); *Ordonnance No. 49, J.O.*, No. 32, August 10, 1946 (to ensure secrecy and freedom of ballot in German elections).

¹³² The official English language translation of this constitution (which was passed by the House of Peers on October 6, 1946) was released by the Far Eastern Commission on November 19, 1946, as FEC Document 087/14. The Japanese text is available as FEC 087/15.

¹³³ Article 19 of the new Japanese Constitution, and MacArthur's directive to the Japanese Gov't, Oct. 4, 1945, State Department pub. 2423, p. 115.

¹³⁴ Constitution, Article 15.

¹³⁵ SCAPIN-756, February 19, 1946, AGO15. Military commissions (empowered to impose the death penalty) and Provost courts were established as occupation courts under this directive.

or accompanying the armed forces has likewise been withdrawn from the Japanese courts, and decisions in all civil cases affecting other United Nations nationals made subject to review, including such revision or other action considered necessary by SCAP. Provision has also been made for review by him of sentences imposed by Japanese criminal courts upon Koreans and other nationals formerly under Japanese domination.¹³⁶ Numerous other measures of a financial, social, and economic nature aimed at the democratization and demilitarization of Japan are being directed and enforced.¹³⁷

* * *

No pretense is here made that all of the practices summarized above are reconcilable with the limitations imposed by the Hague Regulations. Some of the measures taken in Germany prior to liquidation of the Doenitz Government might seem, so far as the bare extent of the powers exercised, on a plane not far removed from those asserted by the Germans during their occupation of Allied territory. There is evident, however, a considerable difference between pernicious legislation which violates the rights of the inhabitants and legislation designed to secure to them that respect for lives, persons, and property which the Nazis abjured. On the other hand, a distinction is clearly warranted between measures taken by the Allies prior to destruction of the German Government¹³⁸ and those taken thereafter. Only the former need be tested by the Hague Regulations, which are inapplicable to the situation now prevailing in Germany. Disappearance of the German State as a belligerent entity, necessarily implied in the Declaration of Berlin of June 5, 1945,¹³⁹ signifies that a true state of war—and hence *belligerent* occupation—no longer exists within the meaning of international law. The occupying authorities are exercising and are entitled to exercise all the attributes of sovereignty over the area. While

¹³⁶ SCAPIN—776, February 26, 1946.

¹³⁷ Among these are revision of the educational system (cf. SCAPIN Directive 178 to the Japanese Government, October 22, 1945); dissolution of monopolistic Japanese combines (the *Zaibatsu* interests) pursuant to par. 11 of Potsdam surrender terms (*The New York Times*, Nov. 28, 1946); termination of feudal system of land tenures (same, Dec. 10, 1945). See also same, April 9, 1946, reporting the abolition of compulsory loans under Government blanket guarantees. Under the Hague Regulations, modification of the system of landholding would be unlawful according to McNair, *Legal Effects of War*, pp. 338–339.

¹³⁸ "Unconditional surrender of the German and Japanese forces which resulted in their laying down arms without the special reservations usually inserted in armistice conventions, does not *ipso facto* imply that the capitulating power abandons all claim to the benefits of the Hague and Geneva Conventions in favor of its nationals" (Letter dated September 6, 1946, from Max Huber, President of the International Committee of the Red Cross, to Secretary of State Byrnes, unpublished). Compare Hyde, work cited, § 701A.

¹³⁹ *Department of State Bulletin*, June 10, 1945, p. 1052.

the factual situation in Japan is different inasmuch as a Japanese Government remains in being, the Hague rules are no more applicable to that defeated enemy than to its former ally. Japan's status is governed by certain sweeping prerogatives vested in the victorious belligerents under drastic surrender terms defined at Potsdam¹⁴⁰ on July 26, 1945, and without which military operations against the enemy would not have been arrested. The Hague Regulations do not purport to limit a conqueror's power to impose conditions upon a vanquished foe, nor do they exclude the exercise of such power unless provision is made therefor in a treaty of peace.

VII. SOME SPECIAL PROBLEMS; CONCLUSIONS

Prior to World War II the rules on belligerent occupation were rarely discussed on the basis of whether their violation constituted punishable "war crimes." Authorities generally spoke in terms of an occupant's powers and of the legal effect of measures taken. In this respect the Report in 1919 of the *Commission on Responsibilities of the Authors of the War* was a significant advance over previous doctrine, at least in so far as the occupant's legislative and judicial excesses are concerned. In its list of 32 separate headings on violations of the laws of war to be invoked for criminal prosecutions, was included "Usurpation of Sovereignty during Military Occupation"¹⁴¹ Particulars thereunder set out in part, (1) the institution of German civil courts in Roumania to try disputes between subjects of the Central Powers, or between a subject of these Powers and a Rumanian, a neutral, or subjects of Germany's enemies; and (2) suspension of many Serbian laws and substitution of Austrian law therefor in penal matters, in procedure, and in judicial organization.¹⁴² But does it follow that every "usurpation of sovereignty" is something which should be classed *eo ipso* as a war crime? Or is it not more consistent with previous practice to inquire further as to the effects of alleged excesses on rights of persons and property? Some caution clearly appears warranted by the evidence examined herein, which attests that broad twilight zones separate the forbidden from the permitted. On the other hand, a weighty responsibility rests upon those who prosecute not to stretch the Hague Rules beyond their true intent. Archaic and inadequate though they appear when tested in the crucible of total war and the organization of modern society, they were nevertheless the law applicable to World War II.

There are still other hazards to an accurate application of the Hague Rules, however. At the opening of the present paper reference was made

¹⁴⁰ Same, for August 12 and August 19, 1945.

¹⁴¹ *Pamphlet No. 32. Carnegie Endowment for International Peace*, p. 38; and this JOURNAL, Vol. 14 (1920), p. 114.

¹⁴² *Carnegie Pamphlet No. 32*, as cited.

to a category of judicial crimes involving the punishment of relatives of an accused inhabitant where curfew regulations were violated. Aside from the possible allegation that a vicarious punishment of this kind conflicts with the letter of Articles 43 and 46 of the Regulations when read separately, or with their spirit when read together, would the charge that these facts constitute a collective penalty (Article 50) be properly drawn? For example the 1919 Commission on Responsibilities included in its summary of offenses "the imposition of collective penalties,"¹⁴³ specifying that German military authorities "held families responsible for the escape of Belgians liable to military service."¹⁴⁴ However, it is questionable whether this is a reasonable construction of Article 50 and whether this type of penalty is contemplated by Article 50 at all. That article declares that "no *general* penalty (*peine collective*), pecuniary or otherwise, shall be inflicted upon the *population* on account of acts for which they cannot be regarded as jointly and severally (*solidairement*) responsible."¹⁴⁵ It may be conceded that while Article 50 is located among the provisions relative to levies in money or kind and the treatment of enemy property, it was not intended to exclude punishments other than pecuniary, but on the contrary, embraces every type of collective penalty. Nevertheless, the basic purpose was to prohibit a belligerent from fastening upon an entire community responsibility for acts which were purely individual, and for which, therefore, the whole population should not be made to suffer. This is clear from the proceedings of the First Hague Conference.¹⁴⁶ Article 50 was concerned with *general* penalties in the social group sense, not in the narrow sense of punishing *A* for a crime committed by *B*. The latter type of viscarious penal responsibility, as noted above,¹⁴⁷ was deemed unobjectionable by Spaight and Hall in commenting upon the Prussian practice in 1870-1871 of fining relatives 50 francs a day for each day an individual subject to conscription was absent from his place of residence.

¹⁴³ Same, item 17, p. 44.

¹⁴⁴ As cited. For a detailed survey of the German theory and practice on collective penalties for wrongs committed by individuals, see Garner, *International Law and the World War*, Vol. II, Ch. XXVI; Mérignhac, work cited, Vol. I, p. 595, and compare Fauchille, work cited, Vol. 2, p. 293.

¹⁴⁵ See above, p. 581.

¹⁴⁶ J. B. Scott, *Proceedings of the Hague Conference of 1899*, p. 55; and see also Spaight, *War Rights on Land*, p. 438; Westlake, *International Law*, Vol. II, p. 106; Feilenfeld, *International Economic Law of Belligerent Occupation*, pp. 47-48; Rolin, *Le droit moderne de la guerre*, Vol. 1, pp. 481 ff. Neither the question of reprisals nor that of hostages was prejudged by this article. *Proceedings*, as cited; Hyde, *International Law*, 2nd ed., § 692; War Department Field Manual, FM 27-10, *Rules of Land Warfare*, par. 334, recognizing that Article 50 does not prohibit "reprisals by the occupant for violations of the laws of war or breach of the occupant's proclamations or regulations by enemy individuals not belonging to the armed forces." See also Wheaton, *International Law*, 7th ed., Vol. II, p. 231.

¹⁴⁷ See above, notes 22 and 23.

But even were that practice regarded as reasonable, it would hardly follow that the execution of relatives in such cases conforms to international law. On the other hand, to charge excessive penalties under Article 50 would certainly be open to criticism. A sounder basis for prosecution would seem to be Articles 43 and 46, as well as the principles incorporated into the preamble of Hague Convention No. IV of 1907.¹⁴⁸

* * *

In view of the uncertainties reflected above, therefore, it may be dangerous to rest a case against judicial or administrative officials solely upon the ground that every action of a tribunal illegally instituted under international law automatically entails the criminal liability of all persons concerned. Moreover, so to hold would inject the element of criminality into a class of cases in which, while a belligerent may have technically exceeded his powers under international law, the fundamental rights of an accused were at all times respected. It might involve the unreasonable proposition that, irrespective of the guilt of an accused, a judge who impartially presided at proceedings which provided adequate safeguards for the defendant's rights and which terminated in a just sentence, was nevertheless a war criminal. The situation may be wholly hypothetical but it assumes greater significance when it is realized that the powers of an occupant in the domain of legislative and judicial action are extremely broad and that while, for policy reasons, he may refrain from interfering in local administration, he is not required to do so. The circumstances confronting military authorities (refusal of local judges to serve; breakdown of local justice, and so on) may leave no other alternative than to create new courts staffed with enemy personnel. Certainly the creation of military tribunals manned by enemy judges in occupied areas is an acknowledged right of every belligerent,¹⁴⁹ as is the right to refer to them offenses committed by his armed forces. While numerous text-writers, interpreting Article 43, accept as a general rule that the organization of the occupied country's courts should remain intact, the practice of belligerents even prior to World War II recognized that special tribunals could be established to deal with offenses by the inhabitants against (a) the authority of the occupant, or (b) against persons belonging to his armed forces, or (c) in violation of the occupant's decrees and

¹⁴⁸ Wheaton, *International Law*, 7th ed., Vol. II, pp. 262-263, where the author condemns the execution of whole families of Yugoslavs because a son attacked the occupants, as contrary to the law of nations.

¹⁴⁹ Spaight, *War Rights on Land*, p. 357; Halleck, *International Law*, 3rd ed., Vol. II, p. 439; Fauchille, *Droit International Public*, Vol. II, pp. 227, 232; Westlake, *International Law*, Vol. II, p. 96; Rolin, *Le Droit Moderne de la Guerre*, Vol. 1, p. 436; FM 27-10, *Rules of Land Warfare*, par. 288; Oppenheim, work cited, p. 349; Kunz, work cited, p. 93.

regulations.¹⁵⁰ On the other hand, there may be cases in which the establishment of new courts or vesting of jurisdiction in enemy appointees is clearly unrelated to military necessity. But the limitations imposed upon a belligerent's conduct are not sharply defined by international law. It may not be easy to determine objectively whether an alleged "usurpation" was an excessive exercise of power. Similar observations apply with respect to modifications of the local criminal law and procedure. The general principle of respect for existing laws and institutions does not require a belligerent to retain such judicial *impedimenta* of the political system in the occupied area as might seriously threaten the security of the occupation. Accordingly Article 43 was not infringed by the abolition of such Nazi institutions as the People's Court (*Volksgerechtshof*) or by the abrogation of those civil and criminal laws whose retention might furnish an incitement to disorder and hamper the successful administration of the territory.¹⁵¹ As already intimated, the Hague injunctions with respect to lives and persons of all the inhabitants may compel the occupant to annul laws which contemplate the degradation and spoliation of individuals as a class.

To sum up: action of a court itself, rather than any alleged illegality in its inception, should furnish the test of judicial criminality. The decisive consideration would seem to be whether trial of an accused by such a court deprived him of the protection to which he is entitled under international law, that is, whether judicial action produced either a violation of some specific prohibition in the regulations, or was in disregard of those fundamental principles of human justice recognized by civilized peoples and which are incorporated in the preamble of Hague Convention IV of 1907.¹⁵² Thus, for example, denial to an accused of the right to plead not guilty, to introduce evidence or to present witnesses, application of principles of law condemned by the practice of civilized nations such as punishment by analogy; imposition of an outrageously excessive penalty in relation to the offense alleged; imposition of harsh penalties upon relatives of a person charged with acts in which their participation is not established; and such draconic action as execution of the relatives of one who is accused of violating curfew regulations, all are properly classed as war crimes subjecting every judicial or administrative official associated with the proceedings, the judgment, or execution of the sentence, to punishment as a war criminal.

¹⁵⁰ See Schwenk, in *Yale Law Journal*, Vol. 54 (1945), p. 405; also paragraph 42d of the United States Manual of Military Government, War Department Field Manual, FM 27-5.

¹⁵¹ The validity of such measures can be sustained solely with reference to international practice under the Hague Regulations, irrespective of the larger powers enjoyed by the victorious belligerents under the Berlin and Potsdam Declarations of June 5, 1945 (this JOURNAL, Vol. 39, supp., p. 171) and August 2, 1945 (same, p. 245). See also Kelsen in this JOURNAL, Vol. 39 (1945), pp. 518-519.

¹⁵² Scott, *The Hague Conventions and Declarations of 1899-1907*, pp. 101-102.

The summary execution of individuals without any judicial proceedings whatsoever likewise provides an unquestionable basis of guilt.¹⁵³ Nor should any greater weight be given to the pleas of "act of State" and "superior orders" than is given in other cases of illegalities by members of enemy forces.¹⁵⁴ Analogous principles should govern the problems raised by illegally constituted civil and commercial courts, whose action results in illegal condemnations, seizure or destruction of a litigant's property and judicial process in aid of the "economic" war crimes. In all cases the deceptive cloak of a formalistic legality may be pierced to determine whether substantive rights have been violated. And the reasonableness of a given measure, in relation to the occupant's security and to public order and safety defines its propriety under international law.

For some, no doubt, this general approach to the problem of "judicial" war crimes may appear to be a rather complex and laborious method of establishing guilt, less convenient than a doctrine which would derive individual criminality merely from the fact that a given court was illegally constituted (that is, pursuant to a usurpation of sovereignty or some other violation of the law of war). Under that doctrine it would presumably be sufficient to demonstrate (a) that creation of the court was illegal under international law, and (b) that alleged war criminals X, Y, and Z at some time or other were members of this court. Whatever the technical warrant for such a theory, justice to an accused, no less than a proper solicitude for the judgment of history, would seem to require something more than disposal of these cases on so formalistic and over-simplified a basis. Even under the view here taken a tribunal might regard, as sufficient for establishing guilt, a showing that a given judicial body was organized, and in fact regularly conducted its proceedings, in such manner as to infringe the rights which international law guarantees to an accused; that, at a given date, X, Y, and Z sat upon such a court; and that penalties were executed pursuant to judgments thus rendered. While such evidence might justify a showing that the accused participated in the proceedings, the presumption could, of course, always be overcome by the presentation of appropriate proof.

¹⁵³ On German practice of summary police justice in occupied Holland see *The Trial of German Major War Criminals, Proceedings at Nuremberg*. London, 1946, Part 5, pp. 308-11, 316.

¹⁵⁴ FM 27-10, *Rules of Land Warfare*, par. 345, C-1, Nov. 15, 1944.

EDITORIAL COMMENT

THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

The General Assembly of the United Nations, on December 11, 1946, appointed a committee consisting of the representatives of seventeen states to study the methods which might suitably be adopted to implement the obligation of the Assembly imposed by Article 13 of the Charter to initiate studies and make recommendations to encourage the progressive development of international law and its codification. The original members of the Committee were: Argentina, Enrique Ferrer Viera; Australia, W. A. Wynes; Brazil, Gilberto Amado; China, Shu-hsi Hsu; Colombia, Antonio Rocha; Egypt, Wabid Rafaat; France, Henri Donnedieu de Vabres; India, Dalip Singh; Netherlands, J. G. de Deus; Panama, Roberto de la Guardia; Poland, Konstanty Grzybowski; Sweden, Erik Sjoborg; Union of Soviet Socialist Republics, Vladimir Koretsky; United Kingdom, J. L. Brierly; United States of America, P. C. Jessup; Venezuela, Carlos Eduardo Stolk; Yugoslavia, Milan Bartos.

The Committee met at Lake Success on May 12 and elected the representative of India, Sir Dalip Singh, Chairman. The representative of the United Kingdom, Professor J. L. Brierly, was elected Rapporteur. Dr. Yuen-li Liang, Director of the Division of Development and Codification of International Law of the Legal Department of the United Nations Secretariat, acted as secretary of the Committee.

The General Assembly resolution of December 11 directed the Committee to study *inter alia* "the methods of enlisting the assistance of such national or international bodies as might aid in the attainment of its objectives." The names of such bodies have been collected by the Committee and the American Society of International Law is naturally on the list. On May 9, three days before the Committee's first session, a meeting was held in the Department of State in Washington upon the invitation of the Honorable Charles Fahy, Legal Adviser, of representatives of the following seven American organizations interested in coöperating in the work of the Committee: American Bar Association, American Branch of International Law Association, American Law Institute, American Society of International Law, Carnegie Endowment for International Peace, the Federal Bar Association, and the National Lawyers Guild. The representatives of these organizations met with Dr. Philip C. Jessup, the United States representative, Mr. Fahy, and other representatives of the Legal Department of the State Department. In an all-day session they discussed the problems involved in the progressive development of international law and its codification, and the methods to be followed. The Chairman of the Society's Committee on the Codification of International Law, Judge

Manley O. Hudson, has since been in communication with the United Nations' Committee in New York.

After holding thirty meetings, the General Assembly's Committee agreed upon a final report and adjourned on June 17. The report will be submitted to the next regular session of the General Assembly. It is printed in the Supplement to this number of the JOURNAL.* Professor Jessup submitted his report as the United States representative on June 19. When the General Assembly approves the procedure, the next step will be to determine the matters of substance involved in the progressive development of international law and its codification.

The terms of reference to the General Assembly are not explained in Article 13 of the Charter. On reading the Preamble of the Charter we find it stated that the peoples of the United Nations are determined to save succeeding generations from the scourge of war by, *inter alia*, establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." Article 13 may be interpreted as a logical consequence of this general declaration; thus in the progressive development of international law, those rules of conduct which have a direct bearing upon international peace are entitled to receive primary consideration. Such a conclusion is in accord with the views of great jurists who have expounded the principles of international law and upon whose works we are dependent for its history and past development. For example, Immanuel Kant, the philosopher of Königsberg, in his essay entitled *Perpetual Peace*, published in 1795, contended that peace is the final goal of international law, and he proposed to preserve international peace by forming a voluntary, permanent congress of nations. "It is only in this way," he said, "that the idea can be realized of establishing a public law of nations which may determine their differences by a civil method, like the judicial proceedings among individuals, and not by a barbarous one (after the manner of savages), that is to say, by war." Again, a great English jurist, Sir Robert Phillimore, some ninety years ago emphasized the analogy between the subjection to law of the individual within the state and the subjection to law of the states themselves within the international community. Certain of his sentences are worth repeating here:

To clothe with reality the abstract idea of justice, to secure by law within its own territories the maintenance of right against aggression of the individual wrong-doer, is the primary object of the state, the great duty of each separate society. To secure by law, throughout the world, the maintenance of right against the aggression of the national wrong-doer, is the primary object of the commonwealth of states, and the great duty of the society of societies. Obedience to the law is as necessary for the liberty of states as it is for the liberty of individuals.

* Belcw, Supplement, p. 18.

The first World War, like the second World War, was initiated with a disregard of the rights of nations recognized by both customary and conventional international law. Speaking of the situation as it existed in 1915, Elihu Root, then President of the American Society of International Law, declared at its annual meeting in Washington, "To give international law binding force, a radical change in the attitude of nations toward violations of law is necessary. Up to the present time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injustice was inflicted and the nation inflicting it. . . . There must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation." Mr. Root then asserted that "Rules may be so framed that a policy of aggression cannot be worked out except through open violation of law which will meet the protest and condemnation of the world at large, backed by whatever means shall have been devised for law enforcement."

When the Covenant of the League of Nations was adopted at the end of World War I, it contained for the first time a conventional recognition that "any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations" (Article II). The weakness of the League which finally led to its dissolution is a matter of history. The unanimity rule, based upon the theory that sovereign states are not bound by new law to which they have not consented, coupled with the flagrant disregard of their covenanted obligations by large powers which were members of the Council of the League, frustrated the primary purpose for which it was formed, namely, to achieve international peace and security. The United Nations has been substituted for the League as a more effective organization to accomplish what the League failed to do. So far as concerns the preservation of international peace the main difference between the two organizations is the modification of the unanimity rule so that in the United Nations the unanimous vote of only the five great powers is necessary in decisions involving the peace of the world and the suppression of aggression. Since world wars are not conducted by the small powers but only by the great powers, the futility of the change is obvious.

The first requisite of every civil society, beginning with the most primitive and progressing through the ages to the most civilized, is to safeguard the public peace in order to assure the security of its members. When, however, we step beyond national boundaries, we find that the community of states is totally deficient in the means of preventing or punishing breaches

of the international peace as such. Our modern world with all its advances in other respects is juridically impotent to preserve its own existence except by the primitive methods of self-redress discarded centuries ago in the evolution of rational societies. Hence, the policies of the great powers to build great armaments and to form alliances to protect what they have, and the cries for security of every small and threatened state.

This deficiency in the development of the law of the international community is something more than a gap to be casually filled in the strengthening of international law by the slow processes of time and custom. The atomic bomb and other lethal weapons of mass destruction have out-moded such processes. The threats to the continuance of our civilization become more and more dangerous in the ruthless and widespread character of every recurring war. Conditions in the world today should make it clear to everyone that the most fundamental and vital international problem is the prevention of international aggression by legal precept and organized procedure freed from the delaying tactics of international debate or from frustration by the veto of a potential or actual aggressor.

The peace of the world today depends upon these words in Article 39 of the Charter of the United Nations: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken," and those decisions must be made by the unanimous vote of the five great powers. This is a fundamental structural weakness upon which it will never be possible to build a world based upon law and order. What is needed is:

First, a clear and unambiguous denunciation of aggression as a crime against international peace. Many such denunciations are already embodied in treaties and resolutions of international conferences, but without implementation they are useless. A statement to this effect was made recently by Mr. Warren R. Austin, chief representative of the United States to the United Nations, when he said: "Nothing happens as a result of conferences, proposals, recommendations and votes in the United Nations except as the member nations implement their talk and their votes with individual action." The International Military Tribunal at Nuremberg hanged some Nazi leaders for planning and engaging in international aggression. In the universal satisfaction with the retributory justice meted out to these captured enemies some would have us believe that the job of outlawing aggression has been completed; but the judgment of Nuremberg is a weak reed upon which to lean. Its chief value as precedent is that in case of another war, and we are victorious, and we catch the enemy criminals, we will try and execute them. The precedent, therefore, envisages another war. Our duty is to try to prevent another war.

Secondly, we must have a definition of aggression which the peoples of the world can understand. It cannot be left to the *ex post facto* delibera-

tions of a political body such as the Security Council of the United Nations. Up to the present time the great nations, including the United States, have deliberately refused to consider a definition of aggression on the ground that it is too dangerous because it might omit conditions that cannot be foreseen. This argument was advanced by Secretary of State Kellogg when he declined the French proposal that the Paris Pact for the Renunciation of War be limited to aggressive war. It was repeated by Secretary of State Stettinius in defense of the attitude of the delegation of the United States to the United Nations Conference at San Francisco. World peace and the preservation of our civilization cannot be made to depend upon the possibility of securing a perfect definition. We must start somewhere. As a beginning, the dropping of an atomic bomb in time of peace should be declared an act of aggression. We might go a step farther and incorporate in universal law the definition already agreed to by the United States and the other States of America in the Act of Chapultepec. Should our Soviet allies object to an American definition, we might suggest their own definition in non-aggression pacts which they concluded in 1932 and 1933 with Afghanistan, Czechoslovakia, Estonia, Finland, Latvia, Persia, Poland, Rumania, Turkey and Yugoslavia, that is, with all neighboring states except China and Japan.

Finally, the international act outlawing aggression should expressly state that the prevention or suppression of aggression should be the concern of every other state of the international community acting either collectively or separately. Experience with the League of Nations now being repeated with the United Nations has demonstrated the practical impossibility of obtaining international agreement for the application of sanctions against a law-breaking state, especially if a great power is concerned either directly or indirectly. It is essential that preventive or remedial action by any state or group of states should be legalized whenever it appears that the international security organization is impotent or unwilling to act.

It seems advisable to recall in this connection the legal position of the Government of the United States during the period from the outbreak of World War II on September 1 until we entered the war as a belligerent following the attack on Pearl Harbor. There is no doubt that at the beginning of the war we were and intended to remain neutral. In his message to Congress on September 21, 1939, President Roosevelt requested that the neutrality law of 1937, which had placed an embargo on the export of war munitions to any belligerent, be modified so that we might return to our historic foreign policy based upon the age-old doctrines of international law, that is, upon the solid footing of real and traditional neutrality. However, when Congress passed the Lend-Lease Act on March 11, 1941, we not only departed from our real and traditional neutrality but repudiated the principles of neutrality under which, in the *Alabama* claims case following the Civil War, we had held Great Britain liable and collected

an indemnity of over \$15,000,000. These facts are mentioned, not for the purpose of criticism, but to add force to the argument that if we intend to abandon our traditional policy of neutrality permanently and take an effective part in maintaining peace and suppressing aggression throughout the world, we should not remain in the dubious position in which we found ourselves in the year 1941. Our position, as well as that of every other signatory, should be made clear that, in case of violations of the international agreement against aggression, we retain the right to act separately against any law-breaking state or in concert with such other states as may wish to join us in any case where the United Nations fails to act.

The most forceful argument that has been made by critics of our so-called isolationism is that our policy has encouraged war because of the belief that we would not take sides. It is further argued that if our eventual participation had been foreseen, the wars would not have started. An international organization in which one powerful member is capable of paralyzing collective action against aggression is as dangerous to the preservation of peace as any other form of isolation. If we must help police the world in order to save ourselves and our civilization, we should be free to do so without incurring the reproach from any quarter that our action is in violation of international law or treaties.

GEORGE A. FINCH

Editor-in-Chief

PROPOSED INTERNATIONAL LEGISLATION WITH RESPECT TO BUSINESS PRACTICES

That agreements between private business enterprises engaged in international trade, which regulate the terms of competition between them, can have important effects upon the flow of that trade has long been apparent. During the period between the two World Wars, agreements of this nature were entered into on a broad scale, particularly in Western Europe.¹ Often these agreements were supported by government policy and sometimes supervised or participated in by government agencies.² The Nazi totalitarian state, as it prepared for World War II, utilized the position of German industry in many of these combines or cartels to the fullest extent possible for its political and military purposes.³

In the years 1935-1940, enforcement action under the anti-trust laws in the United States, with its traditional anti-trust policy and emphasis upon competition, was increasingly directed against these cartels, particularly where American companies had any share therein. Suits were commenced

¹ Edward S. Mason, *Controlling World Trade*, 1946, p. 11 (hereinafter referred to as Mason); Ervin Hexner, *International Cartels*, 1945, pp. 3-18 (hereinafter referred to as Hexner).

² Mason, p. 14; Hexner, pp. 12, 28-29.

³ Wendell Berge, *Cartels, Challenge to a Free World*, 1944, p. 214; Mason, pp. 96-132. See also Joseph Borkin and Charles A. Welch, *Germany's Master Plan*, 1943.

by the Department of Justice to enforce the anti-trust laws against any agreement or course of business operations which restrained either the export or import trade of the United States. The courts, departing further and further from their original limits of jurisdiction as laid down in the American Banana Co. Case,⁴ rendered decisions upholding the application of the anti-trust laws when it could be shown that any agreements, wherever made, respecting goods, wherever produced, in their effect curtailed or limited what came into or went out of the United States.⁵ During the war years this anti-trust policy and these decisions were utilized in an effort to break agreements which were deemed to hamper the war effort of the United States.⁶

In 1944 President Roosevelt wrote Secretary Hull asking that the State Department prepare itself for international consideration of the cartel problem.⁷ With the close of the war the State Department announced its *Proposals for an International Trade Organization*⁸ and these Proposals contained a Chapter dealing with the problem of business agreements.⁹ Modified at the preliminary conference in London, this chapter¹⁰ forms a

⁴ *American Banana Company v. United Fruit Company*, 213 U. S. 347 (1909).

⁵ *United States v. Aluminum Company of America*, 148 F. 2d 416 (1945); *United States v. National Lead Company*, 63 F. Supp. 513 (1945).

⁶ *Annual Reports of the Attorney General of the United States, 1941-1944*. A typical statement of this policy is found in the 1944 Report, p. 19:

The enforcement of the Anti-trust Law during the fiscal year has been directed at those strategic points in the economy where the removal of restraints and monopolistic conditions would have the greatest effect in aiding war production and in preserving for the post-war period the opportunity for free and competitive enterprise.

⁷ In a letter of September 6, 1944, to Secretary of State Hull, President Roosevelt said in part:

During the past half century the United States has developed a tradition in opposition to private monopolies. . . . This policy goes hand in glove with the liberal principles of international trade for which you have stood through many years of public service. . . . Unfortunately a number of foreign countries, particularly in continental Europe, do not possess such a tradition against cartels. . . . I hope that you will keep your eye on this whole subject of international cartels because we are approaching the time when discussions will almost certainly arise between us and other nations. *Department of State Bulletin*, Vol. 12, p. 254.

To this letter Secretary Hull replied on September 11, 1944:

I shall continue to follow closely the progress of this work on the subject of international cartels, . . . in the near future, and consistent with the pressing demands of the war upon your time, I want to present to you in more detail plans for discussion with other United Nations in respect to the whole subject of commercial policy. Same, p. 292.

⁸ *The United States Proposals for Expansion of World Trade and Employment* were originally announced in connection with the public announcement of the British Loan Agreement on December 6, 1945 (*Department of State Bulletin*, Vol. 13, p. 913; Pub. 2411, Commercial Policy Series 79, 1945).

⁹ Chapter IV.

¹⁰ Chapter IV of *The Proposals* became Chapter V of the *Suggested Charter for an International Trade Organisation* (Pub. 2598, Commercial Policy Series 93, September 1946), which, after the preliminary conference in London between October 15. and

part of the *Revised Charter for an International Trade Organization* which is now under discussion at Geneva.

The Chapter in question deserves a fuller consideration than it has perhaps received. Comments have tended to be of a rather general nature reflecting little more than a judgment as to whether the United States was winning or losing its fight against cartels. To those interested in the spreading development of international organization and the attempt to foment the progressive development of international law, this chapter deserves more intensive consideration. Here is an attempt to obtain international agreement and make it effective with regard to a matter of basic economic theory and policy. To the extent that it should be made effective, it would have its impact upon business arrangements all over the world. This particular chapter reflects the economic thinking of one country, the United States, which is almost the only country in the world in which there exists at present legal and administrative machinery adequate to carry it out.¹¹

It is proposed that the participating nations shall first of all agree to take appropriate measures to prevent, in international trade, restrictive business practices whenever such practices have harmful effects on the expansion of production and trade and the maintenance of high levels of real income or on any of the purposes of the Organization. In addition there is a specific agreement by the member nations that certain specified practices shall be subject to investigation if the Organization considers them to have such harmful effects.¹² Provision is then made for the Or-

November 26, 1946, became Chapter VI of the *Revised Charter for an International Trade Organization* (Department of State, December, 1946). The official text of the Charter as revised will be found as the appendix to the "Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment," London, October, 1946, U.N. Document E/PC/T/33.

¹¹ The other country whose economic thinking is most closely represented in this chapter of the Charter is Canada. For a discussion of Canadian Statutes and cases in this field see Harry A. Toulmin, Jr., *International Contracts and the Anti-Trust Laws*, 1947, Chapter V.

¹² The practices referred to are:

- (a) fixing prices or terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
- (b) excluding enterprises from any territorial market or field of business activity, allocating or dividing any territorial markets or fields of business activity, allocating customers, or fixing sales or purchase quotas;
- (c) boycotting or discriminating against particular enterprises;
- (d) limiting production or fixing production quotas;
- (e) suppressing technology or invention, whether patented or unpatented;
- (f) extending the use of rights under patents, trade marks or copyrights to matters not properly within the scope, or to products or conditions of production, use or sale which are not the immediate subjects, of the authorized grant. *Revised Charter for An International Trade Organization*, Chapter VI, Article 39, 3.

In the prior *Suggested Charter*, there was a presumption that these practices had such

ganization to receive complaints, to investigate them, make findings, and "request" the member to take every possible action against harmful practices, including recommendation of specific remedial measures. The Organization is also authorized to conduct studies on its own initiative, both with respect to business practices and with respect to the domestic laws of the member nations relating thereto and to make its recommendations.¹³

Each member nation, in its turn, agrees to take all possible steps by legislation or otherwise to prevent harmful business practices; to take the fullest account of the Organization's findings in considering the initiation of action in accordance with its system of law and economic organization to prevent, within its jurisdiction, the continuance or recurrence of any practices which the Organization finds to have been harmful; to establish procedures to deal with complaints; to conduct investigations and to furnish the Organization with requested information or reports. Finally members are authorized to cooperate with each other in making effective any remedial order issued by one of them, and any member is free to act on its own account in enforcing any national statute or decree directed toward preventing monopoly or restraint of trade.

Certain features of this proposal are notable. In the first place, it is clearly designed within the framework of international agreement rather than of world government. The law which determines the validity or invalidity of any particular business arrangement or practice is still the national law of the nation having jurisdiction.

Nothing contained in this proposal tends to resolve or even improve the pressing and difficult problem of overlapping national jurisdiction. Undoubtedly, in theory, the proposal is designed to reduce some of the jurisdictional difficulties by bringing national policies closer into line, but, to the extent that they remain divergent, the jurisdictional issue must remain a paramount one. It would appear that some method should be worked out for settling this problem.

The exact nature of the obligation which the member nations are assuming is far from clear. One feature of this problem is presented by the question under discussion in the United States as to whether the Charter, if adopted, would or would not be a treaty. If it is a treaty under Article II, Section 2, of the United States Constitution, its provisions would be the supreme law of the land, overriding existing legislation. However, the indications are that our government regards it merely as an

harmful effect, and member nations agreed not merely to investigate, but to take corrective action.

¹³ This Chapter of the Charter was extensively revised by the Preparatory Committee at its meeting in London, and now represents a compromise between conflicting points of view. The effect of this revision has been to reduce considerably the rigidity of prohibitions contained in previous drafts and also to curtail certain powers originally given to the proposed International Trade Organization.

executive agreement, which would not affect our existing law, however much it might place this nation under obligation to adopt the requisite legislation to make our laws conform to the provisions of the Charter.¹⁴

Assuming that the latter is the true interpretation of the Charter, we find what appears to be rather clear and definite agreement among the nations as to the kinds of practices which are to be outlawed. (Since the amendment process is quite cumbersome—approval of two-thirds of the member nations is required—it may well be that the definition is too precise and rigid.)

This precision of definition is lacking, however, in the statement of what action the member nations are obligated to take. The obligation given strongest expression is the general one "to take all possible steps to insure" that the prohibited practices are not engaged in. When, however, the findings or recommendations of the Organization itself are involved the members are only obligated "to take the fullest account of them in considering whether to initiate action in accordance with their own systems of law and economic organization."¹⁵

The heart of the measure seems to be contained in the provisions authorizing the Organization itself to investigate "complaints" and make studies and to submit finding and recommendations.¹⁶ In this area the Organization is comparatively free to go its own way, subject to the important reservation that the subject matter is so complex and often so highly technical that the procurement of a staff of adequate size, disinterestedness, and competence may well present budget problems of real importance. Having in mind the enormous burden which the process of investigation imposes upon the investigated, this power could be easily abused and could even more easily be made the basis of extensive and burdensome but futile academic investigations.

The problem presented by international business agreements is one of immense complexity. It is one in which there is a wide divergence of opinion between nations, a divergence based sometimes on pure economic theory, sometimes on differences between economic situations or legal systems. Clear agreement between the nations on any parts of the prob-

¹⁴ *The United States Tariff Commission* published, in March, 1947, a document of 149 pages which analyzes the Charter provisions and comments on them. This commentary indicates the various ways in which the statutes of the United States would have to be amended to bring them into conformity with the Charter.

¹⁵ Prior to the London meeting, member nations were obligated to "Take action, after recommendation by the Organization, to terminate and prevent the recurrence of a particular restrictive business practice or a group of practices. . . ." *Suggested Charter*, Article 37 (5). Now, members are only obligated "to take the fullest account" of such recommendations. *Revised Charter*, Article 42, 1 (b).

¹⁶ Prior to the London Meeting the Organization did not have to await complaints from member nations but had power to call general consultative conferences on its own initiative. *Suggested Charter*, Article 36.

lem, with resulting uniformity of policy and practice, is unquestionably a much-to-be-desired goal. It is to be hoped that an attempt will not be made to conceal a real absence of agreement behind generalizations which can be the subject of multiple interpretations or behind the authorization of comprehensive studies which cannot be adequately conducted and whose recommendations have no real prospect of being carried out. The twin causes of international organization and international law can perhaps be best served by pursuing limited but attainable objectives.

JOHN E. LOCKWOOD

WHEN DID THE WAR BEGIN?

Captain Bennion, in command of the battleship *West Virginia*, was killed at Pearl Harbor on December 7, 1941, in the Japanese attack on the ship and the harbor. The New York Life Insurance Company paid the principal sum of \$10,000 due under the policy he had taken out in 1925 but refused to pay the \$10,000 demanded as a double indemnity in case of death by accident. The reason for this refusal was the fact that the policy excluded an accident which occurred in "war or an act incident thereto."

Mrs. Bennion sued for the double indemnity in the State Court of Utah from which the case was removed by the company on the ground of diversity of citizenship to the United States District Court. The District Judge, Honorable Tillman Johnson, directed a verdict in favor of the plaintiff, a judgment which was reversed on appeal by the Circuit Court of Appeals, Judge Murrah for the majority holding that the attack on Pearl Harbor "commenced" a war with Japan.¹ *Certiorari* was refused by the Supreme Court and a petition for rehearing was also denied.

Thus the opinion of Judge Murrah in the C.C.A. is the final judicial utterance in the case. It would be easy to agree with this opinion but for the fact that four cases in lower courts² have decided against the insurance company and in favor of the plaintiff.

It was the contention of some of the justices writing the opinions in these cases that war did not begin until Congress declared war on December 8, 1941, at 4:10 P.M. Hostilities, however, had begun on the morning of December 7, and the Japanese had issued a declaration of war two hours and forty minutes after the attack began. It may be asked why a declaration of war by the United States was issued at all, since most wars have commenced without a declaration of war. The answer is that the President

¹ *Louise C. Bennion v. New York Life Insurance Company*, No. 3308, CCA, 10th, 1946; cert. denied by the Supreme Court April 28, 1947. For text of decision see p. 680, below.

² *Savage v. Sun Life Ins. Co.*, 57 E. Supp. 620 (W.D. La.). *Pang v. Sun Life Assur. Co.*, Circuit Court, 1st Judicial Circuit, Territory of Hawaii, dated Aug. 2, 1944, appeal 37, Hawaii 208 (1945). *Rosenau v. Idaho Mut. Benefit Assoc.* (Idaho) 145 Pac. (2d) 227. *West v. Palmetto State Life Ins. Co.*, 202 S.C. 422, 25 S.E. (2d) 475, 145 A.L. R. 1461.

desired to have the support of a unified country and obtained it by the declaration of war. All the congressmen who spoke before 4:10 P.M. on December 8 assumed that war was in existence and the request of the President had read "I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire." A mass of evidence was introduced to show that Congress and the Departments considered war to have begun on December 7, so that Judge Murrah felt obliged to decide the case in line with some previous cases.³ When a foreign country invades the United States the President does not have to wait for a declaration by Congress in order to begin hostilities. The Acts of 1795 and 1802 prescribed that course.

It thus appears that a declaration of war by Congress was in this case unnecessary to create a state of war. War is a fact which may begin by the invasion of another power, a fact which the Court can determine either by accepting the determination of the political department of the government, in this case the President, or by taking account for itself of historical facts.

EDWIN BORCHARD

NATIONALITY AND OPTION CLAUSES IN THE ITALIAN PEACE TREATY OF 1947

Although general international law, in order to delimit the spheres of validity of individual national legal systems, delegates in principle to the sovereign states the power to determine the rules for the acquisition and loss of their nationality by their own municipal law, so that the matter of nationality is, likewise in principle, within the exclusive jurisdiction of the states,¹ these states can, of course, conclude treaties on the sub-

³ *Prize Cases*. "If a war is made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but he is bound to accept the challenge without waiting for any special legislative authority, and whether the hostile party be a foreign invader or states organized in rebellion, it is none the less a war, although the declaration of it be unilateral. . . . However, long may have been its previous conception, it nevertheless springs forth from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact."

Dole v. Merchants Mutual Marine Insurance Co. "War is an existing fact and not a legislative decree. Congress alone may have power to declare it beforehand, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it exists, whether there is any declaration of it or not. It may be prosecuted without any declaration; or congress may, as in the Mexican war, declare its previous existence. In either case it is the fact that makes 'enemies' and not any legislative Act."

¹ But not wholly; for the freedom of the states is limited by a superior norm of general international law, prescribing that individuals, on which the states confer their nationality, must have qualified points of contact with the state in question. Nationality Draft of the Harvard Research in International Law (in this JOURNAL, Vol. 23 (1929), Special Supplement); Convention on the Conflict of Nationality Laws, 1930,

ject and thus create norms of particular international law concerning nationality. This is being done especially in cases of transfer of territory by treaty and consequent change in the territorial jurisdiction of the states involved.

From feudal times onward the inhabitants of ceded territory shared its fate and owed allegiance to the new sovereign.² After the seventeenth century, however, we observe tendency to protect the persons coming under the new allegiance. The means employed was the institution of option, first appearing in the Capitulation Treaty of the City of Arras of 1640. The option was originally no more than a *beneficium emigrandi*, granted to all "inhabitants" of the ceded territory. After 1815 the newer form of option developed into a faculty granted to the nationals of the ceding State to retain their old nationality by an act of their own free will. From that time on option, although still based only on treaty law, became more and more frequent³ and played an enormous role after the First World War, as millions of persons were involved in the new territorial settlements.⁴

As Italy suffers severe losses under the Peace Treaty of 1947, it is pertinent to inquire concerning the nationality and option clauses of this Treaty. The purpose of this paper is to analyze these clauses as they stand, to study them in the light of the long history of the option clause and of the experience of the Paris Peace Treaties of 1920, and to investigate the extent to which they follow traditional lines or reveal modifications and innovations.

The territorial losses of Italy under the Treaty are of different kinds.

I. Of no importance in the Treaty are Italy's ephemeral annexations of the Province of Ljubljana⁵ and of Dalmatia,⁶ nor the setting-up of the "Independent State of Croatia," where Italy had "protective rights" and the nominal King of which was the Duke of Aosta.⁷

II. As to Ethiopia, Italy recognizes by Article 33 the sovereignty and independence of that state. Under Article 36 Italian nationals in Ethiopia

Art. 1 (L. of N. C. 351. M. 145. 1930. V.); Verdross, *Völkerrecht*, 1937, p. 133; H. W. Briggs, *The Law of Nations*, 1938, pp. 157, 165. That is why the language of the P.C.I.J. in its Advisory Opinion No. 4 is not wholly unobjectionable.

² This was common juridical doctrine; see the *règle de Pothier*: *Lorsque une province est démembrée de la couronne, les habitants changent de domination*. Even in England, notwithstanding the dogma of perpetual allegiance, "When the King cedes by treaty, the inhabitants of the ceded territory become aliens."

³ For a full historical and theoretical study of option see: Josef L. Kunz, *Die Völkerrechtliche Option*, 1925, Vol. I, pp. 1-170, 301-325.

⁴ For a full study of nationality and option in the Versailles and St. Germain Peace Treaties see Kunz, work quoted, Vol. I, pp. 171-300, 326-328 and Vol. II (1928).

⁵ Annexed by Royal Decree-Law of May 3, 1941 (Text in Raphael Lemkin: *Axis rule in occupied Europe*. Washington. 1944, pp. 534-85).

⁶ Annexed by Royal Decree of May 18, 1941 (Lemkin, work quoted, pp. 587-88).

⁷ He never went there and resigned on July 31, 1943.

will enjoy the same juridical status as other foreign nationals but Italy recognizes the legality of all measures of the Ethiopian Government annulling or modifying concessions or specific rights granted to Italian nationals, provided such measures are taken within a year from the coming into force of the present Treaty.

III. Identical norms are laid down with regard to Albania.⁸ Italy recognizes also that the Island of Saseno is part of the territory of Albania and renounces all claims thereto.⁹

IV. Italy renounces all right and title to the Italian colonies in Africa, namely Libya, Eritrea, and Italian Somaliland.¹⁰ According to the Treaty the final disposal of these colonies shall be made jointly by Russia, the United States, Great Britain, and France within one year from the coming into force of the Treaty. Pending final disposal the colonies shall continue under their present (British) administration. Nothing is said as to nationality or a right of option of the inhabitants, natives or Italian citizens.

Under the Versailles Treaty Germany ceded her colonies to the "Principal Allied and Associated Powers" and undertook the obligation to recognize the final measures taken by these Powers. The natives, it was laid down, should be entitled to the diplomatic protection of the Government which exercised authority over these territories. The colonies rested therefore, under the sovereignty of the Principal Powers, exercising this sovereignty in condominium until final disposition, which was made by granting these colonies as B and C Mandates to certain Mandatory Powers under the League of Nations.

The regulation in the Treaty of 1947 is not so clear; Italy only "renounces all right and title" to her colonies but does not cede them to any particular Power or Powers. It is thus clear that Italy loses her sovereignty over her former colonies with the moment of the coming into force of the Treaty. Who is the sovereign of these colonies from this moment on, "pending final decision"? The Treaty is concluded between Italy and 21 "Allied and Associated Powers." Nevertheless it seems to follow from Article 23 and Annex XI that the "Big Four" are sovereign over the ceded territories, Great Britain only "administering" them. As Italy loses her sovereignty with the coming into force of the Treaty she can no longer exercise any diplomatic protection over the natives. Is this protection to be granted by Great Britain, which administers these colonies as the agent of the four condominium sovereigns? Italian nationals in the former colonies will remain Italian nationals, subject perhaps to expulsion by the administering Power.

The final determination can only be brought about by the final disposal of the colonies. Should they be given to one or more UN Members in

⁸ Articles 26, 30.

⁹ Article 23.

¹⁰ Article 23, Annex XI.

trusteeship¹¹ everything will depend on the trusteeship agreements; if the model of the League Mandates is followed the natives will not become nationals of the trustee but merely "persons under the protection of the trustee." Should Libya, for example, be made into an independent State¹² the natives would become nationals of the new state. In both cases Italian nationals resident there will probably remain Italian nationals.

V. Although the Austrian South Tyrol remains Italian Italy has pledged herself, under the Italo-Austrian Agreement, reproduced in Annex IV of the Treaty,¹³ "to revise in a spirit of equity and broad-mindedness the question of the option for citizenship resulting from the 1939 Hitler-Mussolini agreements."

VI. As to territorial cessions properly speaking Italy cedes certain small but strategic areas to France,¹⁴ the Dodecanese Islands to Greece,¹⁵ and vast areas—the greater part of the Istrian Peninsula, the island of Pelagosa and the adjacent islands, as well as the community of Zara and all islands and adjacent islets—to Yugoslavia.¹⁶ It is with regard to these ceded territories that the clauses concerning nationality and option are of particular significance. Whereas the Versailles Treaty gave these clauses separately in the case of each single cession, the Treaty of 1947 has adopted the technique of laying down these clauses in a special part of the Treaty¹⁷ in a uniform way for all cases of cession.

Contrary to earlier treaties, but following the system of the Paris Peace Treaties of 1920, the Treaty of 1947 regulates first the legal consequence of the cession of territory, as far as the nationality of the persons involved is concerned. This is theoretically correct and apt to avoid difficulties. For the right to opt is a means to escape a change of nationality; the circle of persons entitled to opt can only be clearly determined on the basis of the knowledge of the circle of persons changing their nationality in consequence of the cession. In this respect Art. 19, par. 1, provides that Italian citizens who were domiciled in a ceded territory on June 10, 1940, and their children, born after that date, become citizens of the State to which the territory is transferred, with the exception of those who, under par. 2, are entitled to opt. This change of nationality is automatic *ipso*

¹¹ Although under Art. 77, par. 1 (b), of the UN Charter the trusteeship system is to apply to "territories which may be detached from enemy States as a result of the Second World War," par. 2 of this Article leaves it entirely "for subsequent agreements as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms."

¹² UN Charter, Art. 78.

¹³ See this writer's Editorial Comment in this JOURNAL, Vol. 41 (1947), p. 439.

¹⁴ Treaty of 1947, Articles 2 and 6.

¹⁵ Article 14.

¹⁶ Articles 3 and 11.

¹⁷ Articles 19, 20, further Annex XIV, para. 10-12.

jure and takes effect at the date of the coming into force of the Treaty. As a measure to prevent dual nationality the Treaty provides that these persons upon becoming citizens of the successor state lose their Italian nationality. The change of nationality hits, of course, only Italian nationals; beyond this the standard adopted is the pure principle of domicile, the classic principle which seems to be the most just. Birth in the ceded territory, without domicile there at the critical moment is, therefore, irrelevant.

Whereas normally the critical moment is that of the coming into force of the treaty, the Treaty of 1947 follows the example of the Versailles Treaty¹⁸ by asking domicile in a critical moment long before the date of the coming into force of the treaty, here June 10, 1940, the date of the Italian declaration of war on Great Britain and France. Thus Italian nationals domiciled in a ceded territory after that date remain Italian nationals; the reason for this innovation is, of course, political. The new institution of "reclamation of the nationality of the Successor" only by special authorization of the "Successor" has not been adopted by the Treaty of 1947.

It is interesting to note that the Treaty of 1947 rests on the traditional position according to which individuals are no subjects in international law and acquire no rights under a treaty, which is binding only upon States. Art. 19, par. 1, prescribes that the acquisition of the nationality of the Successor is brought about only "in accordance with legislation, to be introduced by that State within three months from the coming into force of the Treaty." In consequence it is municipal legislation which operates the change, but France, Greece, and Yugoslavia are internationally bound to enact corresponding laws.

The persons thus acquiring the new nationality have the guarantee that their property, rights, and interests in Italy must be respected by Italy in the same way as that of United Nations nationals and have a right to effect the transfer and liquidation of such property, in accordance with a special agreement to be concluded between Italy and the successor state.¹⁹

The determination of the conditions of the acquisition of the new nationality, namely "Italian nationality," and "domicile" at the critical moment is governed by Italian law.

Contrary to all precedents, not all the persons (Italian nationals, domiciled in the ceded territory at the critical moment) acquire the new nationality but only those who are not entitled to opt.

The Treaty of 1947 recognizes two very different kinds of option:

¹⁸ Versailles Treaty, Art. 36, par. 2; Art. 91, par. 3; Art. 112, par. 2.

¹⁹ Annex XIV, par. 11.

1. There is, first, what this writer has called the "genuine option," under Article 19, or option of the nationals of the ceding state in favor of the nationality of the ceding state, and only of such nationals, directly involved in the cession of territory. Here again, it is provided that the successor state enacts appropriate municipal law concerning the option.

Traditionally all the persons determined, as here, by Italian nationality and domicile on June 10, 1940, who acquire the new nationality, are entitled to opt, so that the circle of persons changing their nationality and the circle of persons entitled to opt were identical. Exclusions from the right to opt were rare.²⁰ In this respect the Treaty of 1947 involves a profound innovation: of Italian nationals domiciled in a ceded territory on June 10, 1940, only those are entitled to opt "whose customary language is Italian." Whereas option was traditionally a means to enable the persons involved in a territorial cession to show their fidelity to the losing state, regardless of blood and language,²¹ the option is here what this writer has called an "ethnic option." Such "ethnic option,"²² introduced by the Paris Peace Treaties of 1920 only in cases of "non-genuine option," has here been, for the first time, made the basis of the genuine option. This "ethnic option" is, of course, an expression of the principle of nationality, of an era in which nationalism precedes state allegiance. The Treaty of 1947 has dropped the criterium of "race" and has decided the problem of "language"—mother tongue or customary language—in the latter sense. On the other hand this criterium may in certain cases not express the "ethnic" character.²³ We see here, therefore, an emphasis on language alone and on the subjective side of the "ethnic" character, as the customary language depends on the will of the individual. The criterion of Italian as "customary language" must exist at the time of the coming into force of the Treaty.²⁴

The Treaty recognizes, therefore, only a restricted or ethnic option which, in the case of the Dodecanese Islands, is a right of an ethnic

²⁰ No option in the case of Alsace-Lorraine (Vers. Tr., Annex to Art. 79) and Neutral Moresnet (Versailles Treaty, Art. 32).

²¹ It is well known that many Alsations, German in blood and language, opted under the Treaty of 1871 for France.

²² The "ethnic option" was newly introduced in the Versailles Treaty only in cases of "non-genuine" option, either for new States (Czechoslovakia, Versailles Treaty, Art. 85, par. 1, par. 3; Poland, Art. 91, par. 4, par. 9) or, further developed as "option according to race and language" by the St. Germain Treaty, Art. 80, and the Trianon Treaty, Art. 64, finally only as an option for the "State of the race" in the Turkish Peace Treaty of Lausanne 1923, Art. 32, 34.

²³ An Italian national, domiciled on June 10, 1940, in a territory ceded to Yugoslavia, who is, perhaps, a Slovene in blood and has Slovene as his mother tongue, is entitled to opt for Italy if his "customary" language is Italian.

²⁴ Persons, "who were domiciled on June 10, 1940," but "whose customary language is Italian."

minority, but in the case of cessions to Yugoslavia may be a right of the ethnical majority.

Because of this innovation the Treaty of 1947 also takes a new stand concerning the much discussed question of whether persons entitled to opt retain or reacquire their old nationality. Under the Versailles Treaty the change of nationality was automatic, so that option meant a reacquisition of the old nationality, although the problem of a possible retroactive effect of the option came up. Under the Treaty of 1947 only the persons not entitled to opt acquire the new nationality, whereas the persons entitled to opt and who have opted "shall retain Italian citizenship and shall not be considered to have acquired the citizenship of the Successor State."²⁵ Such persons will become citizens of the successor only with the expiration of the time-limit for option, without having exercised the right to opt. In any case only one change of nationality is involved.

Many of the detailed norms concerning option follow traditional lines. The remarkable innovation of the Paris Peace Treaties of 1920, creating a special age for the capacity to opt, namely 18 years, is here adopted, with the further innovation of an individual right to opt for all married persons—men or women—whether under or over that age. Option on the part of the father or, if the father is not alive, on the part of the mother, is automatically to include all unmarried children under the age of 18 years.²⁶ As to the technique of option, the action must be exercised through a declaration.²⁷

The norms concerning property rights of optants²⁸ follow traditional lines: freedom to take out movable property and transfer funds, provided—a new rule hitting Fascist measures—they were lawfully acquired, in the case of emigration to Italy; freedom also to sell movable and immovable property; such sale is, therefore, in the traditional way, merely a right, not a duty.

The Treaty of 1947 contains also certain innovations:

(a) Contrary to all previous treaties "the option of the husband shall not constitute an option on the part of the wife"; in consequence an individual right to opt on the part of married women arises, an expression of the movement for the emancipation of women; (b) contrary to the

²⁵ Art. 19, par. 2.

²⁶ This formula is clearer and better than the Versailles formula: option on the part of the "parents."

²⁷ The term "right to opt" can mean either the fulfillment of all the requirements for a valid option or merely the declaration. In the first case a declaration not followed by emigration would not be an "exercise" of the right to opt, or an *agere in fraudem legis*, so that the person in question would remain a national of the successor. Under the second hypothesis the successor could expell the person in question as an undesirable alien. The Treaty of 1947 calls the mere declaration the "exercise of option."

²⁸ Annex XIV, par. 10.

Paris Peace Treaties of 1920 which gave, generally, two years for the exercise of option, the time-limit is here one year from the coming into force of the Treaty, and may in fact be only nine months, as the successor has to enact corresponding legislation within three months; (c) contrary to all previous treaties which prescribed emigration of the optants, the Treaty of 1947 leaves it to the discretion²⁰ of the successor, whether it will require emigration. If so, the time-limit for emigration is one year from the date when the option was exercised and does, therefore, not coincide with the time-limit for option, an innovation introduced by the Paris Peace Treaties of 1920. But, if prescribed, the emigration must be to Italy, and must be actual emigration, a giving up of the domicile in the ceded territory with an *animus non revertendi*. This is certainly the sense of the phrase: "move to Italy."

As to juridical persons, Annex XIV, par. 12, gives certain companies the right to remove their *siège social* to Italy with the benefits of par. 11 of this Annex, provided they fulfill the following conditions: having been incorporated under Italian law; having their *siège social* in a ceded territory; having more than 50 percent of their capital owned by persons who opt for Italian nationality under the Treaty and move to Italy; finally having the greater part of their activity carried on outside the ceded territory.

As in the Paris Peace Treaties so in the Treaty of 1947 there are important *lacunae*: no norms concerning the right to opt of illegitimate children, of unmarried persons under 18 years of age who have no parents, of adopted children, of insane persons, and persons in jail. Contrary to most of the Paris Peace Treaties the Treaty of 1947 contains no norms guaranteeing the exercise of the right to opt. Many problems of option procedure are not dealt with, problems of examining and verifying the prerequisites for option, and so on. In these and other matters differences and difficulties may arise. Much is left to the municipal law of the successor states. No doubt special agreements between Italy and each successor state for carrying-out these treaty norms will be necessary.

2. Art. 20 of the Treaty grants a "non-genuine" option. This writer speaks of a "non-genuine" option because it is not connected with the territorial cession; it is an option of persons, not connected with the ceded territory and in favor of the successor state. This new type of option was introduced by the Versailles Treaty in favor of new states on an ethnical basis and developed in the case of the dismemberment of the Austro-Hungarian Monarchy.

Under Art. 20, par. 1, all Italian citizens domiciled on Italian territory, whose customary language is Serb, Croat, or Slovene, have a right to opt for Yugoslavia. All the other norms concerning this option are identical with those concerning the "genuine" option under Art. 19. But there are

²⁰ Whereas they "shall" provide for other rules, they "may" require emigration.

important differences: (a) the critical moment is here the date of the coming into force of the Treaty; (b) it is no real option, or a unilateral, constitutive act of the optant, but rather what the Versailles Treaty called a "reclamation of nationality," an innovation of that treaty. The persons in question have only a right to file a request with a Yugoslav diplomatic or consular representative in Italy. They acquire Yugoslav nationality only if the Yugoslav authorities accept their request, which is entirely discretionary with them. Yugoslavia will diplomatically communicate to Italy lists of persons who have thus acquired Yugoslav nationality; from the moment of this communication these persons automatically lose their Italian nationality.

Italy has no right to enact municipal law with regard to this option, but "may" require emigration from Italy.³⁰

VII. A special case is that of the "Free Territory of Trieste."³¹ It is, under the Treaty, not a case of a ceded territory, but of the creation of a new state. Under Art. 6 of the Permanent Statute, Italian citizens, domiciled in the area of the Free Territory on June 10, 1940, and their children born after that date, become *ipso jure* original citizens of the Free Territory and in the same moment lose their Italian nationality. Although the Permanent Statute will come into force only as determined by the UN Security Council, Italian sovereignty over that area comes to an end with the coming into force of the Treaty; at this date, therefore, the change of nationality of the persons involved will take place.

Art. 6, par. 2, of the Permanent Statute grants a restricted right of "ethnic option" to those persons whose customary language is Italian. All the other rules are identical with those under Articles 19 and 20, but there are the following differences:

(a) The conditions for the exercise of this right of option are to be laid down, in accordance with the norms of the Permanent Statute, by the Constitution of the Free Territory.

(b) The time-limit for this option is only six months, running from the date of the coming into force of the Constitution.

(c) Contrary to Art. 19 all persons, Italian nationals and domiciled there on June 10, 1940, acquire the new citizenship, whether they are entitled to opt or not. In consequence those entitled to opt for Italy who do so opt reacquire Italian nationality; hence a change of nationality twice. For this there are good reasons, as the overwhelming majority have Italian as a customary language. If the norm of Art. 19 had been adopted here the

³⁰ The question of interpretation comes up. The Treaty uses the phrase "transfer their residence to Yugoslavia." Does that mean emigration? Is "residence" equivalent to domicile? Does the phrase of Art. 20 ("transfer their residence to Yugoslavia") have the same legal meaning as the phrase of Art. 19 ("move to Italy")?

³¹ Art. 4, 21, 22, Annex VI.

Free Territory might, at the moment of the coming into force of the Treaty, have no original citizens at all.

(d) Again the option is limited and constitutes here a right of the ethnical majority. Italian nationals, domiciled there on June 10, 1940, whose customary language is for example, Slovene, are excluded from any right to option, not only for Italy, but also for Yugoslavia.

JOSEF L. KUNZ

CRUCIAL PROBLEMS IN THE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW

Now that work has been resumed on the elaboration and statement of international law under official international auspices, it is presumably permissible to suggest some of the more crucial issues involved in that activity, as far as they can be detected by study of the problem from the outside. In view of the ignominious collapse of this effort over seventeen years ago it is obviously desirable that any possible aid should be given in the renewed attempt at what is by almost universal consent an extremely urgent task, namely the revival, revision, and restatement of international law for the future.

A slight change has been made in the formulation of the problem today. More emphasis has been placed upon the development of international law, in contrast to its codification. And more recently reference has been made, in connection with the second point, to this or that portion of international law being "ready" rather than "ripe" for codification, as the point was stated in the language employed under the League of Nations. The first shift of emphasis is undoubtedly intentional and significant; the second may be merely a chance choice of words but serves to expose an issue of very serious import.

Thus by the "development" of international law reference is almost certainly made to international legislation, either by multipartite unanimous conventions or by statutory action by some degree (simple, two-thirds, three-fourths) of majority vote. And this international legislation must almost certainly fall in the fields of international economic and social problems (health, communications, trade and finance, morals) rather than in the subjects covered by the customary common international law (recognition, jurisdiction, diplomatic privileges, conduct of hostilities, neutrality). The law on the latter topics could conceivably be developed by international legislation also, but they are probably not the subjects in the minds of those speaking of "development" of the law, and it is a matter of historical record that development in this field has normally been achieved by practice rather than by legislation.

If this is true, however, certain inferences follow. One is that the task of international legislation is radically different from that of codification. It deals with different subjects, it proceeds by different methods, it aims

at different results. Consequently it has to be carried on by very different types of persons—health experts, transportation experts, economists, penologists, and so on, rather than by lawyers and diplomats (except for its formal aspects). No alert student of international organization could be opposed to this kind of activity, and must, indeed, be strongly in favor of it, but it is indispensable to make note of and emphasize the vital difference between the job of codification of customary law on basic phases of state organization and action, on one hand, and the development of new state organization and action on more far-reaching social problems on the other.

The League formula, "ripe for codification," to return to that aspect of the matter, was never explained with precision. Obviously codification of presumably existing international law might be undertaken either because of the existence of such an amount of agreement on this, that, or the other topic that codification would be more practicable there than in other cases. Or it might be undertaken because of the existence of such an amount of disagreement on a given important subject that it would seem imperative to secure a reconciliation of divergent views. And the degree of consensus might be such on one side, or the degree of discord such, on the other, that various topics might seem to be distinctly overripe for codification. The adoption of the term "ready" in place of "ripe," in current usage, does not necessarily commit us to one or the other of the two interpretations mentioned. It does seem, however, to point rather in the direction of topics on which a considerable degree of agreement already exists. Where does that leave us with today's problems?

Actually there are few questions or topics in common international law in respect to which sharp and strong differences of national policy do not exist. The three questions—territorial waters, nationality, responsibility of states—submitted to the League codification conference at The Hague in 1930 were chosen largely on the presupposition that agreement could be reached on those topics. The result was catastrophe. The fact is that it had been almost completely overlooked that radical disagreement, the holding of definite divergent views, on the subjects mentioned would be the actual state of affairs, rather than agreement, and that the necessity for some technique for securing agreement in such conditions had been still more completely disregarded. It was not an effort to reform the law which wrecked the Hague conference but simply the effort to get agreement on what the law was in the face of radical disagreement, or rather failure to develop any technique for that purpose. And no change in these matters is perceptible today. Unless something is done to remedy this situation we shall run squarely into exactly the same kind and degree of conflict and frustration as before. Whether an adequate technique can be found for producing agreement out of disagreement in such cases is very doubtful but the problem must be explored.

One attempt to meet this situation has been suggested. A "new" approach to the problem of codification of international law has been recommended, namely unofficial codification. Of course this is not new at all, but the oldest of all methods, practiced for generations before the states got around to official codification. It is retreat and evasion. It may be unescapable, and it does retain some value—such unofficial codes do exercise some influence. But it is far from the level of codification in the national sphere. It is not clear that it is necessary to give up the effort at official codification quite yet although we should know where we stand fairly soon.

Similar to the device of unofficial codification, or taking refuge in that device, is the concept of gradual or ultimate codification. There is no doubt that complete or overall codification of international law presents a tremendous task, and that codification by portions is perfectly feasible and even sound theoretically, provided it is carried into all important sections of the law, coördinated properly, and carried out within a reasonable time—not unimportant stipulations, however. On the other hand it remains true that much of the value of codification,—in so far as such action has any practical value at all, and even in its moral, psychological, and political implications,—depends precisely upon comprehensive rather than fractional application of the method. It might also be suggested that, if comprehensive codification did not seem too great an effort to Justinian and Napoleon, not to mention numerous other similar figures throughout legal history, perhaps a little more courage and loyalty to the task might be expected of our international jurists and our governments today.

Incidentally it will be necessary in this connection, if the effort at codification under United Nations auspices goes very far, to straighten out the situation produced by codification action under Pan-American auspices while the League program was collapsing. The Pan-American action contrasted strongly on the surface with League failure. On the other hand the Pan-American effort may indeed have been more superficial than real. The whole situation calls sharply for clarification.

Finally it is impossible to disregard the need for revision and restatement of the law of war and neutrality. Confusion as to the content of the law is worse here than anywhere in the law of peace. The effects of World War I were almost completely ignored in the period 1919-1939; still further confusion was created during World War II. It is by no means certain that there will be no need for law concerning the conduct of hostilities and even concerning neutrality in the future. Rules may be needed for the operation of international police forces. The war crimes trials and recent efforts to restate the law relating to prisoners of war indicates that these branches of the law are by no means dead. United Nations efforts for development and codification of international law are intended to deal with these subjects only at very special points. We seem to be standing—nay

lying—with regard to the great bulk of the law of war and neutrality, just as still and lifeless today, as we did during the period 1919-1939.

It was well known that resumption of the codification effort under United Nations auspices was hazardous but the decision to resume was made—and justifiably made. Now, however, superhuman efforts must be made to avoid failure along any essential line.

PITMAN B. POTTER

Managing Editor

CURRENT NOTES

SOME ASPECTS OF THE WORK OF THE LEGAL COMMITTEE OF THE GENERAL ASSEMBLY DURING THE SECOND PART OF THE FIRST SESSION

The Sixth Committee (Legal Committee), one of the six main committees of the General Assembly, was charged with the task of dealing with items of a legal nature on the agenda of the General Assembly, as well as with such legal questions as might arise in the consideration of other items by the other main committees. The Sixth Committee was, at the commencement of its work, comprised of representatives of fifty-one Members of the United Nations¹ and had as its Chairman Dr. Roberto Jimenez of Panama,² whose chairmanship carried over from the First Part of the First Session of the General Assembly which had been held earlier in the year in London.

In all, the Legal Committee sat through a total of thirty-three meetings, from November 5 to December 13, 1946, during which time it dealt with some twenty-two items comprising its agenda,³ as well as with a number of items which were referred to it from other committees.

Organization of Work. Working under considerable pressure as a result of the compact schedule of the General Assembly, the Sixth Committee nevertheless managed to complete its work on time and dispose of a number of items whose significance is not limited to the field of law alone and which also affect the United Nations as a whole.

The procedure which it adopted contributed largely to the expeditious manner in which it was able to get through its agenda. The Secretariat, in conjunction with the Rapporteur, made a preliminary analysis of the items assigned to the Sixth Committee and separated them into three categories: (1) those items which would not require lengthy debate and which could most profitably be discussed in the full committee itself; (2) those items which would require minute examination and lengthy debate and which could best be disposed of in a small sub-committee; these items were then regrouped so that half of them could be assigned to one sub-committee and the rest to another; (3) those items which required prior consideration by other committees and which would only come to the Sixth Committee in respect of such legal questions as might arise in connection therewith.

¹ Three Members were added to it with the admission of Afghanistan, Iceland, and Sweden to membership in the United Nations. (Journal No. 37, Supplement A—A/PV/48)

² The rest of the bureau of the Committee was as follows: Vice Chairman, The Hon. Per Federspiel (Denmark); Rapporteur, Professor K. H. Bailey (Australia); Secretary, Dr. Yuen-Li Liang, Director of Division of Development and Codification of International Law of the United Nations.

³ United Nations Document A/C.6/40.

The Sixth Committee also created two sub-committees of ten members each⁴ which enabled the full committee to proceed with its agenda simultaneously with the consideration of more detailed matters by the two sub-committees.

Many of the matters actually considered by the Sixth Committee were of a strictly technical nature, affecting, in the main, only the internal operations of the United Nations. Not a few were of a wider nature, however, and were of major importance in implementing the terms of the Charter.

Registration of Treaties. A good example of such an item may be found in the drafting of the regulations governing the registration of treaties and international agreements⁵ which were adopted by the Sixth Committee only after the most minute scrutiny of each article. At first glance such regulations might seem to be largely administrative and technical in nature but behind the purely formal aspects of the rules there lies the important principle first enunciated by President Wilson of "open covenants openly arrived at."

Article 102 of the Charter provides that every treaty and every international agreement entered into by any Member of the United Nations coming into force after the Charter shall be registered with the Secretariat and published by it.⁶ In seeking to give effect to this Article it was necessary that regulations be drawn up and adopted for the guidance of the Secretariat and the States.

The General Assembly, by a resolution of 10 February 1946,⁷ requested the Secretary-General to submit proposals for detailed regulations and other measures to give effect to Article 102 of the Charter.

By the same resolution the Secretary-General was instructed to invite Member Governments to transmit to him, for filing and publication, treaties and international agreements entered into before the coming into force of the Charter which had not been included in the League of Nations treaty series. He was also to indicate his willingness to receive, from non-Member Governments, for filing and publication, any treaties and international agreements entered into before or after the coming into force of the Charter and not included in the League of Nations treaty series which they were willing to transmit to him.

⁴ Sub-Committee 1 was composed of the Representatives of the following countries: Belgium, Canada, China, Cuba, Czechoslovakia, Egypt, Norway, Union of Soviet Socialist Republics, United Kingdom, United States of America.

Sub-Committee 2 was composed of the Representatives of the following countries: Australia, Colombia, France, Greece, India, Netherlands, Peru, Syria, Ukrainian Soviet Socialist Republic, Yugoslavia.

⁵ United Nations Document A/266.

⁶ Article 102, Charter of the United Nations.

⁷ Resolutions of the General Assembly, First Part of the First Session, Resolution adopted on the Report of the Sixth Committee No. 7, p. 33.

Pursuant to the resolution mentioned, the Secretary-General prepared a set of draft regulations⁸ which were submitted to the Sixth Committee for consideration. The Sixth Committee referred the draft regulations to its Sub-Committee 1, delegations not represented on the Sub-Committee being invited to submit written proposals regarding the draft regulations.⁹

In a total of nine meetings the Sub-Committee settled the terms of the regulations having regard to the following considerations:¹⁰

- (a) the importance of the orderly registration (or filing) and publication of treaties and international agreements and of the maintenance of precise records;
- (b) the desirability of adhering closely both to the Charter and to the General Assembly resolution of 10 February 1946, particularly to the distinction drawn in the resolution between *registration* (applicable only to treaties and international agreements subject to Article 102) and *filing* (applicable to other treaties and international agreements covered by the regulations) and to the special provision therein contained with respect to Franco Spain;
- (c) the undesirability of attempting at this time to define in detail the kinds of treaty or agreement requiring registration under the Charter, it being recognized that experience and practice would in themselves aid in giving definition to the terms of the Charter.

The Sixth Committee in adopting the report of its Sub-Committee thought it necessary to stress the following points embodied in the regulations, which serve as important guides to the interpretation of the text of the regulations themselves:¹¹

- (a) the Sub-Committee agreed that registration is effected by the act of one of the parties (or by an international organization pursuant to Article 4 of the Regulations) and not by any initiative taken by the Secretariat;
- (b) the Sub-Committee recognized that, for the purpose of Article 1 of the Regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto;
- (c) Article 10 of the proposed regulations is intended to carry out the recommendations made by the General Assembly in its resolution of 10 February 1946, on the filing of treaties and international agreements not subject to Article 102 of the Charter. This provision does not apply

⁸ United Nations Document A/138.

⁹ The Sub-Committee considered written proposals submitted by the following delegations, not represented on the Sub-Committee: Argentina, France, Poland, Saudi Arabia, Uruguay, Venezuela and Yugoslavia. Two of the proposals submitted were regarded as beyond the competence of the Sub-Committee namely a proposal that an effort should be made to interpret the meaning of paragraph 2 of Article 102 of the Charter and a proposal that the regulations should specifically provide that all agreements concluded with Quisling Governments are void and so not registrable under the Charter.

¹⁰ United Nations Document A/C.6/125. The discussions in Sub-Committee 1 with respect to the Preamble and each of the Articles are summarized in a memorandum prepared by the Secretariat: Document A/C.6/124.

¹¹ United Nations Document A/266.

to any treaty or agreement concluded by one or more members of the United Nations after 24 October 1945, the date on which the Charter came into force;

(d) with respect to treaties and agreements received from non-Member States pursuant to Article 10 of the proposed regulations, the Sub-Committee included a proviso designed to make it clear that the arrangements provided for by this article do not extend to Franco Spain (see the Resolution of the General Assembly of 10 February 1946).

Development of International Law and its Codification. Of more general interest and of wider import, perhaps, was the adoption by the Committee of a resolution concerning the implementation of Article 13, paragraph 1 (a), of the Charter which imposes upon the General Assembly the obligation to "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification."

As the result of a request from the United States Delegation,¹² such implementation of the Charter was placed upon the agenda of the second part of the first session of the General Assembly. When the matter came before the Legal Committee for discussion the Committee had before it a joint proposal by the Delegations of China and the United States.¹³ At its twenty-first meeting the Sixth Committee referred the question to Sub-Committee 1 for detailed discussion.¹⁴

Sub-Committee 1 of the Sixth Committee considered the matter at its ninth meeting, on 25 November 1946. At that meeting certain delegates expressed the view that the present political situation was not favorable for the codification of international law. Other members of the Committee pointed out that the work of codification itself was not immediately contemplated in the draft proposal submitted jointly by the Chinese and United States Delegations, which was limited to the question of the study of methods.

At the following meeting the Delegate of China submitted an amendment to the original joint proposal. The amended proposal took cognizance of the objections which had been voiced in the previous meeting by including the word "eventual" before the word "codification" and by omitting a paragraph in the original joint proposal which would have obligated the General Assembly to consider the "best procedure for deciding what specific subjects should be first considered." This amended proposal by the Chinese Delegation was adopted by the Sub-Committee with some drafting amendments.

The Sixth Committee adopted the report of its Sub-Committee 1 and recommended that the General Assembly should establish a governmental

¹² United Nations Document A/98. Text of the United States Letter to the Secretary-General.

¹³ United Nations Document A/C.6/54.

¹⁴ United Nations Journal No. 39, Supplement 6—A/C.6/77.

committee¹⁵ of sixteen members¹⁶ which would have as its terms of reference¹⁷ the study of:

- (a) the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification;
- (b) methods of securing the coöperation of the several organs of the United Nations to this end;
- (c) methods of enlisting the assistance of such national or international bodies as might aid in the attainment of this objective.

The Sub-Committee devoted considerable discussion to the method of selecting the members to be represented in the committee, and it was finally agreed that it would conserve the time of the Sixth Committee and of the General Assembly if the sixteen members were appointed by the General Assembly on the recommendation of the President. When the report of the Sixth Committee came before the Fifty-fifth Plenary Meeting of the General Assembly, it was decided to increase the number from sixteen to seventeen through the addition of Brazil. The *ad hoc* Committee on Development and Codification of International Law as established by the General Assembly is composed of the representatives of the following seventeen Members: Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, U.S.S.R., United Kingdom, United States, Venezuela, Yugoslavia.¹⁸ This was done at the Fifty-fifth Plenary Meeting of the General Assembly, and the Committee held its first meeting on May 12 at the headquarters of the United Nations.

Affirmation of Principles Recognized in the Charter of the Nuremberg Tribunal. Closely related to the question of the development and codification of international law was the question of the drawing up of a resolution to be submitted to the General Assembly affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal. This matter had not been included in the provisional agenda of the General Assembly but was brought to the attention of the Sixth Committee on 15 November 1946¹⁹ by the delegation of the United States, within the framework of the proposed resolution implementing Article 13, paragraph 1 (a), of the Charter. The Sixth Committee referred the matter to its Sub-Committee 1 which considered the matter in conjunction with its discus-

¹⁵ "The Sixth Committee felt that since the proposed committee would be concerned with methods and procedures basic to the development and formulation of international law, it should be composed exclusively of governmental representatives of Members of the United Nations": United Nations Document A/222, Report of the Sixth Committee.

¹⁶ "It was felt that this number was not so large as to impair the efficiency of the Sub-Committee, nor so small as to prevent the principal legal systems of the world from being represented": the same.

¹⁷ Resolution 94 (1). Resolutions of the General Assembly, A/64/Add.1.

¹⁸ United Nations Journal No. 58: Supplement A—A/PV/55, pp. 470-473.

¹⁹ United Nations Document A/C.5/69.

sion of the resolution concerning the development and codification of international law. The Sub-Committee was not able to arrive at a unanimous decision with regard to its report and proposed resolution both of which were submitted to the Sixth Committee of 4 December 1946.²⁰

In the discussion in the Sixth Committee the delegate from Cuba indicated that he would not vote for the proposal because "it affirmed the principles of international law by a mere reference to them without enumerating them explicitly. The Cuban Delegation thought that the adoption of principles of such importance should not be based on mere references, but should be the outcome of a thorough study of each of the principles concerned."²¹

The delegate of the Soviet Union also said that he could not accept the report and resolution as drafted by the Sub-Committee. His objections were confined to the second point of the draft resolution, because in the opinion of the Soviet delegation "at the present state the Committee on Codification ought not to deal with concrete problems. The Committee has been instructed only to define methods of developing international law. When those methods were approved by the General Assembly, it would have to undertake the codification of international law. At the present time the first paragraph of the resolution seemed sufficient."²²

When the matter came to a vote at the Thirty-Second meeting of the Sixth Committee the preamble and the first paragraph were adopted with the representatives of Cuba, Argentina, and Peru voting against the resolution for the reasons put forward by the Cuban delegate. The second paragraph of the resolution was adopted by twenty-two votes to four with four abstentions.²³

The Crime of Genocide. Similar, though not related to the resolution affirming the principles recognized in the Charter of the Nuremberg Tribunal, was the resolution drafted by the Sixth Committee relating to the crime of genocide.²⁴

The General Assembly, at its forty-seventh Plenary Meeting on 9 November 1946 referred to the Sixth Committee²⁵ a draft resolution sub-

²⁰ United Nations Document A/C.6/116.

²¹ Journal of the United Nations No. 56, Supplement 6—A/C.6/123, p. 127.

²² The same, and Journal of the United Nations No. 58, Supplement 6—A/C.6/127, p. 129.

²³ Journal of the United Nations No. 58, as cited.

²⁴ "Mr. Fahy (United States) stressed the similarity between paragraph 1 of this resolution and the resolution on the principles recognized by the Charter of the Nuremberg Tribunal; neither of them accepted as a defence that those accused of the crimes in question acted on the orders of superior officers" Journal of the United Nations No. 58: Supplement 6—A/C.6/127, p. 131.

²⁵ United Nations Document A/C.6/64. Letter from M. P. H. Spaak, President of the General Assembly, to Dr. Roberto Jimenez, Chairman of the Sixth Committee, dated 13 November, 1945.

mitted by the delegations of Cuba, India, and Panama drawing the attention of the Economic and Social Council to the crime of genocide and inviting the Council to study this problem and to report on the possibility of declaring genocide "an international crime."²⁶

This draft declaration was debated in three meetings of the Sixth Committee.²⁷ An amendment was presented by Sir Hartley Shawcross (United Kingdom) at the twenty-second meeting which reads as follows:²⁸

Declares that genocide is an international crime, for which the principals and accomplices, whether private persons or responsible statesmen, should be punished.

At the twenty-fourth meeting of the Sixth Committee the delegate of France, in collaboration with the delegate of the United Kingdom, proposed a new text to the Sixth Committee which

distinguished clearly between responsibility of individuals and that of states while at the same time taking care to ensure the repression of the state as a collective entity, which point had been the basis of the United Kingdom amendment.²⁹

The new amendment was as follows:³⁰

Declares that genocide is an international crime entailing the responsibility of guilty individuals, whether principals or accessories, as well as states on behalf of which they may have acted.

At this same meeting the Chilean delegate also put forward an amendment which was intended as a summary of the various amendments that had been proposed.³¹ The amendment and the debate in the Sixth Committee indicated that there was unanimous agreement that the General Assembly should affirm that genocide is a crime under international law, and it was decided to appoint a sub-committee to draft a resolution for submission to the Sixth Committee. After some discussion it was decided to create a new sub-committee for this purpose composed of the delegates

²⁶ United Nations Document A/BUR/50. The operative part of the resolution reads as follows: "BE IT RESOLVED that the United Nations Assembly draws the attention of the Social and Economic Council to the crime of genocide and invites the Council to study this problem and to prepare a report of the possibilities of declaring genocide an International Crime and assuring international co-operation for its prevention and punishment and also recommending among others that genocide and related offenses should be dealt with by National Legislations in the same way as other international crimes such as piracy, trade in women, children, and slaves, and others."

²⁷ Journal of the United Nations No. 41, Supplement 6—A/C.3/84. Journal of the United Nations No. 46, Supplement 6—A/C.6/91. Journal of the United Nations No. 47, Supplement 6—A/C.6/94.

²⁸ The text of the amendments presented by the United Kingdom, India, France, and the U.S.S.R. are all contained in United Nations Document A/C.6/83.

²⁹ Remarks of M. Chaumont (France). United Nations Document A/C.6/96, as cited.

³⁰ United Nations Document A/C.6/95.

³¹ United Nations Document A/C.6/94.

of Chile, Cuba, France, India, Panama, Poland, Saudi Arabia, United Kingdom, U.S.S.R., and the United States of America.

This sub-committee met on 2 and 5 December 1946 under the chairmanship of Mr. E. Gajardo (Chile), with Mr. Charles Fahy (United States) as its Rapporteur, to consider the draft proposals of the crime of genocide. The sub-committee was unanimous in its opinion that the resolution of the General Assembly should affirm that genocide is a crime under international law condemned by the civilized world and that provision should be made for the punishment of principals and accessories who may participate in the commission of this crime. The sub-committee also considered the question of the responsibility of States in relationship to the crime of genocide but it was the consensus of the sub-committee that because of special problems relating to the question of state responsibility, as distinguished from the responsibility of private individuals, public officials, or statesmen it was a matter which would more properly be considered at such time when a convention on the subject of genocide might be prepared. It was also thought desirable to incorporate in the resolution a clause inviting Member States to enact legislation for the prevention and punishment of the crime of genocide. The Sub-Committee, however, considered it unnecessary to compare genocide with other crimes such as piracy and trade in women as had been suggested in some of the proposals before it.

The Sub-Committee felt that it was important that there should be early action with a view to the preparation of a draft convention on the subject of genocide. It was therefore proposed in the draft resolution that the General Assembly should request the Economic and Social Council to undertake the necessary studies and to prepare a draft convention for submission to the next regular session of the General Assembly. Some members of the Sub-Committee expressed a preference for the creation of a small Special Committee of Jurists to prepare the convention, while others felt that the Economic and Social Council should secure the coöperation of the committee which would be set up by the General Assembly to study the methods of encouraging the progressive development of international law and its codification. It was finally decided that the responsibility should be placed solely with the Economic and Social Council.³²

The Sub-Committee's report was unanimously adopted at the thirty-second meeting of the Sixth Committee, 9 December 1946.³³ The Sixth

³² By its Resolution of March 28, 1947, the Economic and Social Council instructed the Secretary-General of the United Nations to undertake the necessary studies with a view to drawing up a draft convention on the subject, and, after consultation with the Committee on Development and Codification of International Law set up by the General Assembly, and after reference to all Member Governments for comment, to submit a draft convention to the next session of the Economic and Social Council. United Nations Document E/325, p. 5.

³³ Journal of the United Nations No. 58: Supplement 6—A/C.6/127.

Committee presented its report ³⁴ at the Fifty-fifth Plenary Meeting of the General Assembly where it was adopted unanimously without debate.³⁵

Treatment of Indians in the Union of South Africa. The Sixth Committee also participated in the consideration of an international dispute which involved legal questions of vital importance to the future of the United Nations itself. This was the case of the treatment of Indians in the Union of South Africa.³⁶ As the result of an application made by the delegation of India in June of 1946 the matter had been placed on the provisional agenda of the General Assembly.³⁷ Because of the legal issues involved in the Indian complaint the matter was referred to a joint meeting of the First (Political) Committee and the Sixth (Legal) Committee.³⁸

The issues arose out of certain alleged discriminatory treatment of Indians in the Union of South Africa and more specifically concerned certain laws promulgated by the Union Government in 1946 regarding the landed property of Asiatics and the representation of Indians, which the Government of India claimed to be discriminatory in character. While the political issues involved were beyond the scope of the work of the Sixth Committee, nevertheless certain important legal arguments were made by the Union Government in their rebuttal of the resolution proposed by the Delegation of India, which sought to have the General Assembly declare that the actions of the Union Government were a violation of the Charter and recommend that the Union Government revise its policy and legislation.³⁹

The original resolution proposed by the delegation of India was amended by a proposal submitted by the delegations of France and Mexico, as follows:⁴⁰

The General Assembly, having taken note of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter:

1. STATES that, because of that treatment, friendly relations between the two Member States have been impaired, and unless a satisfactory settlement is reached, these relations are likely to be further impaired;
2. IS OF THE OPINION that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements concluded between the two Governments, and the relevant provisions of the Charter;

³⁴ United Nations Document A/221.

³⁵ Journal of the United Nations No. 56: Supplement A—A/PV/55, p. 476.

³⁶ United Nations Documents A/149, A/68, A/68/Add.1, A/68/Add.2, A/167, A/167/Add.1, A/C.1 and 6/12.

³⁷ United Nations Document A/66, Item 31.

³⁸ United Nations Document A/C.6/40, as cited.

³⁹ United Nations Document A/C.1 and 6/3 (A/C.1 and 6/3).

⁴⁰ United Nations Document A/C.1 and 6/12.

3. Therefore REQUESTS the two Governments to report at the next session of the General Assembly the measures adopted to this effect.

One of the major contentions of Field Marshal Smuts, speaking for the Union of South Africa, was that the instant case involved matters which were essentially within the domestic jurisdiction of the Union of South Africa, and that the United Nations did not have the right to interfere in the matter, although the Union Government had no objection to the case being discussed. Field Marshal Smuts relied especially on Article 2, paragraph 7, of the Charter, which states that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

In view of the fact that the competence of the General Assembly to deal with the matter had been called into question, the delegates of the United States, United Kingdom, and Sweden submitted a joint amendment to the original resolution proposed by the delegation of India. The resolution proposed jointly by the three delegations recommended that the General Assembly resolve that

the International Court of Justice be requested to give an advisory opinion on the question whether the matters referred to in the Indian application are, under Article 2, paragraph 7, of the Charter, essentially within the domestic jurisdiction of the Union.⁴¹

At the Sixth and last meeting the Chairman stated that he would submit the resolutions to the vote in the following order:

1. That proposed by the delegations of France and Mexico;
2. That proposed by the delegations of the United Kingdom, United States, and Sweden.

This ruling by the Chairman did not go unchallenged but it served to settle the difficult procedural question as to the order of voting. The committee adopted the French-Mexican amendment to the draft resolution proposed by the delegation of India by twenty-four votes to nineteen, with six abstentions.⁴²

⁴¹ United Nations Document A/C.1 and 6/20.

⁴² Votes in favor: Byelorussian Soviet Socialist Republic, Chile, China, Colombia, Cuba, Czechoslovakia, Egypt, Ethiopia, France, Guatemala, Haiti, India, Iran, Iraq, Mexico, Philippine Republic, Poland, Saudi Arabia, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yugoslavia. Votes against: Australia, Belgium, Brazil, Canada, Costa Rica, Dominican Republic, El Salvador, Greece, Iceland, Luxembourg, Netherlands, Nicaragua, Norway, Paraguay, Peru, Sweden, Union of South Africa, United Kingdom, United States of America.

In adopting the French-Mexican proposal the Committee was making an essentially political decision giving voice to a general disapproval of discriminatory practices.⁴³ The fact that rejection of the Indian complaint would have conveyed an impression of condoning discrimination doubtless loomed large in the minds of many delegates. Furthermore, in order to have voted for the amendment submitted by the United States, United Kingdom, and Sweden, it would have been necessary, under the ruling of the Chairman, to have first voted down the French-Mexican proposal. Although, legally speaking, there were good grounds for referring the jurisdictional question to the International Court,⁴⁴ the Committee, in making its decision, was primarily concerned with those articles of the Charter relating to human rights and fundamental freedoms, rather than with giving an exact definition of the scope of Article 2, paragraph 7. Notwithstanding this primary interest in the political aspects of the question, however, it would seem correct to say that the General Assembly has implicitly recognized that any act in violation of the principles set forth in the Charter is a matter of concern to all the Members of the United Nations and falls within the competence of the General Assembly irrespective of the nature or origin of the situation.

The General Assembly considered the matter at its Fiftieth, Fifty-first, and Fifty-second Plenary Meetings.⁴⁵ Before the matter could be voted on by the General Assembly, a prior decision had to be taken regarding the vote necessary for adoption of the report of the Joint First and Sixth Committee.⁴⁶ Under Article 18, paragraph 2, of the Charter, "Decisions by the General Assembly on important questions shall be made by a two-

Abstentions: Denmark, Ecuador, Honduras, New Zealand, Panama, Turkey. Journal of the United Nations No. 48: Supplement Nos. 1 and 6—A/C.1.6/23.

⁴³ See for instance the remarks of Mr. Gromyko, Delegate of the Soviet Union, who said: "To treat the Indian question as a legal matter would tend to minimize the political importance and weaken the prestige of the United Nations, one of whose noblest tasks was to promote respect for human rights and fundamental freedoms for all." Journal No. 44: Supplement No. 186—A/C.1 and 6/9, page 30.

⁴⁴ Dr. van Roijen (Netherlands) "noted that there were three types of exceptions to the inviolability of domestic jurisdiction referred to in the paragraph in question:

- (1) Exceptions expressly recognized by the Charter of which there was at present only one, relating to enforcement measures imposed by the Security Council.
- (2) Exceptions derived from the general rules of international law, for instance in cases of extreme persecution of minorities.
- (3) Exceptions established by special rules of international law, that is to say, those arising from treaty obligations.

The present case did not come into the first of these categories, nor, in his opinion, into the second; he was not, however, convinced . . . that the Agreements of 1927 and 1932 did not amount to treaty obligations, which might lift the matter out of the sphere of purely domestic affairs." The same, page 24.

⁴⁵ Journal of the United Nations No. 54: Supplement A—A/PV/50, A/PV/51, Journal No. 55: Supplement A—A/PV/52.

⁴⁶ United Nations Document A/205.

thirds majority of the Members present and voting." The Assembly decided, by a vote of twenty-nine to twenty-four, with one abstention,⁴⁷ that a two-thirds majority was required. The resolution as drafted by the Joint First and Sixth Committee was then put to the vote and adopted by thirty-two votes in favor, fifteen against, and seven abstentions.⁴⁸

Modifications of Rules of Procedure of the General Assembly. The Sixth Committee also dealt with a number of items concerning the internal functioning of the United Nations. In this connection it modified certain of the Provisional Rules of Procedure of the General Assembly. One of these related to the terms of office of the members elected to councils. In order to clarify the Rules of Procedure regarding the date when such terms of office commence and regarding the date when such terms of office would expire, the Sixth Committee recommended the following rules:⁴⁹

Rule 87

The term of office of Members shall begin on 1 January following their election by the General Assembly, and shall end on 31 December following the election of their successors.

Supplementary Rule J

Members of Councils elected for one, two and three years during the first part of the first regular session of the General Assembly shall hold office until 31 December 1946, 1947, and 1948 respectively. Their successors shall be elected during the second part of the first regular session and during the second and third regular sessions of the General Assembly respectively, and shall take and continue in office in accordance with Rule 87.

These rules were adopted at the Forty-seventh Plenary Meeting of the General Assembly, November 9, 1948.⁵⁰

Another rule of procedure modified by the Sixth Committee related to the opening date of the annual session of the General Assembly. The matter was dealt with by the Joint Sub-Committee of the Fifth and Sixth Committees which recommended that "The General Assembly shall meet every year in regular session commencing on the third Tuesday in September."⁵¹

In view of a procedural difficulty which had arisen during the meetings of the General Committee of the General Assembly in connection with the order of voting when several proposals relating to one and the same question

⁴⁷ Journal of the United Nations No. 55: Supplement A/EV/52.

⁴⁸ Same.

⁴⁹ United Nations Document A/182.

⁵⁰ Journal of the United Nations No. 29: Supplement A—A/PV/47, p. 30.

⁵¹ United Nations Document A/C.5/98 or A/C.6/103.

are put to the vote, the matter was submitted by the President of the General Assembly to the Sixth Committee.⁵² The Sixth Committee turned the matter over to its Sub-Committee 2 for consideration. The Sub-Committee examined this question at its Fifth meeting held on 24 November 1946, and submitted a somewhat equivocal report to the Sixth Committee. The Sub-Committee was "of the opinion that there could be only one resolution relating to one and the same question. All other proposals must be in the nature of amendments to the main resolution. Therefore, Rule 75⁵³ can be given effect to in all cases where there are more proposals than one relating to one and the same question."

After considerable discussion in the Sixth Committee, the delegate of France submitted an amendment as follows:⁵⁴

The first in point of date of the resolutions presented shall be considered as a draft principle resolution. The President of the Assembly or the Chairman of a Committee shall decide, if there were no objections, the order in which amendments shall be voted, by applying Rule 75.

The French proposal was accepted with fifteen votes for and fourteen votes against, with eight abstentions, a vote being taken by roll-call after a vote by a show of hands had proved indecisive (twelve to twelve). The amended text as approved by the Sixth Committee was then communicated to the General Committee for its consideration.

Power of Economic and Social Council and Specialized Agencies to Request Advisory Opinions from the International Court of Justice. The Sixth Committee also considered a recommendation by the Economic and Social Council that it be authorized to request advisory opinions from the International Court of Justice. It recommended that the General Assembly should authorize the Economic and Social Council to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council because that body has wide responsibilities in different fields of economic and social coöperation, and because, by virtue of the terms of Article 63 of the Charter, the function of coördinating the activities of the specialized agencies has been conferred on the Economic and Social Council.⁵⁵ The Sixth Committee also devoted two meetings to the related question of authorizing specialized agencies to request advisory opinions of the International Court of Justice

⁵² United Nations Document A/C.6/70.

⁵³ Rule 75 of the Provisional Rules of Procedure for the General Assembly reads: "If two or more amendments are moved to a proposal, the General Assembly shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed, and so on, until all the amendments have been put to the vote."

⁵⁴ Journal of the United Nations No. 55: Supplement 6—A/C.6/122.

⁵⁵ United Nations Document A/201.

on legal questions arising within the scope of their activities other than questions concerning the mutual relationships of the organizations and the United Nations or other specialized agencies.

At the last meeting of the Economic and Social Council that body, which at first had considered it desirable to exercise some control over the specialized agencies in respect to their power to request advisory opinions of the International Court of Justice, revised its attitude and decided to recommend that the General Assembly should grant to each of the specialized agencies concerned the same procedure for obtaining advisory opinions from the International Court of Justice as that specified in Article 9 of the Draft Agreement with the ILO.⁵⁶

When the matter came before the Sixth Committee certain delegations, notably those of India and the Soviet Union, submitted proposals against granting a general authorization to the four specialized agencies to request advisory opinions from the International Court of Justice. After a lengthy discussion, the proposal of the Indian Delegation was rejected.⁵⁷ The Soviet proposal which took the form of substituting in the various draft agreements with the specialized agencies, the more restrictive procedures set forth in Article XI of the draft agreement with UNESCO, was also rejected after separate votes had been taken on each of the draft agreements.⁵⁸ A proposal moved jointly by the Delegations of France and Belgium to support the recommendation of the Economic and Social Council to include in the agreements a clause containing the general authorization to request advisory opinions as set forth in the draft agreement with the ILO, was adopted in respect of each of the draft agreements with the four specialized agencies,⁵⁹ "it being understood that the General Assembly may at any time revoke this authorization."⁶⁰

Administrative Matters. Also on the agenda of the Sixth Committee were certain questions relating to the International Court of Justice. Thus the Sixth Committee adopted a resolution for submission to the General Assembly relating to the privileges and immunities of members of the International Court of Justice, the Registrar, officials of the Registry, Assessors, the Agents and Counsel of the parties and of witnesses and experts.⁶¹ The joint Sub-Committee of the Fifth and Sixth Committees also considered the question of the pensions of the International Court of Jus-

⁵⁶ Resolutions of the Economic and Social Council on the Draft Agreements, 17 October 1946, Document A/119. The texts of the Draft Agreements with the ILO, UNESCO, FAO, and ICAO may be found in Documents A/72, A/77, A/78, and A/106 respectively.

⁵⁷ Journal of the United Nations No. 52: Supplement No. 6—A/C.6/111.

⁵⁸ The same, pp. 105-106.

⁵⁹ Journal of the United Nations No. 52, as cited.

⁶⁰ Motion Presented by the Delegations of France and Belgium, A/C.6/109.

⁶¹ United Nations Document A/202.

tice⁶² and matters pertaining to the administration of the Court,⁶³ and submitted reports on these matters to the General Assembly.

On a matter of deep concern to the internal administration of the United Nations, the Sixth Committee at its thirty-third meeting also unanimously adopted a thirty-six page report of the joint Sub-Committee of the Fifth and Sixth Committees⁶⁴ relating to a proposed scheme for staff retirement and related benefits.

Site Convention. The Sixth Committee also dealt with the question of the arrangements required as a result of the establishment of the permanent headquarters of the United Nations in the United States of America.⁶⁵

Originally the Secretary-General had been authorized by the General Assembly at its London Session to enter into negotiations with the United States authorities. At the same time the Assembly drew up a draft agreement which was to be the basis of the negotiations.⁶⁶ The negotiations had been conducted on behalf of the Secretary-General by Mr. Ivan Kerno, Assistant Secretary-General in charge of Legal Affairs, and during the negotiations it was supposed that the site would be in Westchester County, but the draft was not put into a definite form because it was realized that until the formal site had been decided upon it would be very difficult to find an accurate formula for some of the questions involved. In an exchange of letters between Dr. Kerno and Mr. Fahy, legal advisor to the State Department, it was therefore agreed to submit the draft to the Second Part of the First Session of the General Assembly and to complete it only after the exact site of the permanent headquarters had been chosen.

In view of the fact that originally a rural site had been envisaged, the decision to locate the United Nations headquarters in New York necessitated certain modifications of the draft agreement in order to adapt it to the circumstances of an urban site. Further negotiations would therefore be necessary and the agreement could not be submitted for the approval of the General Assembly until the Second Session. The Sixth Committee therefore recommended that the General Assembly should authorize the Secretary-General to undertake further negotiations with the appropriate authorities of the United States of America, being guided in his negotiations by the particular plans set forth in the draft agreement relating to the agreements between the United Nations and the United States of America.

In this connection it is interesting to note that at the thirty-third meeting of the Sixth Committee, Dr. Kerno called attention to the fact that in

⁶² United Nations Document A/217.

⁶³ United Nations Document A/226.

⁶⁴ United Nations Document A/C.5/122 or A/C.6/128.

⁶⁵ United Nations Document A/271.

⁶⁶ United Nations Document A/67.

the proposed draft agreement the term "convention/agreement" had been used. Dr. Kernó was now of the opinion that only the word "agreement" should appear in the draft resolution relating to the undertaking of further negotiations by the Secretary-General.⁶⁷ The Assistant Secretary-General cited a letter from Mr. James McGraney, Acting Attorney-General of the United States, addressed to the Secretary of State, to the effect that an agreement executed by the President of the United States, pursuant to a joint resolution of the Congress, would operate as the supreme law of the land superseding any inconsistent State or local laws with the same effect in that regard as a treaty ratified by and with the advice and consent of the Senate.⁶⁸ The draft resolution was then put to a vote and adopted unanimously.

The adoption of the resolution relating to the arrangements required as a result of the establishment of the United Nations in the United States of America was the last item of business undertaken by the Sixth Committee at the Second Part of the First Session of the General Assembly. Not every item on its agenda has been discussed herein, but the analysis has been limited in the main to the items of major importance considered by the Sixth Committee. However, a sufficiently wide range of subjects has been noted in order to convey a balanced picture of the work of the Sixth Committee.

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QUADRIPARTITE MILITARY GOVERNMENT ORGANIZATION AND OPERATIONS IN GERMANY

The failure of the Foreign Ministers, meeting in Council at Moscow, to achieve their major objectives, a peace treaty for Germany and its political and economic unification, serves to emphasize the importance of the manner in which Germany has been and will continue to be governed until the United States, Great Britain, Soviet Russia, and France arrive at a final agreement which will be satisfactory to all concerned.¹

The supreme governing machinery for Germany is the Allied Control Authority (ACA) which is composed of the Control Council, the Coördinating Committee, the Control Staff, and the Allied Secretariat.²

⁶⁷ United Nations Document A/271, as cited.

⁶⁸ United Nations Document A/67/Add.1.

* Any views expressed in this Note are those of the author and are not to be regarded as those of any Member State, organ, or official of the United Nations.

¹ See address by the Secretary of State, April 28, 1947, "Moscow Meeting of the Council of Foreign Ministers," March 10-April 24, 1947, *Department of State Bulletin*, May 11, 1947, p. 919.

² Statement by the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics, and the Provisional Government of the

The Control Council, which is composed of the Commanders-in-Chief of the Armed Forces of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and France, exercises supreme authority in Germany, on instructions from their respective governments, with respect to all matters affecting Germany as a whole.³ It is the responsibility of each Commander-in-Chief to insure that the decisions of the Control Council are implemented in his zone of occupation, where he exercises supreme authority as Military Governor of that zone. All decisions must be unanimous.⁴

The Control Council meets three times a month with the chairman of the meeting rotating each month among the four Powers. Usually these sessions, which are brief and formal, are devoted chiefly to the signing of legislation which has previously been thoroughly discussed and approved by quadripartite bodies at lower levels. Sometimes, however, the Council becomes involved in discussions and problems which are so far-reaching and involve such important matters of policy that consultation with their home governments is required before a decision can be reached.⁵

Directly below the Control Council in authority is the Coördinating Committee which is composed of the Deputy Military Governors of the four zones of occupation, acting as representatives of each of the Commanders-in-Chief.⁶ The Control Council refers a majority of its problems to this Committee for recommendation of action and for implementation of its decisions. The Coördinating Committee, which usually meets about six times each month, has a large staff of secretaries, advisors, and interpreters who assist it in its task of giving preliminary approval to legislation before

French Republic on Control Machinery in Germany, June 5, 1945, *Official Gazette of the Control Council for Germany*, Supplement No. 1, p. 10; *The Axis in Defeat*, Department of State Publication 2423, p. 68.

The basic policy document governing the machinery of the Allied Control Authority is the agreement set forth by the European Advisory Commission, 14 November 1944, as amended 1 May 1945, *Documents on American Foreign Relations*, Vol. VI, p. 14. The signatories to this agreement on control machinery were the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and France. This basic policy was restated and reaffirmed by the same four signatory powers in the Statement on Control Machinery in Germany, 5 June 1945, as cited. Reference is also made to the Allied Control Authority in the Crimea Conference Communique, February 3-11, 1945, *Official Gazette of the Control Council for Germany*, Supplement No. 1, p. 4, section 2, and the Potsdam Agreement (Report on the Tripartite Conference of Berlin), 2 August 1945, Article III, *Official Gazette of the Control Council for Germany*, Supplement No. 1, p. 14.

³ Statement on Control Machinery, Potsdam Agreement. See also Control Council Proclamation No. 1, Section II, *Official Gazette of the Control Council for Germany*, No. 1, p. 4.

⁴ Statement cited above, note 2.

⁵ *Military Government Weekly Information Bulletin*, No. 78, 3 February 1947, p. 4.

⁶ Above, note 4; Control Council Directive No. 2, *Military Government Regulations* 23-161.2. *Military Government Regulations* will hereinafter be cited "MGR".

it is passed on to the Control Council for final action. This Committee is vested with considerable authority and often makes the final decision on policies, even signing a great many legislative enactments for the Control Council.⁷

Serving both the Control Council and the Coördinating Committee is the Allied Secretariat, which is composed of the four national secretaries, each of whom heads one national element.⁸ The Secretariat, which meets daily and without as much formality as the policy-making groups, is responsible for the preparation of the agenda and the minutes of both the Control Council and the Coördinating Committee, as well as the translation of papers into French, English, Russian, and German, when required, and the issuance of the decisions of both the Control Council and the Coördinating Committee. The Secretariat is also responsible for official contacts with foreign missions which are accredited to the Control Council, and acts as the channel of communication of the Control Council and Coördinating Committee in all matters presented by the Control Staff and other agencies.

A considerable portion of the work of the Allied Secretariat is devoted to insuring that all official records are in proper order and that all papers are thoroughly discussed and properly coördinated before they are presented to the Control Council or the Coördinating Committee. Unlike the United Nations Secretariat, there is no single secretary-general and the four national staffs are not integrated. The chairmanship rotates, but the chairman does not supervise any but his own national staff, the integrated translators' pools, the official archives, and the Liaison and Protocol Section, which is the official contact between the Allied Control Authority and the 15 nations which have sent military missions to Berlin, accredited to the Control Council. Decisions of the Secretariat are required to be unanimous.⁹

Serving under the Coördinating Committee as functional specialists are ten quadripartite directorates, referred to collectively as the Control Staff Directorates. They are: the Combined Services Directorate (Military, Air, and Naval); Transport; Political; Economic; Finance; Reparation; Deliveries and Restitutions; Internal Affairs and Communications; Legal; Prisoners of War and Displaced Persons; and Manpower.¹⁰

Each of these Directorates is composed of the chief of the corresponding functional division at his national headquarters in Berlin. Thus the Legal Directorate consists of the Directors of the Legal Divisions for each of the four zones. They are usually staffed with experts in various fields who are expected to have a thorough knowledge of the German fields in

⁷ Above, notes 4 and 5. Control Council Directive No. 13, MGR 23-161.3.

⁸ Control Council Directive No. 3, MGR 23-161.3. See also above, note 5, p. 7.

⁹ Above, note 8. Control Council Directive No. 17, MGR 23-161.17.

¹⁰ Above, note 4; Control Council Directives No. 5 and 34. MGR 23-161.5, 161.34.

which they work. Thus the members of the Economics Directorate, consisting of the Directors of the Economics Division for each of the four zones and their staffs, are expected to have a working knowledge of the problems involved in promulgating and implementing policy and action with respect to the German economic situation.¹¹

Serving these Directorates are over a hundred other quadripartite bodies, consisting of Committees, Sub-Committees and Working Parties, which are the agencies performing the basic groundwork. For example, the Legal Directorate has a Patent Committee, a Committee on the Reopening of German Courts, Working Parties on the German Criminal Code, the Repeal of Nazi Laws, and Working Parties covering numerous other phases of operation. The Economics Directorate has a Food and Agriculture Committee, a Trade and Commerce Committee, an Industry Committee, etc.

Ultimately the men who know the facts and figures, and who are therefore in a position to offer intelligent recommendations and advice to the higher levels, constitute the staffs of these Working Parties and Committees. Each Working Party and Committee is composed of representatives of each of the four occupying Powers. Unanimity is required for all decisions but compromise is usually effected without great difficulty.

Operating through the Working Parties and the Committees and Sub-Committees, the Directorates carry on preliminary discussions and thrash out the various differences which arise. Functioning in a manner similar to the Congressional Committees in the United States, they ultimately prepare reports recommending action to the Coördinating Committee which in turn generally sends the recommendations to the Control Council for final approval. When these recommendations are approved and enacted into legislation the Directorates are then charged with the implementation of the legislation.

Although the Directorates meet only once a week, they work for long periods of time and the Committees, Sub-Committees, and Working Parties are often in daily session. The chairmanship of the Directorates as well as the subordinate agencies rotates each month.

In order to relieve the functional personnel of the burden of "house-keeping" work, the Control Council established the Administrative Bureau, composed of a representative of each of the occupying Powers. Its function is to provide the Allied Control Authority with the necessary security guards and with the proper offices, messing facilities, and such other services as the Coördinating Committee may prescribe.¹²

Two other agencies have been established by the Control Council, namely the Inter-Zonal Facilities Section¹³ and the German External Property

¹¹ Above, note 5, pp. 4-5.

¹² Control Council Directive No. 4, MGR 25-161.4.

¹³ Control Council Directive No. 36, MGR 23-141.36.

Commission.¹⁴ The former, which is under the Administrative Bureau, handles all requests for permits to travel into and out of the various zones of occupation. The latter is charged with the vesting and marshalling of German external assets located within the boundaries of nations other than the four occupying Powers.

The Inter-Allied administration of the Greater Berlin Area is the responsibility of the Allied *Kommandatura*, Berlin, which is immediately subordinate to the Allied Control Authority in the chain of command. The *Kommandatura* governs the city on a quadripartite basis, through the German municipal government which has been established. Within the Allied *Kommandatura* are the Quadripartite Committees which are organized by functions corresponding approximately to the departments of the municipal legislature, the Deputy Commandants, and the Commandants. The Committee members serve as technical advisors to the Commandants and perform the ground work for actions to be decided at higher levels. Recommendations of the Quadripartite Committees are sent to the Deputy Commandants for approval. All decisions must be unanimous. If the Deputies fail to agree the recommendations are forwarded to the Commandants. Upon unanimous approval, either by the Deputies or the Commandants, Allied *Kommandatura* decisions are sent to the *Oberbürgermeister* (Lord Mayor) of Berlin for implementation. All questions on which the Commandants cannot agree, as well as all matters having application beyond the City of Berlin, must be sent to the Allied Control Authority for action or decision. The chairmanship at each level of the *Kommandatura* rotates monthly.¹⁵

The Control Council and the Coördinating Committee are provided with the following means of legislative action:¹⁶

1. Laws: to be enacted on matters of general application, unless they provide otherwise.
2. Proclamations: to be issued in cases of special importance to the occupying Powers or to the German People or both.
3. Orders: to be issued in other cases when the Control Council has requirements to impose on Germany and laws are not used.
4. Directives: to be issued to communicate policy or administrative decisions of the Control Council.

¹⁴ Control Council Directive No. 21, MGR 23-161.21.

¹⁵ Above, note 4. See also MGR 1-415.

¹⁶ Control Council Directive 10, MGR 23-161.10; *Official Gazette of the Control Council*, No. 3, p. 38. Control Council Directive No. 10 has recently been revised and superseded by Control Council Directive No. 51, 29 April 1947. No basic changes are made. However, under the terms of this Directive, legislative action by the Control Council is limited to Proclamations, Laws and Orders. The Control Council may still issue Directives and "Approved Papers" to implement Laws, Orders and Proclamations and to express policy or administrative decisions. However, they are not to be considered legislative acts and are therefore not binding on the population of Germany as a whole, but rather affect only those to whom they apply:—German governmental bodies, persons, or agencies.

5. Instructions: to be issued when the Control Council wishes to impose requirements directly upon a particular authority.

Laws and proclamations must be signed by the Control Council. Orders, directives and instructions may be signed by members of the Control Council or by the Coördinating Committee acting on their behalf.¹⁷ Immediately after they are signed copies of all types of legislation are dispatched to the appropriate authorities in each zone of occupation and in Berlin by each national element of the Allied Secretariat for implementation.

As already indicated, laws of the Control Council have mandatory application throughout Germany and are legally applicable directly to the German people. As such they are enforceable by both German and Military Government courts. More frequently, however, the Allied Control Authority acts through directives which are addressed to the four Zone Commanders and to the Allied *Kommandatura*, Berlin. Each Zone Commander must then issue the necessary instructions within his zone to see that these orders are carried out and he is responsible to the Control Council for their enforcement.¹⁸

If this legislative machinery seems cumbersome and slow it should be remembered that such defects are probably inherent in the operations of a legislative body composed of the representatives of four nations, speaking three different languages, and covering the entire field of government of a fifth nation, speaking a fourth language.

The operation of Allied Military Government in Germany has proved to be an unusual school of international law and relations, requiring not only a continuous effort to reconcile divergent political programs and philosophies, but also calling for practical coöperation in a common administrative enterprise. That this enterprise has been relatively successful in its operations, despite its apparently cumbersome machinery, is indicated by the fact that between the time of its inception in July, 1945, and March, 1947, the Allied Control Authority has enacted 3 proclamations, 53 laws, 4 orders, 48 directives, and over 100 instructions, covering every conceivable phase of German life.

It is submitted that Allied Military Government in Germany has been and still is the greatest test of the ability of the major nations in the world to find not only a *modus vivendi*, but to work together as an active team on the reorganization and rehabilitation of another nation which has been shattered physically, politically, economically, culturally, and spiritually.

ELI E. NOBLEMAN *

¹⁷ Above, note 16. See also Control Council Directive No. 13, MGR 23-161.13.

¹⁸ Above, note 5, p. 31.

* Attorney, Department of Justice. Mr. Nobleman was formerly Chief of the German Courts Branch of the Legal Division of the Office of Military Government for Bavaria and later became Chief of the Military Government Courts Branch of that office. He assisted in the reorganization and supervision of the German Judicial System in Bavaria. The views expressed are not to be regarded as necessarily reflecting the views of the Department of Justice.

DECISION ON POLAR SOVEREIGNTY BY STUDENT MOOT COURT

In view of the editorial comment on "Sovereignty in Antarctica" by Philip C. Jessup in the January issue of this JOURNAL,¹ and discussion on the teaching of international law at the Annual Meeting of the Society in Washington on April 25, 1947, the post-war revival of the annual moot court meeting between international law students of Colgate and Syracuse Universities may be of some current interest to members of the Society, particularly to teachers of international law.

For the question before the moot court, held at the Maxwell School of Citizenship on the Syracuse campus on April 19, 1947, was the following: "Is the sector theory the proper basis under international law for the assertion of national sovereignty in polar areas?" Selection of the question had been the responsibility of the 17 members of the Syracuse international law class taught by Dr. Earl Ketcham, for many years a member of the Society.

The moot court, representing The International Court of Justice, was composed of 13 students of international law in the course given at Colgate University by the undersigned. The case was argued by the Syracuse students, who played the role of attorneys for both the British Commonwealth of Nations and the United States. Briefs had been made available to the court some two weeks prior to the court session.

In its opinion, after outlining the sources of international law which must be considered binding upon an international court, and defining the sector theory, the moot court summarized the affirmative arguments of the student attorneys for the British Commonwealth and the negative arguments of the attorneys for the United States as follows:

In support of their stand, the attorneys of the British Commonwealth invoked the argument of convenience, holding that a division of polar *terra nullius* under this plan would offer the simplest solution to the problem, would obviate future disagreement over partition of lands rich in mineral resources, and that contiguity with the sovereign land mass of the claiming state would render the sector area more easily defensible. It was pointed out that the rigors of the climate made effective occupation in the accepted sense extremely difficult if not impossible and that no nation had yet succeeded in establishing such occupation in the polar regions. The claims to polar sectors by Britain, France, Russia, and New Zealand are cited, and it is noted that Russia's claims are substantiated by treaty. The United States, it is held, has implied acceptance of the sector theory and has in its early history claimed territories under the argument of geographical predestination. The strength of the claim to territories under the principle of contiguity is stressed, and that doctrine is held to be growing in importance. Admitting that because of the peculiar nature of the case there are no clear cut precedents to support its stand, the British

¹ Philip C. Jessup, "Sovereignty in Antarctica," this JOURNAL, Vol. 41 (1947), pp. 117-119.

Commonwealth points out that international law is ever changing and adapting itself to fit new situations and requests the court to return a decision based on reason.

The attorneys of the United States hold that "the sector theory as applied to the polar regions is an arbitrary effort to divide up a large part of the world's area amongst several countries." Denying that it is a valid basis under international law for partitioning polar areas, they maintain that the contiguity doctrine upon which much of the British case rests does not constitute a source of legal rights and has no foundation in international law. The United States cites precedents to demonstrate that the high seas, subject to claim under the sector theory as interpreted by the British Commonwealth, can in no wise be considered sovereign property of any state. It is likewise maintained that undiscovered lands are not subject to sovereignty and that polar ice, if construed as being subject to sovereignty, must undergo similar discovery and occupation. Pointing out that the sector theory as superimposed on Antarctic areas is sometimes based on discovery, it is held by the United States that discovery alone is not considered sufficient grounds under international law for the acquisition of sovereignty. Occupation and effective control are necessary, and these are lacking in Antarctic territories claimed under the sector theory.

Inasmuch as the student attorneys for the British Commonwealth of Nations had based their claims to legal justification of the sector theory on such principles as convenience, contiguity, discovery, and the hinterland theory, the moot court proceeded to investigate the validity of each of these doctrines in turn. It found none of them valid under international law, substantiating its point of view by reference to Gustav Smedal, C. C. Hyde, J. B. Moore, J. B. Scott, D. H. Miller, T. W. Balch, M. O. Hudson, Edwin Borchard, and W. E. Hall.²

The moot court then stated the methods of acquiring sovereignty over territory in temperate regions which it found to be generally accepted under international law at the present time, discussing in particular effective occupation as the method which had a direct bearing on the case before it and citing in its discussion such authorities as Hyde, Hall, E. D. Dickinson, and G. H. Hackworth.³

Having studied the legal basis of the sector theory as proposed by the

² Gustav Smedal, *Acquisition of Sovereignty over Polar Areas*, 1931, pp. 60-62; C. C. Hyde, *International Law*, 1921, Vol. I, pp. 162-177; J. B. Moore, *International Law Digest*, 1906, Vol. I, pp. 265-266; J. B. Scott, "Arctic Exploration and International Law," this JOURNAL, Vol. 3 (1909), pp. 928-941; D. H. Miller, "Political Rights in the Arctic," *Foreign Affairs*, Vol. 4 (1925-6), pp. 47-60; T. W. Balch, "The Arctic and Antarctic Regions and the Law of Nations," this JOURNAL, Vol. 4 (1910), pp. 265-275; M. O. Hudson, *Cases on International Law*, 1929, pp. 378-387; Edwin Borchard, *Fiore's International Law Codified*, 1918, pp. 424-425; W. E. Hall, *Treatise on International Law*, 1924, pp. 125-127.

³ Hyde, work previously cited; Hall, work previously cited. E. D. Dickinson, *Law of Nations*, 1929, p. 504; G. H. Hackworth, *Digest of International Law*, 1940, Vol. 1, pp. 449-465.

student attorneys for the British Commonwealth of Nations, and having set forth the methods of asserting sovereignty which the court had found to be almost universally accepted in temperate regions, the moot court next turned to a consideration of the request that a new concept of law based on reason was needed for polar areas.

Briefly the court denied the contention advanced by the attorneys for the British Commonwealth that allowing the polar territories to remain *terra nullius* until properly occupied would foster international rivalries which might lead to war. The court held that "mere assignment of sectors is insufficient to restrain an aggressive power from establishing itself where its interests dictate. Only effective occupation and defense of an area can secure it against foreign encroachment."

Referring to the claims of the student attorneys for the British Commonwealth that "other nations have either directly or indirectly agreed to the sector theory," the moot court pointed out that "these agreements have been based on bilateral treaties or unilateral statements . . . and are, therefore, not binding under international law on third parties."

The court, then, disagreed with the statement of the student attorneys for the British Commonwealth that "no country has maintained a condition of 'effective occupation' in polar regions so as to be qualified to claim territory there on that basis." The court felt that settlements on Greenland and Spitzbergen, not to mention British and Canadian occupation of Stonington Island in the Antarctic and Ellsmere Island in the Arctic, met rather successfully occupation requirements for polar regions.

In concluding its opinion, the moot court reasoned as follows:

In the light of technological advancements which the world has made, and will make in the future, the court sees no reason why it will be impossible to satisfy minimal requirements for effective occupation in polar areas. There is no reason for premature action to divide these areas before the respective countries are in an adequate position scientifically to use them properly and to occupy them effectively.

The court, therefore, feels under no compulsion to discard the body of law which is its heritage from the past to attempt by reason to rule favorably with regard to the sector theory. On the contrary, the court finds that the course of technological development has been so timed that the generally accepted international law bearing on acquisition of sovereignty is as valid today with regard to polar areas as it was originally as developed in and applied to more temperate regions.

The court is unanimous in its decision against the validity of the sector theory under international law for the assertion of national sovereignty in the polar areas.

Whether one agrees with the opinion of the moot court or not, the value of such a case as a stimulus to the study of international law by members of university classes is obvious. Both Colgate and Syracuse students spent

considerable time, in addition to regular class assignments, in preparation for the court session. In the process they learned something about research procedure and established some degree of familiarity with a number of the more important publications in the field of international law found in the Colgate and Syracuse University libraries.

ROBERT E. ELDER

Colgate University

THE INTERNATIONAL LAW QUARTERLY

At long last—for more than forty years—the proud boast of the American Journal of International Law that it was the only periodical exclusively devoted to this subject published in the English language has come to an end; for there lies upon our desk the first number of the *International Law Quarterly*, more particularly identified as “The British Journal of Public and Private International Law.” We are more than glad to welcome our British professional cousin, not as a competitor, but as a collaborator in a field of work which requires all possible collaboration. The new quarterly is issued under brilliant auspices. Dr. C. John Colombos and Professor G. C. Cheshire are honorary joint editors. The editorial committee is composed of Sir Cecil Hurst, Mr. W. E. Beckett, Professor J. L. Brierly, Sir Harold Duncan, Lord du Parc, Professor A. L. Goodhart, Professor George W. Keeton, Professor H. Lauterpacht, Mr. T. G. Lund, Sir Arnold D. McNair, and Professor H. McKinnon Wood. The managing editor is Mr. E. H. Wall. The first number contains a foreword by Sir Cecil Hurst and articles by Sir Arnold McNair, Professor Cheshire, and Dr. Colombos. These are followed by a number of editorial notes, reviews of international law cases, book reviews, and texts of selected documents. Mr. Howard S. LeRoy, Treasurer of the American Society of International Law, will act as correspondent in the United States, and contributions from this country will be welcomed by the new quarterly.

In his foreword Sir Cecil Hurst states that the new publication is an act of faith, primarily, he adds, of faith in international law. The times do verily require faith in international law. We have never entirely lost it despite the tragedies and catastrophes of two world wars which we have been fortunate enough to live through; but we have been hard put at times for explanations to justify our existence. The appearance now of another collaborator justifies our faith and gives us courage to renew our efforts toward the noble goal in company with all who would go our way.

The first article in the American Journal of International Law started with this sentence from the pen of Elihu Root: “The increase of popular control over national conduct, which marks the political development of our time, makes it constantly more important that the great body of the people in each country should have a just conception of their international

rights and duties." Strange ideologies at variance with those concepts are abroad in the world, and there is greater need today than ever before for the propagation and development of a just conception of international rights and duties. The editors of the American Journal of International Law are happy to join hands with the editors of the *International Law Quarterly* in promoting this common objective.

GEORGE A. FINCH

Editor-in-Chief

COLUMBIA JOURNAL OF INTERNATIONAL AFFAIRS

Under the auspices of the School of International Affairs of Columbia University a new publication, called *Columbia Journal of International Affairs* was to begin publication in May of 1947 under the direction of Professor Schuyler C. Wallace but edited and published by the students of the School; Professor Grayson L. Kirk is Advisor to the Editorial Board. No regular dates of publication have been indicated but each issue of the *Journal* is "to deal with one aspect of International Affairs through interpretive articles, factual summaries, reviews, and selected bibliographies." The first issue was to deal with "Higher Education in International Affairs."

P. B. P.

EXCHANGE OF GREETINGS WITH TURKISH INSTITUTE OF INTERNATIONAL LAW

On the occasion of the recent visit of Professor Herbert W. Briggs to Turkey President Charles Cheney Hyde took advantage of the opportunity to communicate with the President of the Turkish Institute of International Law as follows:

607 Kent Hall, Columbia University
New York 27, New York
March 18, 1947

Through the good offices of my distinguished friend, Professor Herbert W. Briggs of Cornell University, I would extend, on behalf of the American Society of International Law, most cordial greetings to the Turkish Institute of International Law, and to its eminent founder Dr. Cemil Bilsel. We have not forgotten the words of His Excellency Dr. Numan Menemencioglu, Turkish Minister for Foreign Affairs, when he said, in 1943, that his own country was one "where International Law does not take to shelter but where it reigns supreme." That International Law may continue there so to reign is the ardent hope of the American Society of International Law. The American Society rejoices in the efforts of the Turkish Society to uphold the cause of that law. Never heretofore in its history has the United States felt so deep an interest as it does today in the success of the Turkish State in enjoying the full measure of its rights and

privileges under International Law. May the Turkish Institute of International Law play its part in the achievement of that success.

Charles Cheney Hyde, President,
American Society of International Law.

President Hyde recently received the following reply to his communication and it is believed that members of the Society and readers of the JOURNAL will be interested in this communication.

University of Istanbul
Turkish Institute of International Law
April 15, 1947

Dear Mr. President:

The Turkish Institute of International Law of the University of Istanbul has appreciated very much the good wishes of your Society, transmitted to it through the courtesy of Professor Briggs on the occasion of the lectures which he gave under its auspices, and which enjoyed the most complete success among Turkish jurists.

The Institute considers it a duty to thank your Society for the particularly friendly thoughts expressed with respect to its eminent founder, Professor Cemil Bilsel.

Our Institute endeavours, within its sphere of operations, to make known the principles of the law of nations which are the protection of a peace-loving humanity.

To this end it is inspired by the remarkable work of the American Society of International Law, whose *American Journal of International Law* constitutes a most valuable document for research in our science.

We should like to hope that for the future ever closer relations will be established between our two institutions.

(Signed)

Muammer R. Sevig, President,
Turkish Institute of International Law.

P. B. P.

WILLKIE MEMORIAL AWARD IN INTERNATIONAL RELATIONS

An award for the best publication (book, article, monograph) of the year in international relations* will be made by the Willkie Memorial Building through a Committee on Awards of the American Political Science Association, headed by Robert D. Leigh of the Social Sciences Research Council, or, more specifically, through a panel of that Committee headed by Dean Payson S. Wild, Jr., Graduate School of Arts and Sciences, Harvard University. Other members of the panel are Professor William T. R. Fox of Yale University, Professor George Taylor of the University of Washington, Dr. G. Bernard Noble of the Department of State, and Dr. Ralph J. Bunche

* Other awards are to be made in the fields of *government and democracy* and *government and human welfare*; further information may be obtained from the SSRC, 70 East 45th St., New York 17.

of the United Nations Secretariat. The award is offered for the best publication of any citizen or resident of the United States, or publisher, submitted by the author or publisher or by any member of the American Political Science Association. For the 1947 award works published during the period February 1946–September 30, 1947, are eligible, and six copies of the work must be in the hands of the Committee by October 1. The bases of the award are to be quality of research, intellectual penetration, and judgment, stated with reasonable clarity and conciseness. The award is to be a scroll of honor to be presented at the Annual Meeting of the American Political Science Association.

P. B. P.

WILLIAM WILLIAMS

William Williams, well known lawyer, and one who had rendered conspicuous public service, died on February 8, 1947. He was for many years a member of this Society, and in his will he generously recognized its activities by the bequest to it of one thousand dollars. By an appropriate resolution of April 24, 1947, the Executive Council of the Society expressed their appreciation of this bequest and provided for an obituary notice for publication in its JOURNAL.

I had the privilege of knowing Mr. Williams for a great many years. I first met him when, as a young lawyer, he was appointed in 1892 by President Harrison as junior counsel in the famous Bering Sea Arbitration. In the war with Spain he was a fellow-member of Troop A of the United States Volunteers, and was later commissioned as a Major. In the First World War he was a Lieutenant Colonel of Ordnance.

Born on June 2, 1862, in New London, Connecticut, Mr. Williams was a descendant of the William Williams who signed the Declaration of Independence. He received his A.B. degree from Yale in 1884, and four years later graduated from the Harvard Law School. For twelve years he was associated with the well known law firm of Simpson, Thacher, and Barnum in New York City, and since 1900, except for the years in which he held official positions, he was engaged in independent practice of the law and attended his office regularly almost to the day of his death.

In 1902 President Theodore Roosevelt appointed Mr. Williams Commissioner of Immigration at Ellis Island, in which capacity he served until 1905; and in 1909 President Taft appointed him to the same office, where he remained until 1913. His administration upon both occasions was highly commended. In 1914 Mayor John Purroy Mitchel chose him for Commissioner of Water Supply, Gas, and Electricity, and he served his City in this post until 1917.

He was active in church and charity matters, and was a member of various New York clubs. As a lawyer he was clear-headed and forceful; as

a public servant most industrious and of high administrative capacity. He was a wise adviser, esteemed by all who knew him.

Mr. Williams rendered very real service when, as a young man in 1892, in charge of the preparation of the case in the Bering Sea Arbitration, by reason of a slight knowledge of Russian, he discovered that the translator who worked for the State Department had interpolated words in a Russian decree materially affecting the American claim of special rights in the Bering Sea. The translator's reproduction had already been sent to England, and, had it not been for Mr. Williams' timely intervention and immediate communication with the Foreign Office calling attention to the serious mistake, if not conscious fraud, of the translator, there might have been a most unfortunate international scandal. Mr. Williams and Mr. Robert Lansing were responsible for the writing of the American case, which was admirably done.

In 1943 he was persuaded to write for our JOURNAL his reminiscences of the Bering Sea Arbitration. The importance of this arbitration and the strength of the American case had, as it seemed to me, never been properly understood. His excellent account was published in the JOURNAL in the issue of October 1943, and was the clearest and best epitome that we have had of that great international case. I believe that Mr. Williams was the last survivor of the numerous lawyers who had been connected with the arbitration, and it was therefore very fortunate that he was able to prepare this article.

He was ever interested in international law as well as in all questions of public law and foreign relations, and he was a most devoted member of this Society.

I am glad that his memory is to be preserved in our publications where he so well deserves a place as a citizen, a lawyer, and a publicist of high ability.

FREDERIC R. COUDERT

Honorary Vice President

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1947--April 30, 1947

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *E. S. C. O. R.*, United Nations Economic and Social Council Official Records; *G. B. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *N. Y. T.*, New York Times; *P. A. U.*, Pan American Union Bulletin; *S. C. O. R.*, United Nations Security Council Official Records; *T. I. A. S.*, U. S. Treaties and other International Acts Series; *U. N. W. B.*, United Nations Weekly Bulletin.

November, 1943

28-December 1 TEHRAN CONFERENCE. Text of declarations, as released Mar. 24, 1947 by U. S. Department of State: *N. Y. T.*, Mar. 25, 1947, p. 15; *World Report* (Washington) Apr. 8, 1947, p. 31. Text also in: *G. B. M. S.* No. 8 (1947), *Cmd.* 7092.

February, 1945

4-11 CRIMEA CONFERENCE. Text of agreements, as released Mar. 24, 1947 by the U. S. Department of State: *N. Y. T.*, Mar. 25, 1947, p. 14; *World Report* (Washington) Apr. 8, 1947, pp. 32-34. Text also in: *G. B. M. S.* No. 7 (1947), *Cmd.* 7088.

July, 1945

17-August 2 BERLIN CONFERENCE. Text of full Potsdam agreement as made public Mar. 24, 1947 by the U. S. Department of State: *N. Y. T.*, Mar. 25, 1947, p. 14; *World Report* (Washington) Apr. 8, 1947, pp. 35-40. Text also in: *G. B. M. S.* No. 6 (1947), *Cmd.* 7087.

September, 1946

14-March 28, 1947 AUSTRIA. During this period the Government put into effect three laws dealing with the restitution of property which, in connection with the National Socialist assumption of power, was taken away from its owners after Mar. 15, 1938 for so-called racial, national or other reasons, either arbitrarily or on the basis of laws. Brief summary of the laws: *D. S. B.*, Apr. 13, 1947, pp. 669-670.

January, 1947

18-March 22 GREECE-UNITED STATES. American Economic Mission was in Greece during this period and visited many sections of the country. Summary of the Mission's Report and Recommendations, released April 30: *D. S. B.*, May 4, 1947, Suppl., pp. 898-909; *Near Eastern Ser.* No. 7.

February, 1947

8 INDUSTRIAL PROPERTY. Delegates from 25 countries, members of the International Union for the Protection of Industrial Property, signed at Neuchâtel, Switzerland, a convention with final protocol and additional final protocol

- for the preservation or restoration of industrial property rights affected by the 2d World War. Text: *G. B. M. S.* No. 10 (1947), *Cmd.* 7111.
- 8/15 EGYPT—GREAT BRITAIN. Text of correspondence exchanged at Cairo, concerning the prolongation to July 15, 1947 of existing arrangement regarding Egyptian foreign exchange requirements: *Egypt* No. 1 (1947), *Cmd.* 7100.
- 10/22 GREAT BRITAIN—IRAQ. Exchanged notes at Bagdad concerning the prolongation of existing arrangements regarding Iraqi foreign exchange requirements. Text: *Iraq* No. 1 (1947), *Cmd.* 7110.
- 14 GREAT BRITAIN—LUXEMBOURG. Exchanged notes at London regarding reciprocal abolition of visas. Text: *G. B. T. S.* No. 7 (1947), *Cmd.* 7059.
- 17 FRANCE—INDIA. Announcement of decision to exchange diplomatic missions at the Embassy level. India Information Services [*Press Release*] (Washington) no. 3327; *N. Y. T.*, Feb. 13, 1947, p. 13.
- 17 NORWAY—SWEDEN. Issued White Papers stating that Sweden's refusal in the spring of 1940 to permit the transit of German arms to Nazi forces in Norway was backed up by Russia, which at that time had a nonaggression pact with Germany. *C. S. Monitor*, Feb. 13, 1947, p. 4.
- 17-18 INTERNATIONAL BAR ASSOCIATION. Held first meeting in New York. Elected George M. Morris, Speaker of the House of Deputies and Amos J. Peaslee as Secretary-General. *N. Y. T.*, Feb. 18, 1947, p. 19. Recommended to the Executive Committee that groups be set up to work with proper United Nations agencies on the legal aspect of international cooperation. Members of the Committee: *N. Y. T.*, Feb. 19, 1947, p. 16. Summary of minutes: *Int. Bar. Assoc. Bulletin*, no. 2.
- 17-April 2 TRUSTEESHIP. U. S. draft trusteeship agreement for the former Japanese-mandated islands was handed Feb. 17 to Secretary General Lie. *D. S. B.*, Mar. 2, 1947, p. 386. Text: *U. N. Doc.* S/281. Secretary Marshall announced Feb. 25 receipt of Soviet note approving U. S. trusteeship of Pacific islands. *N. Y. T.*, Feb. 26, 1947, pp. 1, 3; *London Times*, Feb. 26, 1947, p. 4. Text of agreement as approved by the Security Council Apr. 2: *D. S. B.*, May 4, 1947, pp. 791-792, 794.
18. ATOMIC ENERGY. Mr. Gromyko in the Security Council submitted 12 amendments to the Atomic Energy Commission's first report. Text, together with sections of Commission report to which the amendments apply: *U. N. W. B.*, Mar. 4, 1947, pp. 191-195.
- 18-April 30 UNITED NATIONS. Security Council. The British case against Albania was presented Feb. 18 by Sir Alexander Cadogan. *N. Y. T.*, Feb. 19, 1947, p. 16; *London Times*, Feb. 18, 1947, p. 3. Albanian representative stated his country was not responsible for mines laid in Corfu Channel as Great Britain had charged, and accused Great Britain of violating its territorial waters. *N. Y. T.*, Feb. 20, 1947, p. 12; *London Times*, Feb. 20, 1947, p. 4. Mr. Gromyko voiced Russian approval Feb. 26 of U. S. proposal of trusteeship over former Japanese-mandated islands, and suggested amendments. Council adjourned action until Mar. 7. *N. Y. T.*, Feb. 27, 1947, pp. 1, 3. Australian, Polish and Colombian members were named Feb. 27 a committee to study the Albanian-British dispute. *N. Y. T.*, Feb. 28, 1947, p. 10. Text of Committee's report: *U. N. Doc.* S/300. Summary: *U. N. W. B.*, Mar. 25, 1947, pp. 279-282. The question of international control of atomic energy was referred Mar. 10 to the Atomic Energy Commission. *N. Y. T.*, Mar. 11, 1947, pp. 1, 10.

For the 10th time Russia used the veto in defeating British charges against Albania. 6 countries voted to uphold, Syria abstained, Poland voted with Russia, and Great Britain could not vote, being an interested party. *N. Y. T.*, Mar. 26, 1947, pp. 1, 6; *London Times*, Mar. 26, 1947, p. 4; *U. N. W. B.*, Apr. 8, 1947, pp. 366-368. On Mar. 28 the U. S. representative explained U. S. position in the matter of projected aid to Greece and Turkey. *N. Y. T.*, Mar. 29, 1947, pp. 1, 2. Text: p. 2; *D. S. B.*, May 4, 1947, suppl., pp. 857-861. Dept. of State *Near Eastern Ser.* No. 7. Approved an agreement Apr. 2 giving to the U. S. sole trusteeship over the former Japanese-mandated islands. *N. Y. T.*, Apr. 3, 1947, p. 1; *U. N. W. B.*, Apr. 15, 1947, p. 389. Text of agreement: *D. S. B.*, May 4, 1947, pp. 791-792, 794. On Apr. 7 Mr. Gromyko accused U. S. of undermining prestige of the United Nations by giving direct aid to Greece and Turkey, and rejected proposals for military aid to Greece and any aid to Turkey. *N. Y. T.*, Apr. 8, 1947, p. 1. Text: p. 4; *London Times*, Apr. 8, 1947, p. 4. Voted Apr. 9 to ask the International Court of Justice to consider the British charges against Albania. *N. Y. T.*, Apr. 10, 1947, pp. 1, 10; *U. N. W. B.*, Apr. 22, 1947, p. 415. Mr. Austin replied Apr. 10 to the Soviet charges. *N. Y. T.*, Apr. 11, 1947, pp. 1, 15. Excerpts: p. 15. Text: *D. S. B.*, May 4, 1947, suppl., pp. 861-865. Rejected Apr. 18 Russia's demand that United Nations supervise U. S. aid to Greece. Voted to keep U. N. observers along Greek northern borders, pending action on the report to be submitted by the commission of inquiry. *N. Y. T.*, Apr. 19, 1947, pp. 1, 5. Rejected on Apr. 30 the Australian proposal not to consider Hungary's application for U. N. membership, and referred the application to a committee for study and report. *N. Y. T.*, May 1, 1947, p. 4; *U. N. W. B.*, May 13, 1947, p. 506.

- 19 AUSTRIAN GOLD. Lieut. General Keyes, U. S. A., made a payment to Chancellor Figl of Austria, in token of \$4,743,000 in gold coin recovered from various caches in the U. S. zone of Austria. *N. Y. T.*, Feb. 20, 1947, p. 14.
- 19 AUSTRIAN OCCUPATION. Law, defining the punishment of Nazis, was published. *C. I. E. D.*, Feb. 10/23, 1947, p. 93.
- 19 FRANCE—POLAND. Signed a cultural agreement at Paris. *N. Y. T.*, Feb. 20, 1947, p. 15; *London Times*, Feb. 20, 1947, p. 4.
- 19 INDIA—POLAND. Signed agreement on cultural exchanges. *C. I. E. D.*, Feb. 10/23, 1947, p. 97.
- 19 POLAND. Polish Diet adopted an interim constitution. *C. I. E. D.*, Feb. 10/23, 1947, p. 106.
- 19-22 REFUGEE ORGANIZATION. Preparatory Commission voted to ask the Secretary General of the United Nations to make an advance of \$250,000, otherwise no work could be done by the Organization. Loans to specialized agencies of the U. N. were approved by the General Assembly and are repayable within two years. *N. Y. T.*, Feb. 20, 1947, p. 12; *London Times*, Feb. 20, 1947, p. 3. The meeting closed Feb. 22. *D. S. B.*, Mar. 2, 1947, p. 388.
- 20 FRANCE—GREAT BRITAIN—Exchanged notes at London for the settlement of differences regarding the application of French nationality to British subjects in Tunisia. Text: *G. B. T. S.*, No. 30 (1947), *Cmd.* 7117.
- 20 GERMAN OCCUPATION. British and U. S. representatives of the Joint Export-Import Agency in Berlin signed agreement with Belgian authorities at Brussels which will permit more commerce between the Belgium-Luxembourg

- union and the merged Anglo-American occupation zones. *N. Y. T.*, Feb. 21, 1947, p. 5.
- 20 INDIA. Prime Minister Attlee announced in the House of Commons that June 1948 had been set for British withdrawal. *N. Y. T.*, Feb. 21, 1947, p. 1. Text of statement and announcement of Lord Mountbatten's appointment as Viceroy: p. 5; *London Times*, Feb. 21, 1947, p. 4. Text of statement: *Cmd. 7047*. Text of Congress Working Committee's resolution on Mr. Attlee's declaration: India Information Services [*Press Release*] (Washington) no. 3344.
- 21 ARGENTINA—ITALY. Signed agreement in Rome providing for emigration of Italian workers to Argentina. It grants equal civil rights to immigrants. *N. Y. T.*, Feb. 22, 1947, p. 6; *London Times*, Feb. 22, 1947, p. 4.
- 21 REFUGEES. Announcement of signature of an agreement between the Intergovernmental Committee on Refugees and Venezuela for the migration to Venezuela of 15,000 Europeans in 1947. *N. Y. T.*, Feb. 22, 1947, p. 6; *C. I. E. D.*, Feb. 10/23, 1947, p. 109.
- 22 AUSTRIA—YUGOSLAVIA. In two notes to the Allied Council in Austria Yugoslavia protested against (1) border crossings by armed Austrian bands, (2) a reported plan to move 100,000 Volksdeutsch into the South Carinthian and Styrian provinces of Austria. *N. Y. T.*, Feb. 23, 1947, p. 24.
- 22/March 20 POLAND. Diet passed by unanimous vote the amnesty law from which some 45,000 political and other prisoners will benefit as soon as the law is published in the official gazette. *London Times*, Feb. 24, 1947, p. 4. The Government announced that 10,400 members of underground groups had accepted the amnesty offer. *N. Y. T.*, Mar. 21, 1947, p. 17.
- 24 CHILDREN'S EMERGENCY FUND. Executive Board of the International Children's Emergency Fund voted unanimously to recommend to the U. N. Economic and Social Council that Switzerland become the 26th member of the Board even though it is not yet a member of the United Nations. *N. Y. T.*, Feb. 25, 1947, p. 11; *U. N. Doc. E/305*.
- 24 FINLAND—SOVIET RUSSIA. Finnish Consul General in New York announced an agreement to cancel \$420,000 imposed as penalties for delayed deliveries of reparations due Russia. Finland has completed payment of \$100 millions, one-third of its obligation. *N. Y. T.*, Feb. 25, 1947, p. 18.
- 25 GERMAN OCCUPATION. 700-page economic report of the Allied Control Council to the Council of Foreign Ministers in Moscow was approved. *N. Y. T.*, Feb. 26, 1947, p. 4; *London Times*, Feb. 26, 1947, p. 3.
- 25/March 2 ITALY—YUGOSLAVIA. Announcement was made of decision to send delegates to Trieste to endeavor to settle frontier disputes without more direction from the Big Powers. *London Times*, Feb. 26, 1947, p. 3. A note from the Big Four to the two Governments suggested that an interim frontier might be decided upon by this method. *London Times*, Feb. 27, 1947, p. 3. Members of the Commission arrived in Trieste. *London Times*, Mar. 3, 1947, p. 3.
- 25-April 21 PALESTINE. Foreign Secretary Bevin told the House of Commons that President Truman's statement calling for greater immigration of Jews to Palestine had interfered with negotiations then in progress. *N. Y. T.*, Feb. 26, 1947, pp. 1, 15. Text: *London Times*, Feb. 26, 1947, pp. 6-7. Text of White House reply: *N. Y. T.*, Feb. 27, 1947, p. 1. Egypt formally proposed

- Apr. 21 that the forthcoming special session of the General Assembly end the mandate and declare Palestine an independent country. *N. Y. T.*, Apr. 22, 1947, p. 23. United Nations issued call Apr. 13 for a special session of the General Assembly to consider the Palestine question. *N. Y. T.*, Apr. 14, 1947, pp. 1, 9; *U. N. W. B.*, Apr. 22, 1947, p. 423; *London Times*, Apr. 14, 1947, p. 4.
- 26 CZECHOSLOVAKIA—YUGOSLAVIA. Announced signature at Belgrade of a 5-year trade agreement. *N. Y. T.*, Feb. 27, 1947, p. 4.
- 26 GREAT BRITAIN—NORWAY. Effected agreement by exchange of notes at London concerning mutual abolition of visas, effective Mar. 1, Spitsbergen and the overseas territories of both countries being excepted. *N. Y. T.*, Feb. 28, 1947, p. 10; *London Times*, Feb. 28, 1947, p. 4. Text: *G. B. T. S.*, No. 16 (1947), Cmd. 7073.
- 26 SIAM—UNITED STATES. Announced signature of an air transport agreement. *N. Y. T.*, Feb. 28, 1947, p. 6; *D. S. B.*, Mar. 9, 1947, p. 450.
- 28 PARAGUAY—UNITED STATES. Signed air transport agreement at Asunción. *D. S. B.*, Mar. 16, 1947, p. 504.
- 28-March 29 UNITED NATIONS. Economic and Social Council. Fourth session was held at Lake Success. Re-elected its first President, who will serve until 1948. Member countries: *N. Y. T.*, Mar. 1, 1947, p. 8. Voted Mar. 3 to set up a special commission to put European reconstruction on a continent-wide basis [Economic Commission for Europe]. *N. Y. T.*, Mar. 4, 1947, p. 7. Text of rules of procedure: *U. N. Doc. E/33/Rev. 3*. Adopted Mar. 19 resolution to carry out General Assembly's decision to bar the Franco régime from all U. N. activities. *N. Y. T.*, Mar. 20, 1947, p. 9. Endorsed on Mar. 24 applications of Switzerland, Italy and Austria for membership in U.N.E.S.C.O. *N. Y. T.*, Mar. 25, 1947, p. 13. Approved Mar. 28 charters for the Economic Commission for Asia and the Far East, and the Economic Commission for Europe with headquarters in Shanghai and Geneva, respectively. Session closed Mar. 29. Next session will open at Lake Success on July 9. *N. Y. T.*, Mar. 31, 1947, p. 43. Approved convocation of the first world statistical congress, to open in September at Washington. p. 42. Decisions reached: *U. N. W. B.*, Apr. 1, 1947, pp. 311-315. Summary of the session: *U. N. W. B.*, Apr. 8, 1947, pp. 343-361.
- March, 1947
- 1 ARGENTINA—SPAIN. Signed commercial air traffic agreement. *N. Y. T.*, Apr. 21, 1947, p. 15.
- 1 PRUSSIA. Law formally dissolving the state of Prussia was published. *N. Y. T.*, Mar. 2, 1947, p. 3.
- 3 GREECE—UNITED STATES. Text of message from Prime Minister Maximos and Foreign Minister Tsaldaris to President Truman and Secretary Marshall, appealing for aid; *N. Y. T.*, Mar. 5, 1947, pp. 1, 8; *D. S. B.*, Mar. 16, 1947, p. 493.
- 3 TRADE WITH JAPAN. Secretaries of the Treasury, State and War Departments and the Attorney General announced that hereafter a license under the Trading with the Enemy Act will not be necessary to enter into current business transactions, and to communicate with persons in Japan. There are, however, certain requirements imposed by the military authorities. *D. S. B.*, Mar. 16, 1947, pp. 496-497.

- 3/4 **TRADE WITH GERMANY.** Secretaries of the Treasury, State and War Departments and the Attorney General announced that hereafter no license would be required to enter into current business transactions, and to communicate with persons in Germany. Certain requirements will still be imposed by military authorities. *D. S. B.*, Mar. 16, 1947, pp. 496-497. Effective Mar. 4 the British Trading with the Enemy Regulations will be lifted. *London Times*, Feb. 25, 1947, p. 4.
- 4 **CANADA—UNITED STATES.** Announcement was made that Canada had agreed to joint establishment and operation with the U. S. of nine new weather stations in the Arctic, all on Canadian territory. *N. Y. T.*, Mar. 5, 1947, p. 11.
- 4 **FRANCE—GREAT BRITAIN.** Signed 50-year treaty of alliance at Dunkirk. *N. Y. T.*, Mar. 5, 1947, p. 1. Text: p. 12; *London Times*, Mar. 5, 1947, p. 3; *France No. 1* (1947), Cmd. 7058.
- 5-April 29 **UNITED NATIONS.** Balkan Investigating Commission. Sent a formal note to Yugoslavia asking suspension of execution of 5 men on the ground that they had information useful to the Commission. *N. Y. T.*, Mar. 6, 1947, p. 18. Yugoslav authorities were said to have agreed to permit members of the Commission to enter Yugoslavia after having barred entrance on the 12th. *N. Y. T.*, Mar. 13, 1947, p. 1; Mar. 14, p. 3. The Commission ended its investigation Apr. 2 after a total of 73 meetings. *U. N. W. B.*, Apr. 15, 1947, p. 406; *London Times*, Apr. 5, 1947, p. 4. The Security Council voted Apr. 18 to maintain in the Balkan area a subsidiary group to continue to fulfill such functions as might be prescribed. *U. N. W. B.*, Apr. 29, 1947, p. 442. The Commission unanimously approved the first part of its report on Apr. 19. *N. Y. T.*, Apr. 20, 1947, p. 37. Decided Apr. 29 to set up a unit in Salonika. Other major decisions: *N. Y. T.*, Apr. 30, 1947, p. 7; *U. N. W. B.*, May 13, 1947, pp. 523-524.
- 5/10 **ATOMIC ENERGY.** Soviet delegate, speaking before the U. N. Security Council, declared against U. S. proposal for international management of atomic production plants. *N. Y. T.*, Mar. 6, 1947, pp. 1, 17. Excerpts: p. 16. On Mar. 10 the Council voted to send back to the Atomic Energy Commission the question of control and instructed it to prepare a report for consideration by the General Assembly next September. *N. Y. T.*, Mar. 11, 1947, pp. 1, 10. Text of resolution: *D. S. B.*, Mar. 30, 1947, p. 572; *U. N. Doc. S/296*.
- 5-10 **INTERNATIONAL LABOR ORGANIZATION.** 101st session of the Governing Body was held at Geneva. *U. N. W. B.*, Mar. 18, 1947, p. 246. U. S. members: *D. S. B.*, Mar. 2, 1947, p. 387. Decided to begin a study of wages in various countries. *N. Y. T.*, Mar. 9, 1947, p. 53. Report on the meeting: *U. N. W. B.*, Mar. 25, 1947, p. 298.
- 5-21 **HUNGARIAN OCCUPATION.** U. S. note of Mar. 5 to Russia charged interference with Hungarian affairs. *London Times*, Mar. 7, 1947, p. 4; *N. Y. T.*, Mar. 7, 1947, p. 1. Text: p. 6; *D. S. B.*, Mar. 16, 1947, p. 495. Russian chairman of Allied Control Council for Hungary rejected on Mar. 8 U. S. note and denounced proposal for inquiry. Text: *D. S. B.*, Mar. 30, 1947, p. 584. British Foreign Office announced Great Britain had circulated to Russia, Hungary and the Council a proposal for an inquiry into the arrest of former secretary of the Smallholder Party. *N. Y. T.*, Mar. 9, 1947, p. 13. Excerpts: *London Times*, Mar. 10, 1947, p. 4. Russian reply rejected investigation. *London Times*, Mar. 12, 1947, p. 3. U. S. note of the 17th to Russian occupation forces' commander repeated charges of Russian interference. Text: *N. Y. T.*, Mar. 18, 1947, p. 4; *D. S. B.*, Mar. 30, 1947, p. 584. Excerpts: *London Times*,

- Mar. 18, 1947, p. 3. Soviet commander's note again rejected U. S. charges. *N. Y. T.*, Mar. 20, 1947, p. 7. British note of the 20th on the political situation was handed to Russian commander. *N. Y. T.*, Mar. 21, 1947, p. 16. Russian reply of the 21st stated the commander could not change his attitude. *C. I. E. D.*, Mar. 10/23, 1947, p. 164; *N. Y. T.*, Mar. 22, 1947, p. 8.
- 5-29 UNITED NATIONS. Conventional Armaments Commission. Warren R. Austin was confirmed as U. S. member on Mar. 5. *D. S. B.*, Mar. 16, 1947, p. 475. As of Mar. 7 the Secretary General had been informed that 7 governments had named as representatives on the Commission their members of the Security Council. *U. N. W. B.*, Mar. 18, 1947, p. 245. Ralph A. Bard was named deputy to Mr. Austin on Mar. 29. *N. Y. T.*, Mar. 30, 1947, p. 43.
- 6 POLAND—SOVIET RUSSIA. Moscow radio announced signature of an agreement at Moscow granting a Soviet loan of more than \$28,000,000. *N. Y. T.*, Mar. 7, 1947, p. 6; *London Times*, Mar. 7, 1947, p. 4.
- 6/April 24 PROPERTY (Allied Nationals). Far Eastern Commission approved policy decisions concerning property of Allied nationals confiscated by Japan. Texts: *D. S. B.*, Apr. 20, 1947, pp. 708-709 and May 18, pp. 986-987.
- 10/21 NETHERLANDS—UNITED STATES. U. S. note was delivered Mar. 10, protesting against restrictive trade regulations in the Netherlands East Indies, involving detention of the *S. S. Martin Behrman*. *C. I. E. D.*, Mar. 10/23, 1947, p. 167; *N. Y. T.*, Mar. 6, 1947, p. 51. Text of Dept. of State announcement of Mar. 21: *D. S. B.*, Apr. 20, 1947, p. 720.
- 10-April 24 COUNCIL OF FOREIGN MINISTERS. Fourth session was held at Moscow to consider the Austrian and German peace treaties. Russia requested the Chinese question be added to the agenda and the U. S. suggested that China should be represented. *London Times*, Mar. 11, 1947, p. 4; *N. Y. T.*, Mar. 11, 1947, pp. 1, 4. Agenda and text of Soviet statement at opening of the session: p. 4. On Mar. 24 Mr. Molotov in letters to Secretary Marshall and Foreign Secretary Bevin agreed to an exchange of information on China in order to implement their 1945 agreement concerning China. *N. Y. T.*, Mar. 27, 1947, p. 1. Text: p. 15. Agreed Apr. 20 that Austria's responsibility for participation in the war should be specified in the peace treaty. *N. Y. T.*, Apr. 21, 1947, p. 1. Agreed Apr. 22 to request the United Nations to make available to the Governor of Trieste a sum up to \$5,000,000 to finance the first period of the new Free Territory. *N. Y. T.*, Apr. 23, 1947, pp. 1, 6. Text: p. 6. Decided Apr. 24 to reduce the number of occupation forces, and instructed Allied Control Council to decide by June 1 on figures to be effective on Sept. 1. Decided to set up an Austrian treaty commission to meet May 12 in Vienna. Next session of the Council will be at London in November. *London Times*, Apr. 25, 1947, p. 4; *N. Y. T.*, Apr. 25, 1947, p. 1. Text of Secretary Marshall's radio report: *D. S. B.*, May 11, 1947, pp. 919-924; *N. Y. T.*, Apr. 29, 1947, p. 4; Dept. of State *Conference Ser.* 98. Text of Mr. Dulles' statement of Apr. 25: *C. S. Monitor*, Apr. 25, 1947, p. 4. Text of his broadcast report on the meeting: *N. Y. T.*, Apr. 30, 1947, p. 12; *Cong. Rec.* (daily) Apr. 30, 1947, pp. A2112-2114. For Secretary Marshall's statements on reparations, peace treaty, etc., see *D. S. B.*, Mar. 16-May 11, 1947.
- 10/May 14 CZECHOSLOVAKIA—POLAND. Signed 20-year treaty of friendship and mutual assistance. A protocol dealt with frontier problems, minority rights and cultural and economic reconstruction. *N. Y. T.*, Mar. 11, 1947, p. 6; *London Times*, Mar. 11, 1947, p. 3. Text: *Central European Observer* (Lon-

- don) Mar. 21, 1947, p. 73. Ratified May 14 by the Czechoslovak National Assembly. *N. Y. T.*, May 15, 1947 p. 12.
- 12 MEXICO—UNITED STATES. Exchanged notes making recommendations concerning Mexican laborers in the United States. *N. Y. T.*, Mar. 25, 1947, p. 12.
- 12 PAN AMERICAN UNION. Alberto Lleras Camargo of Colombia was elected Director General. *N. Y. T.*, Mar. 13, 1947, p. 54.
- 12 TRUMAN, HARRY S. Proposed, in an address to Congress, help to countries seeking to repel totalitarianism, with special application to Greece and Turkey. Text: *N. Y. T.*, Mar. 13, 1947, p. 2; *London Times*, Mar. 13, 1947, p. 4; Dept. of State *Near Eastern Ser.* No. 6; *D. S. B.*, Mar. 23, 1947, pp. 534-537.
- 13 PRISONERS OF WAR. French and American military and economic experts signed provisional agreement in Paris whereby German prisoners, lent to France by the U. S. for work in agriculture and industry will have 3 months to decide whether to remain as free contract workers or return to Germany. *N. Y. T.*, Mar. 14, 1947, p. 13; *London Times*, Mar. 17, 1947, p. 3. Summary: *D. S. B.*, Mar. 23, 1947, p. 539.
- 14 PHILIPPINE REPUBLIC—UNITED STATES. Signed at Manila a 99-year agreement for American military and naval bases in the Islands. *N. Y. T.*, Mar. 15, 1947, pp. 1, 7; *C. S. Monitor*, Mar. 17, 1947, p. 6.
- 14 PHILIPPINE REPUBLIC—UNITED STATES. Signed consular convention at Manila. Text: *Cong. Rec.* (daily) June 4, 1947, pp. 6478-6480.
- 15 SWEDEN. Announced general ban on imports, excepting certain essentials, such as hides, wool, cotton and petrol, in order to conserve foreign currency. *C. I. E. D.*, Mar. 10/23, 1947, p. 169.
- 15/31 AUSTRIA—UNITED STATES. Text of statement of Mar. 15 on U. S. policy on exchanges of cultural materials: *D. S. B.*, Mar. 23, 1947, p. 540. On Mar. 31 the State, War and Navy Departments announced a policy permitting interchange of certain categories of persons with a view to furthering normal cultural relations. *D. S. B.*, Apr. 13, 1947, pp. 667-668.
- 17 ITALY—YUGOSLAVIA. Italy announced agreement to resume normal diplomatic relations. *C. I. E. D.*, Mar. 10/23, 1947, p. 166.
- 17 MEXICO—UNITED STATES. Secretary of Agriculture Anderson announced signature of a sanitary agreement setting up the joint U. S.-Mexican campaign against the hoof-and-mouth disease outbreak in Mexico. Headquarters will be in Mexico City. *N. Y. T.*, Mar. 18, 1947, p. 15.
- 17/25 INDONESIA. Under conditions approved by the Indonesian Republic, the Dutch Cabinet authorized signature of the Cheribon agreement initialled Nov. 15, 1946. *N. Y. T.*, Mar. 19, 1947, p. 13. On the 25th the agreement, recognizing sovereignty of the Indonesian Republic over Java, Sumatra and Madura, was signed at Batavia, Java. The Republic will become a member of the United States of Indonesia, to be granted full independence Jan. 1, 1949. *N. Y. T.*, Mar. 26, 1947, p. 14; *London Times*, Mar. 26, 1947, p. 3.
- 17-29 ARAB LEAGUE. Sixth plenary session of the Council opened Mar. 17 at Cairo with 7 nations represented. *London Times*, Mar. 18, 1947, p. 3. Passed resolution Mar. 23 backing Egyptian demands for independence and its intention to submit its case against Great Britain to the United Nations. *N. Y. T.*, Mar. 24, 1947, p. 8. Adopted resolution Mar. 24 condemning British administration of Palestine and declaring it would argue the case before the United

- Nations on the basis of complete independence for Palestine as an Arab state. *N. Y. T.*, Mar. 25, 1947, p. 17. At closing session it sent a memorandum to United States, stating that the U. S. attitude would "affect good relations between America and the Arab States," and demanding that the U. S. stop its support of immigration of Jews in Germany to Palestine. *N. Y. T.*, Mar. 30, 1947, p. 49; *C. I. E. D.*, Mar. 24/Apr. 6, 1947, p. 190.
- 18-April 23 WHEAT CONFERENCE. International conference opened March 18 in London. Major objectives and U. S. delegation: *D. S. B.*, Mar. 23, 1947, p. 532. Sir Gerald Clauson was elected chairman. *London Times*, Mar. 19, 1947, p. 2. Argentina gave notice that for the present it will be unable to participate in an agreement. *London Times*, Mar. 29, 1947, p. 4. Session ended Apr. 23 without signature of a draft agreement because of British inability to subscribe at the moment. *N. Y. T.*, Apr. 24, 1947, p. 10; *London Times*, Apr. 24, 1947, p. 4. Summary of draft memorandum of agreement prepared for the conference: *D. S. B.*, Mar. 16, 1947, pp. 471-473.
- 19-April 9 ATOMIC ENERGY. U. S. Atomic Energy Commission announced its first regulations for strictly controlling the raw materials of the atomic bomb. *N. Y. T.*, Mar. 20, 1947, p. 3. Nominations of members of the U. S. Commission were confirmed Apr. 9 by the Senate. *Cong. Rec.* (daily) Apr. 9, 1947, pp. 3342-3343; *D. S. B.*, Apr. 27, 1947, p. 774.
- 19-April 16 ATOMIC ENERGY COMMISSION. United Nations Commission accepted Soviet resolution Mar. 19 to refer the unsolved disagreements on international atomic control to study by committees. *U. N. W. B.*, Apr. 1, 1947, p. 329. Text of resolution: *N. Y. T.*, Mar. 20, 1947, p. 3. Work on details of an international control plan began Apr. 16. *N. Y. T.*, Apr. 17, 1947, p. 3.
- 20 DENMARK—GREAT BRITAIN. Effected agreement by exchange of notes at London concerning the reciprocal abolition of visas. Text: *G. B. T. S.* No. 25 (1947), *Cmd.* 7101.
- 20 GREAT BRITAIN—SWEDEN. Effected agreement by exchange of notes at London regarding the reciprocal abolition of visas. Text: *G. B. T. S.*, No. 27 (1947), *Cmd.* 7103.
- 20-April 18 POLISH FORCES IN EXILE. British note of Mar. 20 to Poland stated the Government could do nothing except return to Germany those Poles who failed to choose between joining the Resettlement Corps and repatriation. *C. I. E. D.*, Mar. 10/23, 1947, p. 162. Polish Ambassador's statement issued in London, made it clear that members of such forces are free to return to Poland without prejudice. *London Times*, Apr. 19, 1947, p. 3.
- 21 FRANCE—ITALY. Signed agreement at Rome providing for the sending of 200,000 Italian farm and industrial workers into France before the end of 1947. *C. I. E. D.*, Mar. 24/Apr. 6, 1947, p. 195.
- 21 GREAT BRITAIN—NETHERLANDS. Effected agreement by exchange of notes at London regarding reciprocal abolition of visas. Text: *G. B. T. S.*, No. 26 (1947), *Cmd.* 7102.
- 23-April 2 ASIAN RELATIONS CONFERENCE. Sponsored by the Indian Council of World Affairs the first Inter-Asian Relations Conference opened at New Delhi Mar. 23 with delegates from 25 Eastern states. *N. Y. T.*, Mar. 24, 1947, p. 12. List of countries and organizations represented: *London Times*, Mar. 24, 1947, p. 5. Conference closed Apr. 2 after establishing a permanent Asian Relations Conference, headed by Jawaharlal Nehru, to exchange cultural, social and

- economic information and to promote goodwill and understanding. The next meeting will be in China in 1949. *N. Y. T.*, Apr. 3, 1947, p. 3. Report on the conference: *London Times*, Apr. 15, 1947, p. 5.
- 24/29 SWEDEN—UNITED STATES. U. S. note was delivered Mar. 24 protesting Swedish imposition of general import restrictions which went into effect March 15. *N. Y. T.*, Mar. 26, 1947, p. 10. Text: *D. S. B.*, Apr. 6, 1947, pp. 633-634. Swedish reply stated that Sweden will not discriminate against U. S. products in the application of import restrictions program. *N. Y. T.*, Mar. 30, 1947, p. 21; Apr. 2, 1947, p. 4. Summary: *D. S. B.*, May 11, 1947, pp. 938-939.
- 24/April 9 UNITED NATIONS. Conventional Armaments Commission. In statements at the opening session, Mar. 24. British and American members declared they would accept general disarmament only on condition that compliance would be guaranteed by a system of international inspection. *U. N. W. B.*, Apr. 1, 1947, pp. 303-307; *N. Y. T.*, Mar. 25, 1947, p. 1. Excerpts of statements: p. 9. Members: U. N. Doc. S/C.3/SR.1. Voted Apr. 9 that the Big Five should draw up a plan for reducing the world's arms and armed forces. Voted to appoint a sub-committee to prepare a draft of the plan of work, for submission to the Security Council. *N. Y. T.*, Apr. 10, 1947, p. 11; *U. N. W. B.*, Apr. 12, 1947, pp. 428-429.
- 25 ALBANIA. Secretary of State Marshall at the Council of Foreign Ministers meeting at Moscow declared that the United States saw no acceptable basis for inviting Albania to participate in the peace settlement with Germany. Text: *D. S. B.*, Apr. 6, 1947, pp. 608-609.
- 25 REPARATIONS (German). At a meeting of the Council of Foreign Ministers Secretary Marshall circulated a paper regarding reparations received by the United States. Text: *D. S. B.*, Apr. 6, 1947, p. 609.
- 26 ARGENTINA—BOLIVIA. Signed a financial-economic treaty. *N. Y. T.*, Mar. 27, 1947, p. 9.
- 27/April 4 FRANCE—UNITED STATES. Exchanged notes Mar. 27 at Washington regarding extension of time for securing copyrights during the present emergency. *D. S. B.*, Apr. 6, 1947, p. 632. Signed agreement Apr. 4 at Washington concerning certain industrial property rights affected by the war. *D. S. B.*, Apr. 20, 1947, p. 725.
- 26-April 28 UNITED NATIONS. Trusteeship Council. Ten-nation group held opening meeting Mar. 26 at Lake Success with Russia failing to be represented. Francis B. Sayre (U. S.) was elected chairman. *N. Y. T.*, Mar. 27, 1947, pp. 1, 20; *U. N. W. B.*, Apr. 1, 1947, pp. 308-309. Agenda: pp. 309-310. Delegations: U. N. Doc. T/INF/2. Reached agreement in principle Apr. 1 that an administrative authority should have 2 months to examine and comment on petitions from natives of strategic areas, before they are circulated among Council members. *N. Y. T.*, Apr. 2, 1947, p. 8. On Apr. 8 adopted a procedural rule that abstentions should not count as negative votes, and agreed to set up a committee of four to draw up a questionnaire on various phases of advancement for inhabitants of trust territories. *N. Y. T.*, Apr. 9, 1947, p. 9; *U. N. W. B.*, Apr. 22, 1947, pp. 424-427. Decided Apr. 22 to send a mission of investigation to Western Samoa to study the natives' petition to the U. N. for self-government. *N. Y. T.*, Apr. 23, 1947, p. 9. Session closed Apr. 28. *N. Y. T.*, Apr. 29, 1947, p. 7. Text of draft report to the General Assembly: U. N. Doc. T/39. Summary of work: *U. N. W. B.*, May 6, 1947, pp. 483-487.

- 25 ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST. The Commission was created by the Economic and Social Council of the United Nations. Shanghai will be the headquarters. *N. Y. T.*, Mar. 29, 1947, p. 2. Terms of reference: *U. N. Doc. E/405*. List of member nations: *C. I. E. D.*, Mar. 24/Apr. 6, 1947, p. 211; *U. N. W. B.*, Apr. 8, 1947, p. 345.
- 28 GREAT BRITAIN—SPAIN. Signed monetary agreement superseding the agreements of Mar. 18 and Dec. 2, 1940 which are now abrogated. *London Times*, Apr. 5, 1947, p. 2. Text: *G. B. T. S.* No. 23 (1947), *Cmd.* 7090.
- 28/April 7 ECONOMIC COMMISSION FOR EUROPE. The Commission was created by the Economic and Social Council of the United Nations on March 28. Geneva will be the headquarters. *N. Y. T.*, Mar. 29, 1947, p. 2. Terms of reference: *U. N. Doc. E/402*. Gunnar Myrdal of Sweden was appointed Executive Secretary on April 7. *N. Y. T.*, Apr. 8, 1947, p. 4; *U. N. W. B.*, Apr. 15, 1947, p. 382. The Commission will replace the European Central Inland Transport Organization, the European Coal Organization and the Emergency Economic Committee for Europe. *U. N. W. B.*, Mar. 11, 1947, p. 217. List of member nations: *U. N. W. B.*, Apr. 8, 1947, p. 344.
- 31 DODECANESE ISLANDS. Greek Foreign Minister and British Ambassador exchanged notes at Athens for the transfer of the administration of the Islands to Greece. *London Times*, Apr. 1, 1947, p. 4. Geography, history, etc.: *London Times*, Mar. 31, 1947, p. 7.
- 31 ITALY—VATICAN. Signed accord to delimit some of the new extraterritorial zones. This modification of the Lateran pact of 1929 is regarded as important as a question of principle. *N. Y. T.*, Apr. 2, 1947, p. 12.
- 31-April 3 WOOL. Wool Study Group held first meeting in London with representatives from 24 countries present. Adopted terms of reference. Principal objects of the meeting: *D. S. B.*, Apr. 13, 1947, pp. 659-660. Report on the meeting: *D. S. B.*, May 18, 1947, pp. 987-989.
- 31/April 7 SPAIN. Generalissimo Franco announced the formation, under his direction, of a Regency Council which would take over the government if the Chief of State should become incapacitated. *London Times*, Apr. 1, 1947, p. 4; *N. Y. T.*, Apr. 1, 1947, pp. 1, 16. Text of decree: p. 16. Don Juan, pretender to the throne, issued proclamation condemning the Franco plan for succession: Text: *N. Y. T.*, Apr. 8, 1947, p. 14; *London Times*, Apr. 8, 1947, p. 4.
- 31-April 12 HEALTH ORGANIZATION. Third session of the Interim Commission of the World Health Organization opened Mar. 31 at Geneva. It was announced that U. N. R. R. A. had agreed to the transfer of \$1,500,000 of its funds to the Commission. *London Times*, Apr. 2, 1947, p. 3. Provisional agenda: *U. N. W. B.*, Mar. 25, 1947, p. 299. Session ended April 12 after adopting a 3-million dollar budget for the calendar year 1947. 4th session to be at Geneva, Aug. 13-Sept. 13, 1947. If there are sufficient ratifications of the constitution before July 1, the Commission will meet earlier. *U. N. W. B.*, Apr. 22, 1947, pp. 414, 430. Report on the session: *D. S. B.*, May 18, 1947, pp. 971-973, 983.

April, 1947

- 1 CHINA. Secretary of State Marshall sent note to Foreign Minister Molotov in accordance with decision to exchange information on China. *N. Y. T.*, Apr. 3, 1947, p. 2. Text: p. 2.

- 1 CHINA—PORTUGAL. Exchanged notes at Nanking regarding Portuguese relinquishment of extraterritorial rights. *N. Y. T.*, Apr. 2, 1947, p. 5.
- 1 SOUTH AFRICA—UNITED STATES. Signed \$1,400,000 lend-lease surplus contract at Cape Town. *N. Y. T.*, Apr. 2, 1947, p. 3.
- 1/21 GREECE. King George II died, and was succeeded by his brother, Paul I. *N. Y. T.*, Apr. 2, 1947, p. 1; *London Times*, Apr. 2, 1947, p. 4. King Paul took the oath of office on the 21st. *N. Y. T.*, Apr. 22, 1947, p. 21.
- 2 REPARATIONS (Japanese). United States authorized General MacArthur to make reparations removals from Japan, for distribution to China, United Kingdom, Netherlands and the Philippine Republic. This action was taken without approval of all members of the Far Eastern Commission. *D. S. B.*, Apr. 13, 1947, pp. 674-675.
- 3 WAR CRIMES. Far Eastern Commission approved policy decision regarding apprehension, trial and punishment of war criminals in the Far East. The decision was not released until Apr. 13, 1947. Text: *D. S. B.*, May 4, 1947, pp. 804-806.
- 5 REPARATIONS (Austrian). Vice Premier of Yugoslavia demanded Austrian payment to Yugoslavia of \$150,000,000 in reparations from current production and the transfer of industrial plants. *N. Y. T.*, Apr. 6, 1947, p. 1.
- 7 INTERNATIONAL CIVIL AVIATION ORGANIZATION. Came into being. 28 countries have deposited ratifications or adherences to the 1944 convention. *U. N. W. B.*, Apr. 15, 1947, p. 398.
- 7 INTER-PARLIAMENTARY UNION. 36th conference opened at Cairo, Egypt, with 24 nations represented. *N. Y. T.*, Apr. 8, 1947, p. 22; *London Times*, Apr. 8, 1947, p. 4. Agenda: *Inter-parliamentary Bulletin* (Geneva) Feb. 1947, pp. 1-2.
- 8 NON-GOVERNMENTAL ORGANIZATIONS. List of international organizations having consultative status with the United Nations: *U. N. W. B.*, Apr. 8, 1947, p. 361.
- 9 SOUTH AFRICA—UNITED STATES. Signed at Cape Town a convention for the avoidance of double taxation on estates. *N. Y. T.*, Apr. 10, 1947, p. 3.
- 10-23 TRADE AND EMPLOYMENT CONFERENCE. Second meeting of the Preparatory Committee opened Apr. 10 at Geneva. Elected Max Suetens of Belgium as chairman. Adopted report of the interim drafting committee which reconciled divergent viewpoints on a charter for the proposed trade organization. *U. N. W. B.*, Apr. 22, 1947, p. 413; *N. Y. T.*, Apr. 11, 1947, p. 17. U. S. delegation: *D. S. B.*, Mar. 23, 1947, pp. 528-529. Countries represented: *D. S. B.*, May 11, 1947, p. 932. Summary of Sir Stafford Cripps' address: *London Times*, Apr. 12, 1947, p. 4. Private group discussions began Apr. 15. *London Times*, Apr. 16, 1947, p. 8. Began tariff negotiations on Apr. 23. *U. N. W. B.*, May 6, 1947, p. 466.
- 13 UNITED NATIONS—SITE. Dedication ceremonies took place. *N. Y. T.*, Apr. 14, 1947, pp. 1, 4; *U. N. W. B.*, Apr. 22, 1947, p. 431.
- 14 INDIA—TRANS-JORDAN. Indian Foreign Minister announced the signature of a "treaty of alliance and brotherhood." *C. I. E. D.*, Apr. 7/20, 1947, p. 221.
- 14-25 PASSPORT CONFERENCE. A meeting of governmental experts took place at Geneva to prepare for a world conference on passports and customs formalities. *U. N. W. B.*, May 20, 1947, pp. 535-567. Due to immigration quotas the U. S. delegation was unable to recommend substitution of identity cards for

- passports and abolition of visas for persons making short visits. *N. Y. T.*, Apr. 19, 1947, p. 3. U. S. delegation: *D. S. B.*, Apr. 27, 1947, p. 748. At final session the conference adopted report recommending reduction in fees for passports and visas, a longer term for their validity, elimination of transit visas and examination of baggage for customs in transit whenever possible. *N. Y. T.*, Apr. 27, 1947, p. 52. Summary of work: *C. S. Monitor*, May 7, 1947, p. 12. Text of report: *E. S. C. O. R.*, 2d yr., 5th sess., Supplement 1, pp. 1-17; U. N. *Doc.* E/436.
- 15 NEUTRALITY. President Truman sent message to Congress asking the repeal of Sect. 12 of the Neutrality Act of 1939 and the passage of a new munitions control act, calling for a licensing system to control export of military equipment to foreign governments. *N. Y. T.*, Apr. 16, 1947, pp. 1, 6. Text: p. 6; *Cong. Rec.* (daily) Apr. 15, 1947, p. 3532; *H. Doc.* 195 (80-1).
- 15/16 INDIA. A declaration signed by Mr. Gandhi and Mr. Jinnah was published by them at the request of the Viceroy, deploring recent acts of violence and denouncing the use of force henceforth to gain political ends. The Council of State issued a statement endorsing the joint declaration. *C. I. E. D.*, Apr. 7/20, 1947, p. 220.
- 15-18 TIN. Tin Study Group held first session at Brussels with representatives present from 19 countries, the British colonies and the United Nations. It set up a management committee. Permanent secretariat will be at The Hague. *D. S. B.*, Apr. 13, 1947, p. 659; *N. Y. T.*, Apr. 26, 1947, p. 26. U. S. delegation: *D. S. B.*, Apr. 27, 1947, p. 748.
- 16-17 CHINA. Political leaders signed 12-point statement of common policy. General Chang Chun was chosen to be the new Premier. *N. Y. T.*, Apr. 17, 1947, p. 3. Announcement was made of the political program, organic laws and membership of the new coalition government which will come into being the 18th. *N. Y. T.*, Apr. 18, 1947, p. 17. Members of Cabinet: Apr. 24, 1947, p. 14.
- 17 GREAT BRITAIN—ITALY. Signed financial agreement in Rome. Summary: *London Times*, Apr. 18, 1947, p. 4. Text: *G. B. T. S.* No. 31 (1947), *Cmd.* 7118.
- 17 INDONESIAN RECOGNITION. Limited *de facto* recognition of the Indonesian Republic by the United States was announced. *N. Y. T.*, Apr. 19, 1947, p. 14 (editorial); *London Times*, Apr. 18, 1947, p. 4; *United Nations World* (N. Y.) May, 1947, p. 75.
- 17/24 ALBANIA—GREECE. Albania appealed to the U. N. Security Council against 4 alleged violations of its territorial waters by Greek vessels. *N. Y. T.*, Apr. 18, 1947, p. 16. Head of the Greek delegation informed Secretary General Lie that Albanian failure to recognize their own new flag was the cause of the recent difficulties. *N. Y. T.*, Apr. 26, 1947, p. 6.
- 18 LEND-LEASE AID TO RUSSIA. Statement presented to the U. S. Senate by the Department of State listed aid to Russia in the amount of \$11,100,000,000 under the terms of the agreement signed June 11, 1942. *D. S. B.*, May 4, 1947, pp. 814-815.
- 20 BULGARIA—CZECHOSLOVAKIA. Signed a 4-year trade agreement. *N. Y. T.*, Apr. 23, 1947, p. 4.
- 20/21 DENMARK. King Christian X died on April 20, aged 76 years. *N. Y. T.*, Apr. 21, 1947, p. 1. Frederick IX was formally proclaimed as King on Apr. 21. *N. Y. T.*, Apr. 22, 1947, p. 24.

- 22 INDONESIA. New Parliament, representing the people of East Indonesia, opened at Macassar, Celebes. *N. Y. T.*, Apr. 23, 1947, p. 3.
- 23 PRISONERS OF WAR. Big Four at Moscow agreed to repatriate about two million German prisoners of war before the end of 1948. *N. Y. T.*, Apr. 24, 1947, p. 2.
- 24 NEW ZEALAND—UNITED STATES. Effectuated agreement by exchange of notes at Washington concerning copyright. *D. S. B.*, May 11, 1947, p. 948.
- 25 CANADA—PORTUGAL. Signed air transport agreement at Lisbon. *N. Y. T.*, Apr. 27, 1947, p. 39.
- 25 NEPAL—UNITED STATES. Signed friendship and commercial agreement at Katmandu. *N. Y. T.*, Apr. 30, 1947, p. 14. Text: *D. S. B.*, May 11, 1947, pp. 949-951.
- 26 CHINA—UNITED STATES. President Truman ordered the transfer to China of an unspecified number of floating drydocks and surplus ships, in accordance with provisions of Public Law 512, approved July 16, 1946. *N. Y. T.*, Apr. 27, 1947, p. 1. Text of Ex. Or. 9843: *D. S. B.*, May 4, 1947, pp. 821-822.
- 28 SYRIA—UNITED STATES. Signed air transport treaty at Damascus. *D. S. B.*, May 18, 1947, p. 996; *N. Y. T.*, Apr. 29, 1947, p. 15.
- 28-May 10 TIMBER CONFERENCE. Was held at Marianske-Lazne (Marienbad), Czechoslovakia, under auspices of F.A.O. U. S. delegation: *D. S. B.*, Apr. 13, 1947, p. 661. Countries represented, general program of work, etc.: *U. N. W. B.*, May 6, 1947, p. 488; *London Times*, Apr. 29, 1947, p. 4. Conference ended May 10 after recommending that German forests be used to relieve the shortage of soft woods in Europe. *London Times*, May 12, 1947, p. 3. Other recommendations: *U. N. W. B.*, May 20, 1947, p. 526.
- 28 UNITED NATIONS—SIAM. Siam was formally admitted to membership as the 55th nation. *N. Y. T.*, Apr. 29, 1947, p. 8; *U. N. W. B.*, May 6, 1947, p. 470.
- 28 UNITED NATIONS—UNITED STATES. President Truman issued Executive Order setting up a U. S. mission to the U. N. in general charge of Warren R. Austin, whose title is Representative of the United States at the Seat of the United Nations. This mission will include all U. S. representatives, deputies and their staffs in the U. N. organizations, except the Military Staff Committee. *N. Y. T.*, Apr. 29, 1947, p. 11. Text of Executive Order 9844: 12 *Fed. Reg.* 2765; *D. S. B.*, May 4, 1947, pp. 798-799. Below, Supplement, p. 16.
- 28 UNITED NATIONS. General Assembly. Special session to consider the problem of Palestine opened at Lake Success. Elected Oswaldo Aranha of Brazil as its president. *N. Y. T.*, Apr. 29, 1947, pp. 1, 6; *London Times*, Apr. 29, 1947, p. 4. U. S. delegation: *D. S. B.*, May 4, 1947, p. 798. Other delegations: *U. N. Doc. A/INF/3/Rev. 1*; *U. N. W. B.*, May 6, 1947, pp. 480-482.
- 29 INDIA. Constituent Assembly adopted provision outlawing "untouchability." *N. Y. T.*, Apr. 30, 1947, pp. 1, 14.
- 29 NEPALESE RECOGNITION. Announced by United States. *N. Y. T.*, Apr. 30, 1947, p. 14.
- 30 POLAND—SOVIET RUSSIA. Mixed commission signed at Warsaw an agreement fixing their mutual frontiers. *N. Y. T.*, May 8, 1947, p. 6.

MULTIPARTITE CONVENTIONS

AIR TRANSPORT AGREEMENT. Chicago, Dec. 7, 1944.

Withdrawal:

China. Dec. 11, 1946 (effective in one year.) *D. S. E.*, Mar. 16, 1947, p. 506.

AVIATION. Interim Agreement. Chicago, Dec. 7, 1944.

Signature:

Iran. Dec. 30, 1946. *D. S. B.*, Mar. 16, 1947, p. 506.

AVIATION CONVENTION. Chicago, Dec. 7, 1944.

List of countries which have deposited ratifications or which have instruments of ratification in the process of transmittal: *D. S. B.*, Mar. 23, 1947, p. 530.

To come into force April 4, 1947.

COPYRIGHT. Washington, June 22, 1946.

Ratification:

Mexico. Dec. 31, 1946.

Ratifications deposited:

Ecuador. Mar. 4, 1947.

Dominican Republic. Apr. 14, 1947.

Came into force Apr. 14, 1947, *D. S. B.*, May 11, 1947, p. 953.

HEALTH ORGANIZATION. Constitution. New York, July 22, 1946.

Ratifications:

Liberia. *U. N. W. B.*, Mar. 18, 1947, p. 246.

Switzerland. *N. Y. T.*, Apr. 1, 1947, p. 4.

Trans-Jordan. *U. N. W. B.*, Apr. 15, 1947, p. 382.

Netherlands, Italy, Denmark and Rumania. *U. N. W. E.*, Apr. 22, 1947, p. 430.

INDUSTRIAL PROPERTY. Neuchâtel, Feb. 8, 1947.

Signatures and Text: *G. B. M. S.*, No. 10 (1947), *Cmd.* 7111.

INTER-AMERICAN COFFEE MARKETING AGREEMENT. Washington, Oct. 1, 1946.

Ratification:

United States. Mar. 7, 1947.

Ratification deposited:

United States. Mar. 19, 1947.

Promulgation:

United States. Apr. 1, 1947. *D. S. B.*, Apr. 20, 1947, p. 727.

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT.

Washington, Dec. 27, 1945.

Signatures:

Italy. Mar. 27, 1947.

Lebanon. Apr. 14, 1947.

Syria. Apr. 10, 1947. *D. S. B.*, Apr. 27, 1947, p. 749.

Turkey. Mar. 11, 1947. *N. Y. T.*, Mar. 12, 1947, p. 37; *D. S. B.*, Mar. 23, 1947, p. 533.

INTERNATIONAL MONETARY FUND. Washington, Dec. 27, 1945.

Signatures:

Italy. Mar. 27, 1947.

Lebanon. Apr. 14, 1947.

Syria. Apr. 10, 1947. *D. S. B.*, Apr. 27, 1947, p. 749.

Turkey. Mar. 11, 1947. *N. Y. T.*, Mar. 12, 1947, p. 37; *D. S. B.*, Mar. 23, 1947, p. 533.

INTERNATIONAL COURT OF JUSTICE. Statute. Optional Clause. San Francisco, June 26, 1945.

Declaration signed:

France (effective for 5 years, with nations accepting the same jurisdiction).
N. Y. T., Apr. 6, 1947, p. 34.

NARCOTIC DRUGS. Lake Success, Dec. 11, 1946.

Text: *Cong. Rec.* (daily) Apr. 22, 1947, p. 3912; 80th Cong., *Exec. N.*; *U. N. Doc.* A/54/Add. 1, pp. 81-89.

Signatures as of Dec. 19, 1946: *U. N. W. B.*, Dec. 31, 1946, p. 41.

This Protocol amends the Agreements, Conventions and Protocols, concluded at The Hague, Jan. 23, 1912, at Geneva, Feb. 11 and 19, 1925, and July 13, 1931, at Bangkok, Nov. 27, 1931, and at Geneva, June 26, 1936.

REFUGEE ORGANIZATION. Constitution. Flushing Meadow, N. Y., Dec. 15, 1946.

Signatures:

China. Apr. 29, 1947. *N. Y. T.*, Apr. 30, 1947, p. 6; *U. N. W. B.*, May 6, 1947, p. 466.

New Zealand. Mar. 17, 1947. *U. N. W. B.*, Mar. 25, 1947, p. 278.

WHALING. Supplementary Protocol. London, March 3, 1947.

Signatures:

Australia, Canada, Denmark, France, New Zealand, Norway, South Africa, U. S. S. R., United Kingdom, United States. *D. S. B.*, May 18, 1947, p. 1005.

Text: *Cong. Rec.* (daily) Apr. 30, 1947, p. 4418; *G. B. T. S.* No. 28 (1947), *Cmd.* 7107.

DOROTHY E. DART

JUDICIAL DECISIONS
NEW YORK LIFE INSURANCE COMPANY v.
LOUISE C. BENNION

UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT*

[November 6, 1946]

Attack by one sovereign state upon another with intent to wage war and resistance by the latter bring state of war into being without further formality.

MURRAH, Circuit Judge, delivered the opinion of the court.

The New York Life Insurance Company issued its policy of insurance to Captain Mervyn S. Bennion, providing for double indemnity for accidental death, but specifically excluding from its coverage death resulting from "war or any act incident thereto." The policy is a Virginia contract, executed May 23, 1925. On account of the insured's occupation as a naval officer, an extra premium, equal to the normal charge for double indemnity benefits, was included in the total premium.

When the Japanese attacked Pearl Harbor on the morning of December 7, 1941, Captain Bennion was in command of the Battleship *West Virginia*, at that time lying at anchor in the Harbor. While at his post of duty repelling the attack, he was killed soon after its commencement by a fragment of a Japanese bomb or shrapnel. The Company paid the face amount of the policy, but denied liability for double indemnity on the grounds that death resulted from war or an act incident thereto within the meaning of the policy. The trial court granted recovery, and the Company has appealed.

According to official reports,¹ 250 or 300 Japanese bombing and torpedo planes took part in the attack, resulting in 3,435 American casualties; severe damage to or loss of 8 battleships, 3 light cruisers, 3 destroyers, 3 miscellaneous vessels, and 188 planes, as well as damage to land-based military installations. Japan suffered something less than 100 casualties, the loss of 29 planes, and 5 midget submarines. The event was one of the greatest military and naval disasters in our nation's history. When the attack was launched, we were not only at peace with Japan, but were actually engaged in a peace conference with her envoys. It was deliberately

* Text provided by courtesy of Edwin Borchard, of Counsel for appellant, and *United States Law Week*.

¹ The Roberts Report, Senate Document 159, 77th Congress, 2nd Session. Joint Committee on Investigation of the Pearl Harbor Attack, Congress of the United States, Senate Document 244, 79th Congress, 2nd Session.

and strategically planned, and while recognized as a possibility in view of our strained relations, came as a complete surprise to our civil, military and naval authorities.

About one hour after the commencement of the attack (7:30 A.M. Honolulu time, 1:30 P.M. Washington time), the Japanese envoys in Washington delivered a note to our State Department informing our Government of the severance of diplomatic relations. The delivery of the note was intended to coincide with the attack as a part of Japan's prearranged war strategy. About three hours after the commencement of the attack, and while it was in progress, the Japanese Imperial Headquarters announced that war began as of "dawn" that date, meaning 7:30 A.M. Honolulu time. About eight hours still later (3:00 P.M. Honolulu time, 9:00 P.M. Washington time), the United States Embassy at Tokyo received a communication from the Japanese Foreign Minister, informing our Government that a state of war had arisen between the two countries, "beginning today." President Roosevelt appeared before a joint session of Congress on the following day, December 8th, to request that Congress declare the existence of a state of war between the United States and the Japanese Empire. The Congress was informed that "Yesterday, December 7, 1941 * * * the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan." After detailing the course of events of the preceding day, the President asked the Congress to declare that "since the unprovoked and dastardly attack by Japan on Sunday, December 7th, a state of war has existed between the United States and the Japanese Empire." (See House Document 453, 77th Congress, 1st Session.) The Congress responded by joint resolution "that the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States, is hereby formally declared. * * *" The resolution was approved by the President and became effective December 8, 1941, at 4:10 P.M., Washington time. (55 Stat. 795.)

No one denies the grim reality that the attack beginning December 7, 1941, at about 7:30 A.M., Honolulu time, marked the commencement of an armed conflict between two sovereign nations which ended only when the Japanese surrendered nearly four years later. Furthermore, it seems to be agreed that the existence or non-existence of a state of war is a political question, to be determined by the political department of our Government. The basic difference lies in the contention on the one hand that a formal declaration by the Congress, which alone has the constitutional power to declare and make war, is an essential prerequisite to judicial cognizance of its existence; and the contention on the other hand that the existence of a war is not dependent upon its formal declaration, but rather is determinable from an appraisal of actualities; that the formal declaration by Congress on the day after the attack was merely a

formal recognition of that which was already actually in existence. Both contentions find very respectable support in the adjudicated cases. Since the contract was made in Virginia, its construction and effect are of course governed by Virginia law. But the Virginia courts have not spoken, and we therefore have the duty to determine what we conceive will be the law of Virginia when its courts do speak on the subject.

All of the cases which support the appellee involve the death of an insured resulting from the Pearl Harbor attack under contracts of insurance, containing either identical or similar words of exclusion as those under consideration here. They are bottomed on the concept that courts may not take judicial notice of the existence of a war until it is formally and officially declared by the Congress of the United States; that the parties contracted in contemplation of this rule of law and are bound by it. A valid distinction is drawn between an act of war and a state of war, and the attack of December 7th is characterized as an act of war, which did, but not necessarily, eventuate in a state of war. The *Panay* Incident on the Yangtze River in China is suggested as a comparable act of war which did not eventuate in a state of war. Then too, it is said, in accordance with the universal rule, that if the words used to express the intention of the parties in the contract are ambiguous or susceptible of two meanings, one of which will permit recovery and the other will not, it should be given a construction most favorable to the insured. *West v. Palmetto State Life Ins. Co.*, 25 S. E. 2d 475; *Rosenau v. Idaho Mutual Benefit Assn.*, 145 P. 2d 227; *Savage v. Sun Life Assur. Co.*, 57 Fed. Supp. 620; *Gladys Ching Pang v. Sun Life Assur. Co.*, Supreme Court of the Territory of Hawaii, October Term, 1945.

The last cited case from the Territory of Hawaii calls attention to the joint resolution of Congress, approved December 8th, formally declaring war, and points to what it considers the significance of the failure of the Congress to comply with the President's request to declare that a state of war had existed since the "unprovoked and dastardly attack by Japan on Sunday, December 7th." To show that the Congress could have, but did not recognize the existence of a state of war on December 7th, the court emphasized the difference between this resolution and the joint resolution of Congress formally declaring war on Spain on April 25, 1898, in which war was specifically declared to exist, and had existed since the 21st day of April, 1898. The court also cites and quotes from a treatise by Manley O. Hudson, 39 Harv. Law Review, 1020, to the effect that for the purpose of municipal law, a state of war between the United States and Germany did not exist until its formal declaration by joint resolution of Congress on April 6, 1917, although the Congress was "perhaps competent" to give the declaration a retroactive effect in view of the many previous acts of war committed by Germany against the United States. This argument, of course, assumes the premise that the courts may not take

notice of the existence of a state of war until it is formally declared by the Congress.

The authorities which support the contentions of the appellant also involve insurance contracts which are identical or similar to ours. *Vanderbilt v. Travelers Ins. Co.*, 184 N.Y.S. 54, involved an insurance contract excluding from its coverage "death * * * resulting directly or indirectly, wholly or partly, from * * * war or riot." The insured lost his life when a German submarine sank the British steamer *Lusitania*, on which he was a passenger. At that time a state of war existed between Germany and Great Britain, but not between Germany and the United States. The court rejected the contention that the United States must have been at war with Germany in order to come within the language of the policy, holding that "war is every contention by force between two nations under authority of their respective governments."

Stankus v. New York Life Ins. Co., 44 N. E. 2d 687, involved an insurance contract also issued by this appellant, containing identical words of exclusion. The insured, a seaman in the United States Navy, lost his life when the *U.S.S. Ruben James* was torpedoed by German submarines on October 30, 1941. At that time, Germany was at war with Great Britain, but at peace with the United States. In holding that the insured's death resulted from war or an act incident thereto, the court reasoned that the existence of a war was not dependent upon its formal declaration, but that any conflict between the armed forces of two nations under authority of their respective governments was commonly regarded as war. The attack on Pearl Harbor was cited as the latest illustration of war without formal declaration. Referring to the insurance contract, the court noted that the term war, as used therein, was not limited or restricted by anything appearing in the policy; that it referred to no particular type or kind of war, but applied in general to every situation that ordinary people would commonly regard as war, and should be so construed and enforced. In support of its definition of war, the Massachusetts court cited *Bas v. Tingy*, 4 Dall. 36, 1 L. Ed. 731; *The Prize Cases*, 2 Black 635, 17 L. Ed. 459; *Montoya v. United States*, 180 U. S. 261; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Hamilton v. McClaughry*, 136 F. 445; *Gitlow v. Kiely*, 44 F. 2d. 227.

In the Prize cases, *supra*, after the outbreak in hostilities between the States, President Lincoln, on April 19 and 27, 1861, issued an executive proclamation establishing a blockade of all Southern ports, and ordered the capture of all vessels violating the blockade. In pursuance of the proclamation, certain vessels belonging to foreign countries were captured and held as prizes of war. Congress was in recess at the time and had not acted upon the insurrection, and the question arose whether the vessels thus captured and held were war prizes under either municipal or international law. It was argued with great force and eloquence that since

Congress alone was empowered to declare war, there could be no war cognizable in the courts without and until a legislative declaration thereof; that only the Congress could interrupt the otherwise peaceful commerce between friendly nations. In holding that the vessels seized under the executive proclamation were war prizes, the court recognized that Congress alone had the constitutional power to formally declare a national or foreign war, but it also affirmed the power of the President, as Commander and Chief of the army and navy, to use the military and naval forces of the United States in case of invasion by a foreign nation. Said the court, "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.'" The court called attention to the historical fact that the battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress declaring war on Mexico on May 13, 1846, which recognized "a state of war as existing by the Act of the Republic of Mexico." (9 Stat. 9.) And speaking of the commencement of the Civil War, the court used language which has singular application to our situation. "However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." And speaking of the province of the courts in a situation of this kind, the court said, "They cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race * * *." Thus, the court left no doubt that the executive proclamation was a political determination of a state of war, of which the courts were bound to take judicial cognizance.

When one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all the force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it. Mankind goes no further in his definitive search—he does not stand on ceremony or wait for technical niceties. To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense.

Let us suppose that Congress was not in session on December 7th when the Japanese attacked, and could not convene for thirty days, therefore could not and did not formally declare or recognize a state of war until

January 8, 1942. Meanwhile, the President, acting in his capacity as Commander and Chief of the armed forces, took all available measures, not only to repel the invasion, but waged, as we did, an offensive war at Midway and throughout the Pacific. And let us suppose that the insured here had been killed on January 7, 1942, in one of the many sea battles which ranged over the Pacific immediately after the Pearl Harbor attack. In these circumstances, it cannot be denied that the acts and conduct of the President, acting in furtherance of his constitutional authority and duty, would constitute a political determination of a state of war of which the courts would take judicial notice. We can discern no demonstrable difference in the supposition and the actual facts, and we therefore conclude that the formal declaration by the Congress on December 8th was not an essential prerequisite to a political determination of the existence of a state of war commencing with the attack on Pearl Harbor.

But the actual existence of a state of war and the political determination of its commencement with the attack on December 7th is immaterial to this lawsuit if the word war, as used in the contract, was intended by the parties to mean a state of war which commenced only with a formal declaration by Congress on December 8th. In construing and interpreting the contract between the parties, it is our function and duty to ascertain and effectuate their lawful intention. In so doing, we should place ourselves in the position of the parties when the contract was made, consider the purposes, the subject matter, and the circumstances under which their minds met. *New York Casualty Co. v. Sinclair Refining Co.*, 108 F. 2d 65; *Cocke v. Vacuum Oil Co.*, 63 F. 2d 406; *Western Commercial Travelers Assn. v. Smith*, 85 F. 401; *Restatement of Contracts*, Sec. 226 & 236.

The subject matter of the contract was a risk assumed on the life of the insured by the Company, for a stipulated premium, and the use of the word war was obviously intended to denote a restriction or limitation upon the risk assumed. It is plain, therefore, that the definition given to the word war bears a direct relationship to the risk assumed, which is the subject matter of the contract. Viewed in this light, it is also plain that when the parties used the word war, they had in mind the hazard to human life incident thereto. Virginia courts adhere to the general rule that, as in other contracts, words used in insurance contracts to express the intent of the parties are to be construed in their plain, ordinary and popular sense, unless it is evident from the general scope and purpose of the contract that the words were intended to have some other special meaning. *United States Mutual Accident Assn. v. Newman*, 3 S. E. 805; *Darden v. North American Benefit Assn.*, 170 Va. 479, 197 S. E. 413; *Cooley Briefs on Ins.*, Vol. 2, p. 1004; *Restatement of Contracts*, Sec. 235; 29 *Amer. Juris.*, Sec. 159, p. 175. Furthermore, the language used in the contract to express the intention of the parties is that of the Company, and

it is only consistent with reason and justice that if a critical word or phrase in the policy is susceptible of more than one meaning, one of which permits recovery and the other does not, it should be given the construction most favorable to the insured. *United States Mutual Accident Assn. v. Newman*, supra; *Marandino v. Lawyers' Title Ins. Corp.*, 159 S. E. 181; *Stroehmann v. Mutual Life Ins. Co. of New York*, 300 U. S. 435; *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489.

But we can find nothing in the subject matter, the context, or the purpose of this contract to indicate that the parties intended to use the word war in the technical sense of a formally declared war. The parties did not specify any particular type or kind of war, rather they used the all inclusive term, and we think it only fair to assume that they had in mind any type or kind of war in which the hazard of human life was involved. In short, we think the parties contracted with reference to a "shooting war." It follows therefore that the insured's death resulted from war or an act incident thereto within the meaning and purpose of the insurance policy.

Finally, it is argued that the Company is precluded from contesting its liability under the policy by virtue of Section 4228(a), Virginia Code, 1924, which pertinently provides that an insurance policy shall not be contestable for any cause after one year from the date of its issuance "except for nonpayment of premiums, or the violation of the conditions of such policy requiring the payment of additional premium in the event of naval or military service in time of war; * * *" This statute necessarily enters into and becomes a part of every insurance contract written in the State of Virginia. On this basis, it is contended that since the provision covers and includes military service, within the limits of the risk assumed, the policy cannot be contested, because death resulted from military service unless the insured violated the conditions requiring the payment of additional premium.

But the Virginia courts have held that this statute relates to the validity of the contract, and does not deny the Company the right to controvert the amount of its liability, or to "contend that the risk was not assumed in the coverage." *Darden v. North American Benefit Assn.*, 170 Va. 479, 197 S. E. 413. See also *New England Mutual Life Ins. Co. v. Mitchell*, 118 F. 2d 414, construing the same statute. Statutes of similar import have received a like construction by other states. See *Metropolitan Life Ins. Co. v. Conway*, 252 N. Y. 449, 169 N. E. 642; *Equitable Life Assur. Society v. First National Bank*, 113 F. 2d 272; *Head v. New York Life Ins. Co.*, 43 F. 2d 517. The statute did not preclude a denial of coverage as in this case.

The judgment is REVERSED.

HUXMAN, Circuit Judge, DISSENTING:

In my judgment, the decision of the lower court should be affirmed. In *Gladys Ching Pang v. Sun Life Assur. Co. of Canada*, decided at the October, 1945, term of the Supreme Court of the Territory of Hawaii, the court concluded that the attack on Pearl Harbor on December 7, 1941, did not constitute war so as to relieve an insurance company of liability under a similar exclusion clause. This is a well reasoned, exhaustive opinion, and I agree with its reasoning. The gist of this opinion is adopted for the purpose of this dissent. In addition to what is said in that case, I desire to make the following observations.

It is, of course, recognized without exception that where ambiguity exists in words or terms of an insurance contract, such ambiguity is most strongly construed against the insurance company and in favor of the insured. It is equally well recognized that a court may not and should not create an imaginary ambiguity in order to construe a contract against the company.

If the word "war" has but one meaning and is susceptible of exact definition so that the minds of reasonably intelligent men cannot differ as to its meaning, there is no occasion for the construction of the contract. It must, then, be given the one meaning which it has to men of such intelligence. But if, on the other hand, it has different meanings, or if what is war may have different meanings when considered in different settings, then there is ambiguity in the use of these terms in the contract, unless the sense in which they are used is clearly set out and defined.

"War" is a word of many meanings. It cannot be said that it has but a single meaning. Neither does what constitutes war between nations mean the same things at all times. So there are acts of war, or acts of aggression, which, while they may lead to war, do not constitute war themselves. So, also, there is war in the legal sense, and in the material sense. Legal war exists when there is an interruption of all pacific relations between nations and an authorized contestation of armed forces by the constitutional authority of the nations, while material war is evidenced by the use of armed forces by the parties. It is said that war "is not a mere contest of force, but must be an armed struggle carried on between two political bodies each of which exercises de facto authority over persons within a determinate territory, and its existence is determined by the authorized political department of the government."¹

In a legal sense, we are not and cannot be at war with another nation until Congress has declared war, either by a formal declaration of war or by an Act of Congress evidencing its consent to the waging of war, such as providing for the raising and equipping of armed forces, and authorizing the President to use them in combat with an aggressor nation. An

¹ See 67 C.J., Sec. 1, on War.

act of aggression, whether large or small, by another nation, does not create a state of war until we accept the challenge in a way provided for under our Constitution. The President has power to resist acts of aggression, but he is powerless to declare war, go to war, or put us into war without the formal action of Congress expressed by some form of statutory enactment.

If we were at war with Japan during the attack on Pearl Harbor on December 7, we were likewise at war with Japan during the bombing of the *Panay*. The *Panay* incident is sought to be distinguished on the ground that it was unintentional on Japan's part, and the result of an accident. That was the explanation Japan gave, and we chose to accept it, because we did not at that time want to go to war. There is no doubt now that the *Panay* incident was deliberate, and I doubt if our government officials misunderstood it at the time. If the Pearl Harbor incident constituted war, then we were at war with Mexico when our fleet bombarded Vera Cruz, and we were at war with Mexico when our armed forces invaded Mexico in pursuit of Villa. Certainly the attack on Vera Cruz was just as deliberate as the attack on Pearl Harbor. There was no accident or misunderstanding in that attack. The gunfire from our warships was deliberately and intentionally directed against the property of a sovereign nation, and killed Mexican citizens and destroyed Mexican property. Everyone knows that for a number of years, even before we went to war with Japan, the Japanese and Russian forces in Manchuria made numerous attacks on each other, some lasting for days. Yet both nations chose to ignore them and refused to go to war. During all this time they maintained their diplomatic relations and carried on their ordinary peace-time activities. It will be recalled that for a long time after we were at war with Japan, we urged Russia to sever diplomatic relations with Japan and go to war against her, but that Russia refused, and declared war and went to war against Japan only during the closing months of the war. Certainly, all of these acts of war which the Russian and Japanese forces committed against each other were deliberate and intentional. It cannot, however, be contended seriously that Russia and Japan were at war during the time of each of these incidents, extending over a number of years, but were then immediately at peace again when the incident was over, and were at war again when the next incident occurred, because during all of this time they continued their diplomatic relations and considered themselves to be at peace. These illustrations could be multiplied many-fold, but they suffice to show the distinction and difference between acts of aggression, which may or may not lead to war, and war itself. The only difference between the Pearl Harbor incident and the *Panay* and Vera Cruz incidents is one of degree. Those incidents did not lead to war. While the incident at Pearl Harbor did lead to war, it was legally possible to avoid war, and war did not come until it was declared.

Neither is the risk assumed for loss from acts of aggression between the armed forces of nations as great as loss from war. An act of aggression or an act of war may be a single incident or a limited number of incidents. Acts of aggression also cover a shorter period of time and are not waged with the same intensity as battles in war. As a result, an insurance company might well be willing to assume such risks, but not be willing to assume the enormous loss resulting from a legally declared war.

It seems to me that the word "war" and what constitutes war is susceptible of different meanings and incapable of exact definition. It follows that the sense in which these terms are used in the exclusion clause is ambiguous. While it may not be of legal significance, it is worthy of note on the question whether there is uncertainty in the mind of the company as to the ambiguity in the terms of the exclusion clause, that in another policy which we had occasion to consider in *New York Life Ins. Co. v. Cooper*, decided on the 26th day of October, 1946, the language employed was entirely different. The language in that policy excluded loss from death resulting "... from military or naval service in time of war; from a state of war, or insurrection." This language is certainly broader than the language in the policy in question here, and does not have the same meaning.

When ambiguity once exists, our duty under the well recognized rule of construction is clear. We do not gaze into a crystal ball to try to place ourselves in the position of the parties at the time of the execution of the contract in order to attune our minds to theirs, to try and think their thoughts as to how they would consider such a subsequent act as Pearl Harbor. The rule is clear that in such a case, we adopt the meaning most beneficial to the insured, and construe the contract most favorably to him. So construed, the ruling should be that the policy excludes loss from death resulting from war, meaning a legal war, but covers loss for death resulting from acts of aggression, whether they did or did not subsequently lead to war.

For the above reasons, I respectfully dissent.

WESTCHESTER COUNTY *v.* RANOLLO

CITY COURT OF NEW ROCHELLE, N. Y.

[November 8, 1946]

In prosecution of employée of United Nations for operating automobile at excessive speed question whether employée was immune from prosecution because of provisions of Congressional act held required to be treated under general rules of construction applicable to criminal proceedings.

Motorist was not immune from prosecution for driving automobile in excess of speed limits because he was employée of United Nations and was driving Secretary General of United Nations at time of alleged excessive speed.

The defendant, as the operator of a motor vehicle, is charged with having violated the provisions of the ordinances of the Westchester County Park Commission, in that he did on the 17th day of October, 1946, on the Hutchinson River Parkway, a public highway in this City, operate said vehicle, for a distance greater than a quarter of a mile, at a rate of speed of fifty miles per hour, the legal limit being forty miles. Appearing through counsel, the defendant answers that he was operating said motor vehicle at the time and place complained of as an employee of the United Nations, and, in fact, he was accompanied in the vehicle at the time by the Hon. Trygve Lie, Secretary-General of the United Nations, and by virtue of these facts he urges that he is immune from prosecution in this Court, or, for that matter, in any Court.

The claim for immunity rests upon Executive Order 9698, promulgated by the President of the United States February 19, 1946, by virtue of the authority vested in the President by Sec. 1 of the International Organizations Immunities Act Approved December 29, 1945, otherwise known as Public Law 291, 79th Congress. That statute was enacted and designed to implement the Immunities provisions as embodied in the Charter of the United Nations.

By the provisions of Article 105 of Chapter XVI of the United Nations Charter the signatories, including the United States, covenanted and agreed:

1. The Organization shall enjoy in the territory of each of its Members *such privileges and immunities as are necessary for the fulfillment of its purposes.*
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy *such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.*

It is to be noted significantly at this point that the phrase, "such privileges and immunities" is nowhere defined in the Charter.

The Congressional Act (Public Law 291) provides, among other things, that "the privileges, exemptions and immunities provided for" herein may

be accorded, withheld, withdrawn, conditioned or limited by Executive Order of the President (Sec. 1).

By Sec. 7 of the Act the national policy on the subject of immunity is laid down in the following words:

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

One examines the statute in vain for any definition of the term "legal process" or of the term "in their official capacity and falling within their functions as such representatives, officers or employees."

Again when we turn to Executive Order 9698, there is a declaration by the President that the United Nations are "entitled to enjoy the privileges, exemptions and immunities conferred by the said International Organizations' Immunities Act," without any attempt to further define or limit or prescribe the extent of the immunities so conferred.

It is urged in behalf of the defendant that the application of these cited provisions requires the exemption from prosecution or suit, criminal or civil, and without regard to the degree of the offense committed, of all personnel accredited to the United Nations as an international organization, without regard to the question as to whether the one so involved is the Secretary-General himself or an accredited delegate to the Organization's deliberations, or the humblest servant attached to the personnel of the Organization, and without regard to the importance or unimportance of the functions of the particular individual defendant in the deliberations and workings of the Organization so long as the defendant, at the time of the commission of the offense or the incurring of the liability, be acting in his official capacity. This Court is not prepared to accede to that view.

In the absence of statutory definitions, the question presented must be treated under the general rules of construction applicable to criminal proceedings in this State. Section 21 of the Penal Law very aptly furnishes the rule of construction in the following language:

The rule that a penal statute is to be strictly construed does not apply to this Chapter or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, *to promote justice and effect the objects of the law.*

To recognize the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity, even though the individual's function has no relation to the importance or the success of the Organization's deliberations, is carrying the principle of immunity

completely out of bounds. To establish such a principle would in effect create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment. Any such theory does violence to and is repugnant to the American sense of fairness and justice and flouts the very basic principle of the United Nations itself, which in its preamble to its Charter affirms that it is created to give substance to the principle that "the rights of all men and women are equal."

Furthermore, the establishment of such a rule of immunity would far exceed any effort heretofore undertaken in the intercourse between nations to recognize the principle of diplomatic immunity, for ambassadors and foreign ministers and members of their households, accredited to a specific nation and enjoying immunity from prosecution here under the provisions of Sec. 25 of the Penal Law, at least, theoretically, were subject to return to their own country for trial and punishment. The United Nations has no tribunal for the trial and punishment of offenders among its personnel, and if blanket immunity were to be recognized as prevailing in this case then one would have to come to the conclusion that such an offender could escape trial and punishment completely. Certainly no court of justice, and no people who believe in justice, would be prepared to endorse such a position.

It is interesting to note that research discloses a similar attempt to escape punishment by one Avenol in the Courts of the Republic of France in 1934, when he was being held to account for alleged failure to support his family, he then being the Secretary-General of the ill fated predecessor to the present International Organization, namely, the League of Nations. The judgment in that instance refused to accord the claimed immunity, with the comment, "No one may claim to be immune from suit in 50 States. That is practically in all the world. Such a privilege would be abhorrent to the fundamental idea of justice."

There can be no disputing of the proposition that if these international legislative bodies are to function properly within the borders of the particular nation that may be housing their activities, a certain amount of immunity, exemption and privilege is necessary to insure their necessary personnel against harassment by way of court proceedings, civil or criminal, and every right thinking American citizen is sincerely anxious that the deliberations of this international body shall proceed uninterruptedly and with a maximum measure of success in everyone's interests.

This assurance can be given by interpreting the language of the Charter and the Act of Congress and the Presidential Executive Order as being limited in the application of the principle of immunity to those personnel whose activities are such as to be necessary to the actual execution of the purposes and deliberations of the United Nations as distinguished from those household servants and personnel who merely serve the personal

comfort, convenience or luxury of the delegates and Secretariat who actually perform the true functions of the Organization. It is only by the application of such a rule that one can be said to be interpreting the law "according to the fair import of its terms to promote justice and effect the objects of the law."

Our State and national legislators enjoy a measure of immunity so as to insure the proper functioning of the Congress and of the State Legislatures, which falls far short of that measure of immunity contended for on behalf of the personnel of the United Nations, and no valid reason exists why the immunity accorded to the United Nations should be greater in scope than that found necessary to insure the proper functioning of our own Congress.

It is only by a proper definition of the immunity to be accorded to the personnel of the United Nations and by a proper circumscription of the effect to be given the Congressional language that the American people can be assured that the hospitality accorded the United Nations on American soil will not be abused by conduct on the part of even the humblest member of its personnel in a manner that is hostile to the American concept of the equal administration of justice among our people. This Court feels strongly that the question of immunity under these circumstances should be entrusted not to the whim or caprice of any individual or committee that might speak for the United Nations Organization, but rather that such immunity should be available only when it is truly necessary to assure the proper deliberations of the Organization—a circumstance that could be readily brought about if the granting of immunity were restricted to those cases where our own State Department certified that the exemption from prosecution or suit was in the public interest.

In the light of the foregoing citations and principles, this Court holds that upon the facts in this case the defendant is not entitled to immunity as a matter of law without a trial of the issue of fact and is accordingly required to plead to the Information before the Court.

BOOK REVIEWS AND NOTES

Tratado de Derecho Internacional Público. By Hildebrando Accioly.
Rio de Janeiro: Imprensa Nacional; 1945-1946. Vol. I, Pp. xxvi, 664;
Vol. II, Pp. vii, 519; Vol. III, Pp. viii, 645.

In these three volumes the distinguished Brazilian jurist, now holding the post of the Under-Secretary of State in his country's Foreign Office, gives us a Spanish translation of his three volumes published in Portuguese in 1933;* at the same time he has taken the opportunity of revising the earlier volumes and bringing the material down close to the date of publication. American jurists, to whom Portuguese may have presented greater difficulties, have now an opportunity to become acquainted with the interpretation of international law by one of the foremost representatives of Latin American thought.

What characterizes Ambassador Accioly's work is the balanced judgment which he shows in treating the controversial aspects of his subject. In respect to classification of material and analysis of the subject the author follows the general lines of the Latin tradition. He is not a positivist, because he has too keen an appreciation of the inadequacy of a law based upon nothing more than the rules to which states have given their specific assent. He does not derive international law from the will of the state, because it seems clear to him that individual self-interest is a precarious source of juridical rules. He asserts the priority of international over national law as the only possible condition of the existence of a true community of states.

Upon the fundamental issue of sovereignty Accioly makes clear that the sovereignty of the state is subject to the law, and that it can not be made a justification for arbitrary conduct. The very existence of the international community implies restrictions upon the "independence" of states. Incidentally the author calls attention to the provisions of the Brazilian Constitution of 1891, as revised in 1926, which gave to the Supreme Court jurisdiction over suits "between foreign nations and the Union or the States,"—a provision which has been carried over into the Constitution of Brazil of 1946, by which the Federal Supreme Court has competence to try "litigation between foreign powers and the Union, the States, the Federal District and the Municipal districts."

Upon the highly controversial problem in Latin America of the conditions which should attend the recognition of new governments the author points out the illogical and impractical character of the Estrada Doctrine,

* Reviewed in this JOURNAL, Vol. 28 (1934), p. 615; Vol. 29 (1935), p. 538; Vol. 30 (1936), p. 563.

asserting that the procedure of recognition is in no way an attack upon the sovereignty of the state, and that the substitute offered of maintaining or withdrawing diplomatic missions would be but another form of recognition. In respect to the thorny problem of intervention, the author, after analyzing the various forms of intervention and discussing instances taken from Brazilian history, is not afraid to contemplate the possibility, "when international organization becomes further advanced," of a right of collective intervention by the whole body of states as a means of correcting abuses and injustices. Upon the subject of the responsibility of the state he finds no difficulty in accepting the principle of the minimum standard of justice which the government of the alien may claim in his behalf.

The treatise of Sr. Accioly is valuable not only because it is marked by good judgment in the treatment of problems which are still on the fringes of international law, but because it contains at the same time numerous illustrations of the application of legal principles taken from the foreign relations of Brazil. The rapid development of the regional group of the American States within recent years makes it all the more important that students in the United States should keep in touch with the juridical problems of Latin America and with the traditions and ideals of Latin American jurists, among whom the author takes first rank.

C. G. FENWICK

Of the Board of Editors

The British Year Book of International Law, 1945. London: Oxford University Press; 1946. Pp. vi, 341. Index.

This second volume of the *British Year Book of International Law* to appear under the editorship of Professor H. Lauterpacht maintains the high standards of the 1944 volume.

Of outstanding value are the contributions of Mr. C. Wilfred Jenks, Legal Adviser of the International Labor Office. In an article of sixty-two pages Mr. Jenks discusses "Some Constitutional Problems of International Organizations." Under this rubric he makes a comparative study of the constitutional provisions and the constitutional practice of the United Nations, the League of Nations, the International Labor Organization, the United Nations Relief and Rehabilitation Administration, the Food and Agriculture Organization, the International Bank and Fund, the International Civil Aviation Organization, and various other comparable organizations and agencies. Topics to which he devotes considerable attention include Purposes and Competence; Membership (including admission, withdrawal, expulsion, and suspension); Composition of Representative Organs; Voting; Permanent Staffs; Powers; Immunities; Finances; Amendment. Here is the grist for many an advanced seminar in international organization. In a shorter Note Mr. Jenks discusses "The Legal Personality of International Organizations."

In "Some Aspects of Modern Contraband Control and the Law of Prize," Mr. G. G. Fitzmaurice rouses the sleeping dogs of Anglo-American controversy over neutral rights and attempts to justify British prize court practice. Fortunately the subject is becoming less important. Professor Lauterpacht continues his scholarly contributions on recognition in "De Facto Recognition, Withdrawal of Recognition, and Conditional Recognition." Mr. Wyndham L. Walker discusses the historical background of "Territorial Waters: The Cannon Shot Rule" and shows that the "rule was already well known and appealed to as law by diplomatists before Bynkershoek wrote."

Other contributions include the following: "Leibniz as International Lawyer," by J. Walter Jones; "The Most-Favored Nation Standard in British State Practice," by Georg Schwarzenberger; "Who Are British Protected Persons?" by J. Mervyn Jones; "The Place of the Calvo Clause in International Law," by K. Lipstein; "International Law and the Controversy Concerning the Word 'Law,'" by Glanville L. Williams; and "International Civil Aviation and the Law," by E. Y. Jennings.

There are Notes on "The Relationship of International Organizations to Municipal Law and their Immunities and Privileges," and on other topics, and the usual digest of English court decisions on international law. The volume contains a large number of book reviews.

HERBERT W. BRIGGS

Of the Board of Editors

Die Entwicklung zur staatlichen Handelsschifffahrt im Spiegel des internationalen Rechts. By Serge Maiwald. Stuttgart: Wissenschaftliche Verlagsgesellschaft; 1946. Pp. 141.

This first book on international law from post-war Germany which this reviewer has seen is an investigation of the development toward state merchant vessels as reflected in international law. Based on a full use of the corresponding literature in the different great languages, it gives a survey of international treaties and an analysis of the jurisprudence concerning immunity of state ships in the Courts of the principal European states and of this country. It is an excellent and interesting study, not devoid of new and original ideas.

The author tries to prove that this jurisprudence is, in the last analysis political in character; that it reflects, as in a mirror, the political, economic, and ideological position of the state of the forum. Hence the difference between the Continental and the Anglo-American approach. Hence, sometimes, the difference between the attitude of British and American Courts. Thus in World War I British courts, under the political impact of the war, granted immunity to ships of the Allies carrying goods for war purposes, not only when they were owned or chartered by a foreign state, but

also to private vessels carrying state cargoes. The courts of this country, on the other hand, where the prevailingly private character of maritime transportation of goods dominated, notwithstanding the existence of the Fleet Emergency Corporation, gave immunity only to ships which were owned by or in the actual possession of foreign states. Thus in the Spanish civil war, British courts granted immunity to ships requisitioned by the Madrid Government (*The Christina*), whereas American courts, under the impact of the strong isolationist neutrality wave, denied it (*Navemar*).

The author further tries to show that the whole development since the beginning of the XIXth century must be understood by starting from the liberal-democratic conception of the legitimate and limited activities of a state, and from the liberal conception that transportation of goods and passengers on the seas is essentially a private commercial enterprise for profit and cannot be regarded as a legitimate field of state activity. In consequence immunity was granted to warships (*The Exchange*) and to other vessels for governmental or non-commercial purposes. And even when state ownership, not state function, was taken as a criterion, "public ships" were identified with non-merchant vessels, "private ships" with merchant vessels.

The first inroad into this conception came with the mail-boats. If they were state-owned and, perhaps, manned by navy personnel the solution was easy (*The Parlement Belge*). But postal conventions and jurisprudence later granted immunity also to mail-boats which were only chartered or even only subventioned by a foreign state. The doctrine developed the idea of the *service public*, regardless of property. The problem was posed by the dual purpose of these ships—carrying mail, which was also, in the liberal conception, a legitimate state activity, but also carrying passengers and goods. Only immunity in time of peace was granted to them; in regard to the law of maritime warfare and neutrality they were assimilated to private (merchant) vessels (*The Bundesrat, The Herzog*).

World War I brought an expansion of the liberal conception of "state ships" in Continental and British courts. But after the war the Allies tried to reintroduce the liberal order in world economy. But the American Emergency Fleet Corporation continued and these ships became in the post-war period the prototype of the "state merchant vessel." The continuance of these ships was a mere solution of embarrassment, dictated by purely financial considerations. These ships served exclusively commercial purposes for profit. They savored of the state only in that they were state-owned. Foreign Courts granted them immunity (*The Ice King*), just as American courts did in regard to Italian state merchant vessels (*The Pesaro*), but only on account of state ownership, and not without grave doubts. Mercantile circles urged the doing away with these

"privileges." After the Public Vessel Act of 1925, by which this country waived the immunity of these ships, the way was free for the adoption of the Brussels Convention of 1926. It had primarily a political character, reaffirming the liberal conception of state ships and barring the claim of a different ideology that maritime transportation be regarded not as a commercial operation for profit, but as a public function, as the exercise of sovereignty.

The issue has become acute with the appearance of the Soviet merchant marine. The Soviet ships, based on an anti-liberal communistic conception of the state, are in every point totally different in character from the United States merchant vessels of the Emergency Fleet Corporation.

JOSEF L. KUNZ

Of the Board of Editors

Diritto Internazionale Bellico. By Giuseppe Vedovato. Florence: Sansoni; 1946. Pp. 360. Appendixes. Index. L. 600.

The book under review is not, as one might expect from the title, a treatise on the laws of war, but a collection of three studies dealing with different problems in this field. The studies are written to show the present day chaotic condition of the laws of war and the need for their revision.

The first and longest study (pp. 11-172) displays the insufficiency of present day positive international law concerning *occupatio bellica* by giving a detailed account and analysis of German legislation in occupied countries of Western Europe. In comparison with Raphael Lemkin's book the theme is a restricted one: restricted to German occupations, considering only German legislation, and only with regard to Holland, Belgium, France, and Alsace Lorraine. The study is based on a collection of hundreds of German legislative acts up to April 1942. From that date on, the author says, these German acts were no longer obtainable, but he believes that all basic legislation was made prior to that date. This assumption seems to be correct, as Lemkin's work also contains few texts after this date.

The second study (pp. 175-217) demonstrates the insufficiency of positive international law for the protection of historic monuments and works of art against aerial attacks. In a very interesting and highly documented study the development of this problem from 1907 is studied: World War I, the proposal of the Dutch Archeological Society of April 1918, the "Hague Rules" of 1923, the Roerich Pact of 1935, the Draft Convention of the International Office of Museums of 1939, the Draft Convention of the International Association *Lieux de Genève*, the declaration of many cities as "open cities" in World War II, and the devastations of this war. The author who does not even mention in this respect the atomic bomb, urges a new international convention, to be worked out by the UN.

The third study (pp. 221-293) treats the problem of the punishment of war crimes. The author starts from the Hague Conventions of 1907, surveys the work of the corresponding Commission at the Paris Peace Conference of 1919, inter-war developments, and the developments leading to the Nuremberg Trial. The study was written before the Judgment was given but the London Accord of 1945, the Statute of the International Military Tribunal, and the Indictment are fully reprinted in English in an appendix.

Although the author cannot yet know much of the most recent literature on this topic, his study is based on an immense literature, including Professor Glueck's book.

Speaking as a jurist, the author is bound to emphasize the many "juridical anomalies" involved: there did not exist a positive international criminal law; it is not possible to explain away the contradiction with basic legal principles *nullum crimen sine lege* and *nulla poena sine lege*; positive international law did not know an individual criminal liability of persons, acting as organs of a state; the exclusion of the plea of superior command; the doubtful legality of the court's competence, which could not even be challenged; the partiality of the court, functioning as party, judge, and judging under a law made by a party to the case; the application only against the vanquished, not the victors, in contradiction with elementary notions of law and justice.

The author feels that Nuremberg was much more a political than a legal affair, that an essentially political objective was cloaked by a juridical appearance. He concludes that it would have been more logical and more in harmony with juridical conscience to repeat of the indicted men the words which Robespierre uttered concerning Louis XVI: *Il n'était pas un accusé, mais un ennemi; il n'y avait pas de procès à faire, mais une mesure de salut public à prendre.*

JOSEF L. KUNZ

Of the Board of Editors

Os Súditos Inimigos. By Antonio Chaves. Sao Paulo: Grafica Editora "Lex"; 1945. Pp. 426. Index.

The book under review is a detailed and painstaking investigation of the Brazilian attitude toward enemy subjects in World War II. And for comparative purposes the attitudes of the other belligerents in the two World Wars and Brazil's attitude in the first are surveyed. The principal decrees are reprinted on pp. 336-419.

Brazil, like all the countries of the Civil Law, had, prior to 1914, no traditional law against "alien enemies" and against trading with the enemy. But here as elsewhere much of the Anglo-American traditional law was accepted by imitation or reprisal, contrary to the previously held classical doctrine that wars are waged between states, not between citizens, and

that private property is sacrosanct. The author investigates the definition of physical and juridical persons as "enemy subjects," the organs created for the application of the measures against the person and property of enemy subjects, prohibition of trading with the enemy, annulment of commercial contracts, *facultas standi in iudicio*, rescission of worker's contracts, political activities—but no "civilian internment," declaration of enemy property, prohibition to sell, sequestration, liquidation, and industrial, literary, and artistic property rights.

The author makes a severe criticism of Brazilian war legislation. All the laws were "decree-laws" of the authoritarian Vargas dictatorship. There was an immense torrent of decree-laws, ordinances, resolutions, instructions, circulars; no system emerged here, a truly chaotic mass of law appeared which made it often difficult to know what laws were still in force or what their actually valid text was. Sometimes measures were taken which were not authorized by any legal form. The author reproaches the legislator for acting at times with basic ignorance of the elementary principles of international law. Anti-enemy measures were sometimes taken against Brazilian citizens. Many measures were in the author's opinion unjust, others inefficient.

The author particularly attacks the principle of nationality as the sole criterion of enemy character. This criterion was quite insufficient and precarious, especially in view of the large number of enemy nationals resident in Brazil and in view of the strongly ideological character of the war. Only German, Italian, and Japanese nationals were declared "enemy subjects." But great injustice was thus done to many "enemy subjects" long resident in Brazil, often strongly opposed to the governments of their countries. Even more absurd was the treatment of anti-fascist Germans and Italians and of Jewish refugees from these countries as "enemy subjects." Austrians were not regarded as enemy subjects. But as the passport was proof of nationality under the law, Austrian refugees, travelling, by necessity, after the annexation, on a German passport, were held to be "Germans." True, they could, under the law, register as Austrians after their arrival. But the authorities often refused to accept such registration, holding that an Austrian nationality no longer existed.

The author laments that Brazil, at one point, has given the "sad example" of a completely new measure by ordering a collection of 10-30% from enemy bank deposits over a certain value. This measure hit only rich enemies and only those who had their fortune in bank deposits and similar values, whereas land-holding enemies suffered no damage; on the contrary, by the prohibition to sell they often profited from the rising prices. While these levies were used to create an Indemnity Fund, even the relatives of the sailors of torpedoed Brazilian ships could obtain noth-

ing for years, because of the not-existence of a distribution plan. A point not investigated by the author is that the measures were taken also against subjects of states with which only diplomatic relations had been broken; the legality under international law is here more than doubtful.

To give an illustration of things that happened, we cite (p. 155) the case of two men, speaking German in their store; a third person told them that this is illegal and was ejected by the two. The *Tribunal de Segurança Nacional* acquitted them. The Court, apart from holding that there is no legal prohibition against the use of an enemy language, gave the following remarkable reasons: the men spoke the Bavarian dialect which is "rather different from German," they were both Brazilian citizens; they had to speak German, as they understood very little Portuguese, a language hardly spoken in that zone of the State of Santa Catarina, in which they lived.

The study of this detailed work shows again that the much-advertised "progress" in international law is often an illusion and that, with regard to the legal status of alien enemies and to all other points, there is an urgent need for a revision of the laws of war, which are, at the present time, in a chaotic condition.

JOSEF L. KUNZ

Of the Board of Editors

Seizure of Territory. The Stimson Doctrine and Related Principles. By Robert Langer. Princeton: Princeton University Press; 1947. Pp. viii, 314. Index. \$3.50.

For centuries a "right of conquest" was generally admitted; a seizure of territory by an aggressive nation was accepted as a fact with little or no concern by the international community. In the first part of his book Mr. Langer shows the development since the late eighteenth century of a community interest in this matter, expressed eventually in the principle of non-recognition to transfers of territory affected by force. This development culminated in the 1930's with the Stimson Doctrine (1931), the recommendation of the Assembly of the League of Nations in the Manchurian incident (1932), the Chaco Declaration (1932), the League Council report on Leticia (1933), and various Inter-American treaties.

Some of the legal aspects of the principle of the non-recognition of territorial seizures are discussed in the second part of the book. The author points out that no legal obligation to abstain from recognition was created where the principle took the form of a unilateral declaration, as in the statement by Secretary Stimson and the Chaco Resolution, but that an obligation did in fact result where the principle was embodied in an international compact, such as the Anti-War Treaty or the Montevideo Convention. He discusses the difference of opinion that arose as to whether

the Assembly Resolution of March 11, 1932, created a legal duty on the part of members to abstain from recognizing Manchukuo. Other legal questions examined include the problem of diplomatic and consular representation in a non-recognized seized area, the status of property there, and the validity of the acts of the dispossessing sovereign.

The third part of the book summarizes diplomatic practice of the last decade. The author discusses at some length the seizures of territory in the Far East by Japan, in Ethiopia and Albania by Italy, in Austria and Czechoslovakia by Germany, and in Eastern Europe by Russia. Although he confesses some difficulty in procuring adequate information for this portion of his monograph, the account which he gives is a good one, probably the best now available.

The book is well organized, well written, and well documented. Very little comment is interpolated by the author, who explains that he prefers "to let the documents speak for themselves." His conclusions are reserved for the last chapter of the book. Here the author admits the shortcomings and limitations of the principle of non-recognition to territorial changes brought about by force, asserting that "it failed miserably" in Ethiopia, Austria, Czechoslovakia, and Albania. Not least among the reasons for the failure was the refusal of many nations to adhere to programs of non-recognition. Mr. Langer admits also the inconvenience occasioned by non-recognition to nations with property and other interests within seized areas, whose welfare and security call for official relationships that are impossible without diplomatic and consular officials. In spite of these admissions of the shortcomings of non-recognition, Mr. Langer still maintains that the principle is generally constructive, that its positive aspects outweigh its limitations. He asserts that non-recognition supports the morale of the people in the seized area, that juridically it is beneficial to those nationals of the seized area who are within the jurisdiction of the non-recognizing state, and that ethically it is a protest against conquest. While the Charter of the United Nations has no article comparable to Article 10 of the Covenant of the League of Nations, which might furnish a basis for the principle, Mr. Langer expressed the hope that the new security organization will nevertheless adopt a program of non-recognition of territorial seizures.

The only disappointing part of this fine monograph is this final chapter. While the chapter is entitled "Conclusion," it is not a conclusion at all but only a statement of opinions. These opinions are interesting, but since they have not been substantiated in the earlier part of the volume, they appear quite unconvincing. As a result, after reading the book one still wonders whether the non-recognition of seized areas is a program worth adopting.

NORMAN HILL

University of Nebraska

El Mar Territorial y 429.000 Km.2 de Plataforma Continental que Aumentan el Territorio Nacional. By Jose Luis Laris Casillas. Mexico: Universidad Nacional Autonoma de Mexico; 1946. Pp. 133. Appendices.

This study, prepared as a thesis in the Faculty of Law and Social Sciences of the University of Mexico, is a concise general survey of the law of territorial waters. Its particular contribution is the inclusion of detailed references to Mexican laws, decrees, regulations, and treaties and a final chapter on the problem of the continental shelf. On various topics within the general subject there are brief historical summaries from Greek and Roman times to the current period, with attention paid both to doctrine and to state practice. The discussions on this subject at the Hague Codification Conference of 1930 are appropriately indicated. The Mexican nine-mile limit is held to be justified, a conclusion with which the reviewer disagrees. The author's argument is not strengthened by invoking in this connection the treaty of 1848 between the United States and Mexico regarding the boundary at the mouth of the Rio Grande. The author clearly points out the weakness of the Declaration of Panama of 1939 which asserted a very extensive neutrality zone around the American continents. The author accepts the view that the rights which a state has over its territorial waters are properly described as "sovereignty."

The Chapter on the continental shelf naturally lays stress on the United States proclamation and the Mexican draft law of 1945; both these documents are given in appendices. There is a brief but interesting examination of the scientific basis of the delimitation of the continental shelf and reference to prior doctrinal discussions by Storni, José León Suárez, and Ruelas. Borchard's analysis in this JOURNAL in 1946 is relied on, and the author advances certain technical criticisms of the Mexican draft law. The discussion concludes with emphasis upon the economic importance of the continental shelf to Mexico; the extent of the area off the coasts of Mexico is shown by an official chart in another appendix. Reasons are given justifying claims to such areas and there is a suggestion that the matter be treated by one of the Inter-American Conferences.

PHILIP C. JESSUP

Of the Board of Editors

Les Sources du Droit International. Etude sur la jurisprudence de la Cour Permanente de Justice Internationale. By Max Sørensen. Copenhagen: Einar Munksgaard; 1946. Pp. 274. Price: Dan. cr. 15.

This study was prepared before the Permanent Court of International Justice had been replaced by the new International Court of Justice; since the Statute of the new Court conforms in all essential points to the Statute of 1920, however, the author rightly believed that he was justified in publishing the study. The problem which he seeks to solve is whether

the contents of Article 38 of the Statute prescribing the law to be applied by the Court correspond to the general rules of international law in the matter of sources or whether the Article is of such an exceptional character that it sets aside the presumed traditional concepts. As to international conventions and custom mentioned in paragraphs 1 and 2 of the Article, the author finds no difference of opinion among writers that in these respects the Article is in conformity with traditional doctrine. This, however, is not the case with respect to paragraph 3 which authorizes the Court to apply the general principles of law recognized by civilized nations. Some opinions are cited holding that this paragraph constitutes an exceptional source not traditionally recognized but the author does not agree with them.

A helpful prelude to the body of the work is given in Chapter I, which contains a summary of the views of a number of modern writers on the subject of the sources of international law. The succeeding chapters analyze the decisions and opinions of the Court involving the authority attributed to each category of law enumerated in Article 38. The author concludes that the wording of this Article has not exercised a decisive influence on the jurisprudence of the Court; that its dispositions correspond to the principles by which every international judicial organ is inspired in the exercise of its functions, and that the decisions and opinions of the Court would have been the same in the absence from the Statute of all stipulations relative to the sources of law to be applied. A resumé in Danish, chapter by chapter, is appended. The study should be of value to everyone interested in the development of international jurisprudence.

GEORGE A. FINCH

Editor-in-Chief

Problemas del Derecho de Nacionalidad (Proposiciones de Reforma). By Juan A. Lessing. Prologue by Isidoro Ruiz Moreno. Buenos Aires: Tipográfica Editora Argentina; 1946. Pp 163. Index.

This book, described by its author as containing proposals for a reform of the law of nationality, consists of summary statements under the following titles: Basis of Nationality, Publicity in the Law of Nationality, Incongruities in the Rules of Nationality, Points of Relationship in the Law of Nationality, Persons with Abnormal National Status, Organization and Draft for the Establishment of an International Office on Nationality Problems.

Although the author has treated his subject-matter synthetically, he has given us a thoughtful, suggestive, and well-reasoned study of one of the most controversial topics in the entire field of law, with special reference to the part which the organization of the United Nations should play in developing more realistic and practical views and reducing to a minimum the causes of misunderstanding between states and of uncertainty to individ-

uals. He takes the position that under Article 55 of the Charter of the United Nations it is for the new international organization to pave the way for the solution of the grave problems which arise all the time owing to the abnormal personal status of countless individuals throughout the world today. The question of the regulation of the national status of persons is no longer a matter of merely domestic interest. The adoption of the principles of the *jus soli* and *jus sanguinis* (and he might have added also the controversial *jus domicilii*, followed in Brazil and Mexico) in the legislation of most countries unquestionably creates political and legal situations which can not but have serious international repercussions.

The author has covered the salient questions in the broad field of nationality law. He has criticized existing legal theories, pointed out practical difficulties, and suggested compromises and solutions. He devotes many pages to a study of the provisions of the Charter of the United Nations and urges the establishment of an International Office for Nationality Problems, to have charge of all questions relating to nationality (Appendix, pp. 141 and following).

Dr. Lessing's work is concise and to the point. It is basic and offers an excellent point of departure for a more detailed study in the light of recent political and juridical developments in the organization of the United Nations looking toward general agreement on a matter so vital to individuals and nations.

J. IRIZARRY Y PUENTE

New York City

L'Ordinamento Capitolare in Oriente nei Privilegi Toscani dei Secoli XII-XIV. By Giuseppe Vedovato. Florence: Monnier; 1946. Pp. 176. Appendix. L. 350.

Dr. Vedovato's book is a useful outline of the privileges obtained by the Tuscan cities in the Mediterranean basin and especially in the Levant from the 12th to the 14th Century through the so-called Capitulations. The greater part of the work is devoted to the history and an analysis of the Capitulations obtained by Pisa, one of Italy's leading maritime republics until her defeat by the Genoese in the naval battle of Meloria (1284). A short appendix deals with the Capitulations negotiated by Florence, which, after the downfall of Pisa, took over a share of her trade with the Orient. The author separately examines Pisa's Capitulations with the Byzantine Empire, the Christian principalities, and the Moslem powers in the Orient. He outlines the various classes of privileges which were granted to the Pisans, such as trade advantages, most favored nation treatment, exemption from escheat and the right of shipwreck, and the grant of various property rights over entire sections in several cities. The author conclusively supports the view already entertained by this reviewer (*The Italian Conception of International Law*, New York, 1943, p. 28), that many Ca-

pitulations negotiated by Italian maritime cities during the period examined were in the nature of bilateral agreements, international in character, rather than unilateral concessions by the Oriental powers. Dr. Vedovato's work is based chiefly on documents preserved in the Florentine archives. Although not very original the book sheds some new light on the dates, specific contents, and historical background of some Capitulations. Its usefulness for students of the history of international law would be greater if the author had drawn a more detailed comparison between the Capitulations of Pisa and those of other Mediterranean powers. Like many Italian works, the book lacks an index.

ANGELO PIERO SERENI

New York City

Comparative Law: An Introduction to the Comparative Method of Legal Study and Research. By H. C. Gutteridge. Cambridge: Cambridge University Press (New York: The Macmillan Company); 1946. Pp. xvi, 208. Appendix. Index. \$3.00.

Of all the learned professions possibly the lawyer's is the most provincial. The doctor or engineer does not hesitate to use and apply knowledge without regard to the nation in which it may originate. Professor Gutteridge points out that in England there is not only indifference to the study of other legal systems, but one often finds positive hostility. "In his heart of hearts the average English lawyer is in agreement with the sentiments expressed by Junius, when he complained bitterly of Lord Mansfield's treachery in corrupting the noble simplicity and the free spirit of our Saxon laws by importing into the court over which he presided such elements of pollution as the Roman code, the laws of nations and the opinions of foreign civilians."

In this small volume Professor Gutteridge has provided a guide and handbook to the comparative method of legal study. Without minimizing the difficulties, he presents in a masterful way the practical and theoretical utility of the study of comparative law as an instrument for the growth and development of law as such. Being himself deeply convinced of the general value of the comparative method, the author surveys its possibilities and limitations in many separate fields of application. In defining and outlining the province of comparative law the author points out that it is not a distinct branch of law like family law or maritime law, but rather a method of study applicable to any such branch. The German term "comparison of law" is more apt, but "comparative law" is too firmly established in English usage to be dislodged.

While Common Law jurists, familiar with the laws of other nations, have borrowed freely, particularly from the Roman Law, it was not until the latter half of the nineteenth century that comparative law secured definite recognition as a branch of legal study. In England the turning point was

the publication of Maine's *Ancient Law* in 1861, and on the Continent the foundation in Paris of the *Société de Législation Comparée* in 1869. In the meantime a number of legal scholars, organizations, universities and publications have recognized the value of comparative law as an instrument for the creative evolution of national law.

The value of the comparative study varies in different fields. In legal philosophy, the history of law, and in parts of family and property law, for instance, where each nation has worked out for itself the legal institutions most congenial to its temper and its national way of life, it will serve chiefly to increase the scholars store of knowledge. But in commercial law, for instance, critical comparative study has produced results of practical value by furthering the movement for the unification of law of different nations on points where the diversity of national systems caused hardship. Notable achievements have been made in the uniform law of collision at sea, negotiable instruments, and carriage by air. The Bustamante Code of Private International Law has been adopted by many Latin American Republics. In the United States the Uniform Negotiable Instruments Act, the Uniform Sales Act and the Uniform Warehouse Receipts Act represent notable advances. Possibly maritime, commercial, communications and private international law offer the most promising fields.

Comparative study is indispensable for the international lawyer, public or private. It serves as a corrective against the tendency of the international lawyer toward an uncritical application of the principles of his own national system to international questions. The international lawyer trained in the Common Law, who is unfamiliar with the codes, institutions, and procedures of the Civil Law, is not prepared to deal understandingly with judges or counsel for foreign governments with a Civil Law background. While there is little hope for creating a single international legal language, Professor Gutteridge believes that the compilation of an international legal dictionary should be seriously considered. If preliminary explorations in the vocabularies of selected topics suggested that such an application is at all possible the task should be taken in hand by a representative and authoritative international body.

Because of his deep insight and familiarity with the Common Law, the Civil Law, and International Law, Professor Gutteridge, emeritus professor of Comparative Law and Fellow of Trinity Hall in the University of Cambridge, has contributed a volume that no one interested in the creative growth of the law can afford to neglect. All who are concerned with the unification of law and the development of international law into world law will find wise counsel and stimulus in this book. Its value is enhanced by an appendix which gives an extensive list of foreign law reports and law reviews.

JAMES OLIVER MURDOCK

The George Washington University Law School

Völkerbund, Dumbarton Oaks, und die schweizerische Neutralität. By Paul Guggenheim. Zürich: Europa Verlag; 1945. Pp. 112.

The well-known Swiss international lawyer, Professor Paul Guggenheim, discusses in this little book some problems of international organization in the light of the Dumbarton Oaks Proposals and the League experience. The particular position of Switzerland as a traditionally neutral country is constantly before the author. Of the three functions of international organizations—legislative, judicial, and executive—least emphasis is placed on the first and, while the Proposals fail to break new ground in this respect, no decisive import is attributed to this fact. The absence of a clear distinction between political and legal disputes is regretted. The author does not think that both types of controversies should be submitted to the Security Council. He seems to assume (it is believed mistakenly) that the Proposals were intended to confer upon the Security Council the power to decide disputes. This view is based on paragraph 1 of Section B of Chapter VIII. If there was any doubt about the meaning of this clause it has been removed by the Charter which limits the power of the Security Council to the making of recommendations. This would seem to be in line with the author's ideas on the matter.

Sanctions are discussed in some detail. The author correctly insists that the absence from the Proposals of a provision corresponding to Article 10 of the Covenant of the League had the effect of increasing tremendously the discretionary element in the powers of the Security Council. The author attaches some importance to giving explicit recognition to the freedom of Members to take action in support of either party involved in case the Security Council fails to agree on the aggressor and measures of repression. It may be observed that this has been done to some extent in Article 51 of the Charter. Neutrality does not seem to the author to be incompatible with the Proposals. Drawing upon the experience of Switzerland in the League he formulates two basic conditions: first, the organization must be so constructed as to ensure the absolute superiority of the law-abiding states against the aggressor, and secondly, the neutral state may participate in collective sanctions only so long or so far as its relations with the aggressor, which is also its neighbor, are not seriously endangered. He believes that a neutral is not limited to choosing between indifference towards or participation in, collective sanctions. It may also adopt a political attitude which does not amount to giving support to the law-breaking state. This discussion, it may be noted in passing, has no current importance in view of the position of the United Nations with respect to neutrals. The League made concessions to Switzerland to make it possible for her to join. The United Nations is not at present disposed to accord differential treatment to any would-be member.

In conclusion the author considers the role of public opinion in an international organization and the possibilities of achieving a working compro-

mise between heterogeneous political and economic systems. Without exaggerating the importance of democratic institutions he believes that the maintenance of international peace presupposes on the part of members of an international organization at least the readiness to seek an accommodation of their conflicting interests. Encouraged by the performance of the Soviet Union in the League of Nations he does not think that the methods of democracy are incompatible with the ideological bases of the Soviet Union. The general recognition of the rights of man appears to the author as the necessary foundation for a policy of mutual understanding which alone can harmonize the existing heterogeneity between the political and economic systems prevailing within the international community. It may be readily conceded that the adoption of an international bill of the rights of man would create a minimum of homogeneity between such conflicting systems, and make coöperation a good deal easier.

The book is of considerable interest as affording a valuable insight into the reactions of a thoughtful neutral towards the United Nations. It is written dispassionately and with a profound knowledge of the mechanism of international organizations for the maintenance of international peace and security.

LEO GROSS

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United States, Department of State. Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919. Vol. V, pp. vi, 950, \$2.25; Vol. VI, pp. vi, 1021, \$2.25; Vol. VII, pp. vi, 985, \$2.50; Vol. VIII, pp. iv, 986, \$2.25; Vol. IX, pp. iv, 1054, \$2.75; Vol. XIII, pp. xiv, 1018, \$3.25. Maps and Indices. Washington: Government Printing Office, 1946-1947.

The so-called Council of Four was the supreme authority during the Paris Peace Conference of 1919, from the time of the setting up of the Council in March, 1919, until the signing of the Treaty of Versailles on June 28, 1919. The full official record of the meetings of the Council, about two hundred in all, are now made public in Volumes V and VI of the series.

A large part of Volume V is taken up with the discussion of the Italian claims in regard to Dalmatia. President Wilson insisted that the question had to be asked at every point whether the lines of the settlement squared with the new order to be established by the League of Nations. M. Clemenceau, on the other hand, objected that it was not possible to change the whole policy of the world at one stroke (Vol. V, p. 90). Mr. Lloyd George admitted the strength of President Wilson's arguments, but he believed that if Great Britain had felt scruples about the Italian claims they should have been expressed before the signing of the Treaty of London. Signor Orlando maintained that the attachment of the Covenant of the League of

Nations to the Peace Treaty with Germany would make it impossible for Italy to take part while reserving the Treaty with Austria. Otherwise "Italy would engage itself to guarantee the territories of other countries, without being itself guaranteed" (Vol. VI, p. 485). The unresolved differences between these points of view were reflected in the terms of the peace settlement and accounted, at least in part, for some of the failures of the later decades.

Volumes VII, VIII and IX contain the minutes of the Council of Heads of Delegations, a designation given to the Supreme Council in the form it assumed after the signing of the Treaty of Versailles and the second return of President Wilson to the United States. Among the subjects which received particular attention were the determination of the Austrian frontiers, the troubled relations between Rumania and Hungary, the establishment of Commissions of Control in Germany, the arrangements for plebiscites in various parts of Europe, and the convocation of the League of Nations. Volume IX concludes with the significant note that the sessions of the Peace Conference at Paris terminated with the meeting of the Council of Ministers of Foreign Affairs on January 21, 1920. Thereafter the Conference of Ambassadors continued to carry on the business which had been begun, while questions of a more general nature were reserved for the action of the governments themselves, or for meetings of Premiers.

In reviewing these volumes of discussions auxiliary to the Peace Conference proper, one is impressed with the fact that many of the problems now confronting the makers of peace in Europe were also uppermost after World War I. After all, the physical nature of the continent has not changed; but some of the victors then are not in that category now. Russia was then prostrate. The infant League of Nations was being relied upon to settle many questions left open and this too has its parallel in the United Nations today. International organization supplies the way but not necessarily the will to coöperate. M. Clemenceau, in his usual trenchant manner, warned his colleagues that Germany only wanted admission to the League of Nations to make trouble there. He remarked that "peace must first be established as a living thing in Europe" (Vol. VI, p. 158).

While the treaty with Germany had been signed, the other treaties of the peace settlement had still to be completed and political and economic problems of the moment had to be dealt with. Then as now, hunger followed in the wake of war and the return to stability in Eastern Europe was slow. It was with such matters as these the Heads of Delegations were concerned.

Volume XIII of the series, which is intended to be the final volume, differs from the others in that it does not concern itself with the negotiations. It presents the actual texts of the Versailles Treaty as well as of the Treaty of Berlin of August 25, 1921, which resulted from the refusal of the Senate to ratify the former. The announcement of the State Department accompanying the volume informs us that it was prepared at the direction of

President Roosevelt in the hope that it would serve as a basis for further and more popular studies which would convey to the layman some idea of the complexities of peace-making and the successes and failures of the peacemakers of 1919. Vertical lines in the right-hand margins guide the reader to the actual text. The annotations follow the text, article by article, and deal not only with material tending to elucidate the application of the text but also with facts which have occurred since the making of the treaties which bear upon the particular texts. These annotations were prepared by Denys P. Myers, with the collaboration of Bernadotte E. Schmitt and others of the staff, who are to be commended for the care and objectivity with which the work has been completed.

It is precisely because of the necessity of establishing peace as a "living thing" that these volumes will be found of great interest and importance by those who will have this task in hand for many years to come. Authoritative reports such as these may be viewed as bases for strategic histories, or, as President Raymond Fosdick of the Rockefeller Foundation has phrased it in a somewhat different connection: "so that the record of past successes and failures may be available for the guidance of the future."

ARTHUR K. KUHN

Of the Board of Editors

Defeat in Victory. By Jan Ciechanowski. New York: Doubleday; 1947. Pp. xvi, 397.

This is the type of book of which we may see many examples. It is well written and a good account of Washington diplomacy. In substance the former Polish Ambassador blames President F. D. Roosevelt for sacrificing the eastern part of Poland to Soviet Russia. F. D. Roosevelt made many mistakes including the one of promising what he could not perform. It is perfectly true that he had promised Polish representatives that he would not see Poland mutilated but he was five thousand miles away, and, in the face of the Soviet pressure, helpless. So we will be in many settlements that are now temporarily made.

The author is mistaken in relying upon the United States to cure the incurable. Doubtless we will be belabored by many countries that have an irremediable grievance.

EDWIN BORCHARD

Of the Board of Editors

NOTES

La Croix-Rouge et les conventions de Genève. By Auguste-Raynald Werner. Geneva: Georg; 1943. Pp. 447. Fr. Sw. 8. The author of this volume has undertaken to study from a critical point of view and *dans sa plus grande généralité* the juridical system of the Red Cross (p. 16). The product should be of great value to students of international organization as well as to those who are concerned with the application of the principle of humanitarianism in the world.

Viewing the Red Cross as an indispensable machinery of public life (p. 38) and as a *personne non-étatique du droit des gens* (p. 89), Dr. Werner skillfully shows the relationship of the different elements in the organization of the Red Cross in the world, pointing out the relationship of national units to their respective governments, the nature of the League of these national elements, and the role of the International Committee. The law underlying the international activity of the organization is considered in some detail, much of the volume being taken up with an examination of the multilateral conventions involved. To matters relating to prisoners of war the author has devoted nearly a third of the book. A short section (pp. 389-391) is given to Red Cross activities in connection with the treatment of civilian internees, a subject which, in the opinion of the reviewer, would have merited more extended treatment. While the author's plan apparently did not involve documentation on the actual application of conventions, there are general references to the experience of recent wars (as at pp. 184, 287), with some mention of the effects of developments in the First World War, and some reference to practice as late as 1940 (pp. 339, 377).

Students of public international law will find some discussion relating to the *droit commun* as well as treaty law (as at pp. 226, 227, 326), and brief discussion of the legal aspects of such questions as the treatment of escaped prisoners of war in neutral jurisdiction (pp. 367, 380). The usefulness of the volume is enhanced by careful and logical arrangement of materials.

ROBERT R. WILSON

Of the Board of Editors

Uprooted Jewish Refugees and Displaced Persons After Liberation. By Zorach Warhaftig. New York: Institute of Jewish Affairs; 1946. Pp. vii, 219. \$2.75. Most refugees and displaced persons today are neither the wards nor the responsibility of any nation. Within this grave and complex quandary of the uprooted people there is the distinct and tragic problem of the Jewish refugees and displaced persons. This volume was published to call the attention of the Second Part of the First Session of the General Assembly of the United Nations to this persistent problem. Although the study is concentrated upon the specific case of Jewish DP's, it also presents the salient background of the underlying general problems of refugees and displaced persons. Based not only upon exhaustive documentation but also upon the author's personal contacts with refugees and potential refugees during his extensive travels in Germany, the work is the best dispassionate, scholarly, and even original, introduction to this field.

JOSEPH S. ROUCEK

Hofstra College

Canada at Geneva. By S. Mack Eastman. Toronto: Ryerson; 1946. Pp. 117. Appendix. \$.75. In appraising the role of Canada at Geneva Dr. Eastman has presented an extremely worthwhile critical account of Canada's reaction to international problems during the troublesome period between the two wars. The volume assumes that the reader is conversant with world developments but it is to be regretted that more basic documents were not included in the Appendix. Any small volume written on

the work of a particular country does not permit a sufficiently broad perspective and materially tends to overemphasize the importance of that country's decision in world affairs. This volume is no exception to that phenomenon.

Dr. Eastman regrets that Canadian statesmen at Geneva asserted a Canadian point of view on all problems which he interprets as an anti-European complex. He admits that the statesmen reflected the attitude of the Canadian people. But he is extremely critical both of the Canadian statesmen and of the people themselves. His approach to all international problems leads him to underestimate the contribution of Canada in every phase of international work. At Geneva the advocates of territorial guarantees, of which France was naturally the most persistent exponent, viewed any other policy as negative. Even other positive contributions were regarded as negative in this light, which leads Dr. Eastman to underestimate the valuable contribution of Canada in many fields, particularly in the pacific settlement of international disputes. Both views, those of the Canadian statesmen reflecting the views of Canadian public opinion and occasionally visiting Geneva, and those of Dr. Eastman, an international civil servant living at the world's international centre, are readily understandable. But no country passed any self-denying ordinances nor offered blank checks to any international organization, nor yielded any domestic jurisdiction to the international society, and Canada was no exception. The whole international situation must be considered in evaluating the contribution of any nation, and Canada has no reason to apologize for its policies at Geneva.

There is a tendency to overlook the fact that Canada, with a small population situated on the periphery of the world's troubled areas, a late arrival in the world's councils, has made enormous strides internationally. The astute policies of Mackenzie King and the late O. D. Skelton, implemented by such men as Riddell, Pierson, and Reid, to name only a few, have enhanced the prestige of Canada and made decided contributions in the international field.

WILLIAM E. ARMSTRONG

Washington, D. C.

Peoples Speaking to Peoples. By Llewellyn White and Robert D. Leigh. Chicago: University of Chicago Press; 1946. Pp. x, 122. This is one of the specialized studies published in connection with the report of the Commission on Freedom of the Press. The subject is of interest to international lawyers in two ways. International law, like all systems of law, rests on sufficient intercommunication among the subjects of that law to maintain common opinions. Law cannot exist except in a community, and a community cannot exist without communication. A second interest to international lawyers lies in the fact that effective international communication requires rules of international law to regulate it. The early international unions dealt with international telegraphic and postal communication. Subsequently, radio has required extensive international regulation. The press, the motion picture, and other mass media of international communication are the subject of pending international discussions. Thus a study of international communication throws light both upon the solidity of the basis of all international law, and upon the

conditions which should determine the content of an important special field of international law.

This little volume provides the facts of mass communication, the companies involved, the extensiveness of their operations, and the methods and modes of censorship and other barriers to free international communication. The authors emphasize particularly the problem of quality, and recognize that completely free international communication of "finished products" such as newspapers, books, and voice broadcasts may provide intolerable opportunities for spreading misinformation and misunderstanding. On the other hand there is no adequate reason why "raw materials" such as original press reports, photographs, and point-to-point broadcasts, and "semi-finished products" such as press association reports should not be freely transmitted across national boundaries. Such materials do not reach the public until they have been edited, and the responsibility is, therefore, with the editor rather than with the international communication agency.

The volume is designed to be opinion-forming as well as informative. Concise propositions for national policy, United Nations policy, and international regulation on most matters concerning international communication are included in the text in italics. These propositions are summarized in the final chapter under the heading *Improvement of Facilities, Reduction of Barriers, Improvement of Quality*. The authors favor conditions which will permit private agencies to do the international communication job so far as possible but they recognize that national governments and United Nations agencies will have to give supplementary services. The Department of State's program of international broadcasting and cultural relations is in general approved.

Official and unofficial sources are classified in a concluding note.

QUINCY WRIGHT

Of the Board of Editors

Cartels in Action. By George W. Stocking and Myron W. Watkins. New York: Twentieth Century Fund; 1946. Pp. xii, 534. Charts and Tables. Index. \$4.00. This is the first of a three-volume study of the problems of national and international monopoly undertaken by the Twentieth Century Fund in 1944. This volume undertakes to examine intensively actual cartel experience in eight specific industries in which cartels have played an important part. The approach used is novel in that the authors have used a case history method, giving a factual account of the origins and operations of cartel arrangements in the fields of sugar, rubber, nitrogen, iron and steel, aluminum, magnesium, incandescent electric lamps, and chemicals.

The authors define a "cartel" as "an arrangement among, or on behalf of, producers engaged in the same line of business, designed to limit or eliminate competition among them." Cartels, we are told, range from loosely defined gentlemen's agreements or informal understandings among business rivals, to formal compacts providing administrative machinery for regulating output, sharing markets, and fixing prices. Some cartels are set up with the active help of national governments whereas others are established by private corporations some of which have secret agreements in actual violation of the laws of the countries in which they exist. While pointing out that the difference between governmentally sponsored cartels

and those which are privately contrived is often difficult to discern, typical examples of the former type may be found in the sugar and rubber industries, coffee valorization and tin consortium. Industries which have lent themselves to private cartels are aluminum, magnesium, and electric lamps. Nitrogen and iron and steel cartels, although promoted by private producers, were usually the result of negotiations of a quasi-public character, with a considerable degree of government observation and association, except with respect to the American group.

Cartels are further broken down into "two broad, but not always sharply differentiated, categories: defensive and aggressive." Leading the defensive type is sugar, "an industry long wracked by surplus capacity and a chronically depressed market. . . ." Since not only the financial security of business interests was at stake, but also the livelihoods of large sections of the population, defensive action became necessary. Typical of the aggressive type is aluminum "which has never in its half-century history known ruinous prices or faced a serious problem of excess capacity or dislocated markets." The balance of the cartels under consideration fall into one or the other categories, depending upon international economic and political conditions.

Regardless of whether they are government-sponsored or privately contrived, whether they are defensive or aggressive, whether they are legal or illegal in their countries of origin, or whether they take the form of informal understandings among business rivals, international cartels have one element in common. They seek to free producers from the influence of market forces and to subject the market to deliberate and concerted control, by and for producers, and represent a type of economic planning primarily for the protection and promotion of producer interests.

A concluding chapter, which discusses the role of the I. G. Farbenindustrie in the development of international cartels, is particularly interesting in the light of the trial in Nuremberg, by a United States Military Tribunal, of 24 of the leading executives of that international monopoly, on charges of preparing and participating in aggressive warfare, the first proceeding of its kind in international legal history. This chapter contains an absorbing analysis of how this gigantic combination of German chemical companies built up its own power as well as Nazi influence before the war, by working out restrictive trade agreements with leading producers in the United States, England and other countries.

The basic conclusions resulting from this study have been reserved by the authors for the second volume in the series which will appear shortly. It is their intention, in that volume, to describe and appraise the methods and economic effects of cartels in every field and to make conclusions and recommendations for action. Their only conclusion here is that "a strikingly wide divergence is shown in these case studies between business philosophy and business practice, between business rhetoric and business behavior. In surveying the actual conduct of business, one finds with less and less frequency evidence of those economic principles and habits of thought which supposedly animate a free private enterprise. . . . What was once a way of life in the business world is fast becoming a way of rumination—or oratory. If competition is to survive, it must be more than a shibboleth or a slogan."

ELI E. NOBLEMAN

Department of Justice

International Implications of Full Employment in Great Britain. By Allan G. B. Fisher. London and New York: Royal Institute of International Affairs; 1946. Pp. vii, 202. Comment. Supplementary Note. Index. \$3.50. Men of public affairs and economists in Great Britain are well aware that British public opinion today gives priority in economic matters to stability, full employment, and adequate social security. Not many decades ago priority was reserved for maintaining what Professor Fisher¹ calls an "Open International Economic Order." Now, however, the maintenance of an open international economic order is profoundly questioned and debated in Great Britain, while the general acceptance of the doctrine of full employment is widespread and non-political. The nature of this conflict is the subject matter of the short book by Professor Fisher.

Functionally the work falls into five main divisions: chapters two and three elucidate the concept of full employment; chapters four and five develop the concept of an open international economic order; chapters six and seven discuss some of the consequences to full employment of membership in an open international order; chapters eight and nine set up safeguards that are available, especially to Great Britain, in attempting to maintain a system of full employment midst international economic fluctuations; chapters ten and eleven ventilate the alternatives to an open international economic order for Great Britain.

The entire book leans heavily upon the published works of others; indeed, Professor Fisher states that it is his objective to present the arguments as they have been developed and let the reader choose. Professor Fisher has brought forth, within the confines of one small book, most of the propositions and arguments originating in the two concepts being discussed, and, while leaning heavily in the direction of placing the power and prestige of Great Britain on the side of an attempted revival of some sort of open international order, he presents the arguments against such a policy with acuteness equal to the arguments that he marshalls for his preference. Professor Fisher's objective is to elucidate alternative costs and dangers in adopting either program. He is appealing for support on this basis, but not before having presented a well balanced exposition of alternatives. His own words are that "the support which can politically be mobilized in favor of either of our main objectives must necessarily depend on what it costs in terms of other desired objectives, or rather on what it is expected to cost, which is not always the same thing, and the estimates relevant for this purpose will themselves be dependent on conditions which are constantly changing" (p. 7).

In his discussion of full employment Professor Fisher takes much for granted, and difficult indeed will be the analysis unless the reader is familiar with the works of Keynes and Beveridge. Much the same holds for his discussion of an open international order, for the reader must be familiar with the development of the international institutions of the nineteenth century political, economic and legal order.

This book is the best short statement of the implications of a full employment program on international affairs with which this reviewer is familiar.

GROVER A. J. NOETZEL

University of Miami

¹ Price Professor of International Economics at The Royal Institute of International Affairs, London, England.

American Sea Power Since 1775. By J. Roger Fredland, William W. Jefferies, Neville T. Kirk, Thomas F. McManus, Elmer B. Potter, Richard S. West, Jr., and Allan Wescott. Philadelphia: Lippincott; 1946. Pp. viii, 609. Photographs. Maps. Index. \$5.00. The task of presenting the history of the United States Navy in a single volume has been rendered complex by reason of the vastness of its operations during the recent war. The authors of this book, all of whom are teachers at the Naval Academy, have accomplished this task in a commendable manner. Their presentation is clear, precise, and without a trace of sensationalism. The first three-fifths of the book constitutes a history of the Navy from the Revolution to 1941. A single-volume history of this sort does not pretend to add to the knowledge of this period, but it does provide an adequate background of past achievements and traditions for the more detailed account of the naval operations of World War II which follows. For the latter section of the book the authors have utilized the testimony of former Japanese naval officers as well as the multitude of other source materials now available. In certain instances they draw upon the Japanese testimony to revise estimations made known during the war.

As the authors declare in their preface, this is "primarily an operational history." Accordingly they are concerned first of all with the operations of ships (and ship-based aircraft), with naval campaigns and engagements, and they achieve their purpose well. The text is well illustrated by diagrams of engagements and by charts showing the strengths of opposing forces. Study of these engagements is facilitated by use of the index, which lists all vessels, foreign as well as American.

This study also treats other aspects of our naval history, including naval geography and logistics, the impact of technological developments upon tactical and strategical concepts, and the many elements which make up sea power. Unfortunately the treatment of the period since 1941, which is excellent for its coverage of numerous naval operations, devotes slight attention to these related matters. There is practically no discussion of the activities of the Navy ashore, no recognition of the contributions of the Naval Reserve to the winning of the war. Likewise, although the personal qualities of the Navy's heroes of the past are chronicled realistically, only Mitscher and Halsey emerge with a trace of individual personality in the reporting of the campaigns of World War II.

JOHN W. MASLAND

Dartmouth College

France Yesterday and Today. By Katherine Munro. London: Royal Institute of International Affairs; 1945. Pp. 107. Appendix. \$1.25. *France and Britain.* By Chatham House Study Group. London: Royal Institute of International Affairs; 1945. Pp. 110. \$1.75. As France muddles through a series of Parliamentary crises again in a not unfamiliar fashion the appearance of these two discerning monographs will definitely contribute to a better understanding of problems underlying the "Fourth Republic's" reorientation in world affairs. The first, *France Yesterday and Today*, is calculated to present in capsule form French political development down to 1945. It also includes a discussion of the geography, natural resources, and general economy of France, all of which are integrated with the political discussion of this thorough study.

Much of the material, to be sure, covers familiar ground. That the seventy years of the third Republic were punctuated by eighty-eight cabi-

nets, an overstock of political parties, and an impotent executive are facts well known to most observers. But for a synopsis the subject-matter is effectively presented. Indeed, it would be difficult to find a more intelligent briefing on administrative and political questions confronting the French nation within the confines of a work twice the length of this modest primer. The account of the politics and policies of the Republic since 1871 is presented with unusual clarity, making it possible for even the casually interested reader to detect certain patterns in the labyrinth of competing political groups.

While this work does not purport to offer a variety of pregnant recommendations for the rebuilding of France, it does inject an occasional suggestion. For example—in true British tradition—there is a strong hint that the French Chamber of Deputies should be rebuilt “not in its present semi-circular form, allowing gradations from Right to Left, but as a rectangle with clearly defined sides.” The general tone, however, remains at the descriptive level and succeeds admirably in giving a quick profile of this land and people, whose history, says Paul Valéry, “consists mainly in its ceaseless work of self-formation.”

France and Britain is concerned more specifically with the immediate political and economic relations between these two countries. Like the above companion monograph, it starts off with an historical approach, but the much larger proportion of the study is devoted to an analysis of strategic and economic factors that must be understood if conflicting national interests are to be harmonized.

As this report seeks to examine Anglo-French relations from the standpoint of how such coöperation “fits into the general framework of British policy,” it is not to be assumed that the views expressed would necessarily be repugnant to Frenchmen. In any case it is an eminently fair presentation of the alternative policies available to both countries. For Britain a keystone argument for warm relations with France is the establishment of western security. Coöperation with France, therefore, is an indispensable condition for the discharge of British obligations to continental Europe. It is also a necessary complement to the Anglo-Soviet Alliance, because this Treaty was expressly devised to prevent further German aggression and such an end can only be realized if Germany is constantly confronted with the prospect of a war on two fronts.

To France the advantages of close collaboration with Great Britain are portrayed with equal vigor. France, it is conceded, might try to achieve isolation but she lacks the power to sustain such a position. Similarly, she could strive for security “by absorption in a purely continental system,” but here again evidence is marshalled to show that France’s policy perforce must be carefully synchronized with Britain’s if the security of western Europe is to be preserved.

Perhaps the strong emphasis on military security dates this monograph, which was completed just a few days following the German surrender in May, 1945, but it also contains useful material on the need for economic and cultural reciprocity between France and Britain. Both monographs deserve a prominent place among the literature that deals not only with these two countries but with the general subject of international relations as well.

MALCOLM MOOS

The Johns Hopkins University

The Course of German History. By A. J. P. Taylor. New York: Coward-McCann; 1946. Pp. 251. Index. \$3.00. A. J. P. Taylor is of the younger generation of English historians. The author of several other works on European history and diplomacy, he is an Oxford Tutor and a commentator on world affairs for the British Broadcasting Corporation. The present volume was first published in England in 1945; only minor changes were made in the American edition.

Like many others, Taylor has attempted to find out why modern German history has had such an unfortunate course both for the Germans and for Europe. The result is a striking volume, written in a lively, frank style, which presents that history in terms of certain strongly held convictions. Taylor begins by stating that few historians who have hitherto dealt with the subject have recognized what to him appears fundamental, that German history presents a special case which differs essentially from the historical development of the British and French peoples, for example, in that the Germans never achieved freedom for themselves. Napoleon brought them a measure of liberation from the old order, to which there was only half-hearted response and ultimately a mild nationalist movement of a distinctly reactionary flavor. The revolution of 1848 was a fiasco in which the liberal leaders demonstrated for the most part political incompetence, a failing which Taylor finds in succeeding generations. Because of the developments of 1848-49 the ruling elements—the Junkers, the capitalists, the militarists—or the impulses which they gave to German politics, dominated the German scene from the time when Prussia defeated Austria and thus became the major power, throughout the period of the German Empire, when Germany had a parliamentary government in form only, and even in the revolution of 1918 which, Taylor points out, worked no radical change in the German picture. The Weimar period he regards as largely a sham; its infancy marred by a continuation of many of the old forces, it achieved a certain glory in the few years of Stresemann's policy of "fulfillment," only to end with Brüning's decree dictatorship and plans for monarchist restoration, and ultimately the Nazis. Taylor believes that it was the lack of any real freedom which made the Germans turn to military ventures and preparation therefor. This compensation was provided by the ruling groups, however reluctantly in particular cases, because it was the only way to prevent the whole political and social structure from collapsing. The tragedy of Germany and the world, in Taylor's view, is that no political force in Germany was ever strong enough or directed with sufficient acumen to turn Germany into truly democratic and peaceful channels, and here he places the responsibility on all non-Conservative German parties. Taylor does not deny that there have been many good Germans who have regretted this state of affairs and even attempted to combat it. He disposes of them, however, by asking what they have amounted to.

Obviously no particular friend of the Germans, Taylor has yet written an intelligent and incisive analysis which is well above the level of most of the indictments by professional and amateur Germanophobes which have appeared as the natural reaction to two bloody world wars. This book should prove interesting and useful to many students of German affairs. At the same time the reader should be aware that Taylor's study, however sound it may be in many respects, clearly cannot be considered to be comprehensive. The author has drawn his thesis in broad strokes, and in the process he has been guilty of omissions and dubious generalizations; fur-

thermore, certain significant factors which have influenced German history are not adequately stressed. Finally, the book could have been considerably improved by the addition of at least a minimum of document references and more adequate identification of quotations.

ALEXANDER F. KIEFER

Washington, D. C.

The History of Liberty in Germany. By Rudolf Olden. Washington: Public Affairs Press; 1946. Pp. 176. \$2.75. The author of this little book, the late Rudolf Olden, who was a German Liberal of the best sort, here pleads a case for the "good Germans." When the history of Liberalism began in Germany the ideas of liberty and national unity were inseparably linked. Autocratic Prussianism, because it protected that unity, has again and again been preserved, even admired and loved. "When, however, the Germans once more have breathing space and the opportunity to reflect and to remember that they love liberty too, then they will do well to remove from their national life even the last traces of that old and tenacious force." A well-written pamphlet, with a lot of interesting facts. But the thesis has been treated in recent years in numerous other works and it is unfortunate that the author has failed to include a bibliography wherein parallel presentations of this case could have been noted.

JOSEPH S. ROUCEK

Hofstra College

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* Mention here neither assures nor precludes review later.

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WILBUR S. FINCH

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UNITED STATES

STATUTE FOR THE APPOINTMENT OF REPRESENTATIVES OF THE UNITED STATES IN THE ORGANS AND AGENCIES OF THE UNITED NATIONS, AND TO MAKE OTHER PROVISION WITH RESPECT TO THE PARTICIPATION OF THE UNITED STATES IN SUCH ORGANIZATION*

December 20, 1945

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "United Nations Participation Act of 1945."

Sec. 2. (a) The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States at the seat of the United Nations who shall have the rank and status of envoy extraordinary and ambassador plenipotentiary, shall receive annual compensation of \$20,000, and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may from time to time direct.

(b) The President, by and with the advice and consent of the Senate, shall appoint a deputy representative of the United States to the Security Council who shall have the rank and status of envoy extraordinary and minister plenipotentiary, shall receive annual compensation of \$12,000, and shall hold office at the pleasure of the President. Such deputy representative shall represent the United States in the Security Council of the United Nations in the event of the absence or disability of the representative.

(c) The President, by and with the advice and consent of the Senate, shall designate from time to time to attend a specified session or specified sessions of the General Assembly of the United Nations not to exceed five representatives of the United States and such number of alternates as he may determine consistent with the rules of procedure of the General Assembly. One of the representatives shall be designated as the senior representative. Such representatives and alternates shall each be entitled to receive compensation at the rate of \$12,000 per annum for such period as the President may specify, except that no member of the Senate or House of Representatives or officer of the United States who is designated under this subsection as a representative of the United States or as an alternate to attend any specified session or specified sessions of the General Assembly shall be entitled to receive such compensation.

(d) The President may also appoint from time to time such other persons as he may deem necessary to represent the United States in the organs and

* 59 Statutes at Large 619.

agencies of the United Nations at such salaries, not to exceed \$12,000 each per annum, as he shall determine, but the representative of the United States in the Economic and Social Council and in the Trusteeship Council of the United Nations shall be appointed only by and with the advice and consent of the Senate, except that the President may, without the advice and consent of the Senate, designate any officer of the United States to act, without additional compensation, as the representative of the United States in either such Council (A) at any specified meeting thereof in the absence or disability of the regular representative, or (B) in connection with a specified subject matter at any specified meeting of either such Council in lieu of the regular representative. The advice and consent of the Senate shall also be required for the appointment by the President of the representative of the United States in any commission that may be formed by the United Nations with respect to atomic energy or in any other commission of the United Nations to which the United States is entitled to appoint a representative.

(e) Nothing contained in this section shall preclude the President or the Secretary of State, at the direction of the President, from representing the United States at any meeting or session of any organ or agency of the United Nations.

Sec. 3. The representatives provided for in section 2 hereof, when representing the United States in the respective organs and agencies of the United Nations, shall, at all times, act in accordance with the instructions of the President by the Secretary of State unless other means of transmission is directed by the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Charter of the United Nations.

Sec. 4. The President shall, from time to time as occasion may require, but not less than once each year, make reports to the Congress of the activities of the United Nations and of the participation of the United States therein. He shall make special current reports on decisions of the Security Council to take enforcement measures under the provisions of the Charter of the United Nations, and on the participation therein under his instructions, of the representative of the United States.

Sec. 5. (a) Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any

persons subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.

(b) Any person who willfully violates or evades or attempts to violate or evade any order, rule, or regulation issued by the President pursuant to paragraph (a) of this section shall, upon conviction, be fined not more than \$10,000, or, if a natural person, be imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation or evasion shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, or vehicle, concerned in such violation shall be forfeited to the United States.

Sec. 6. The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: *Provided*, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

Sec. 7. There is hereby authorized to be appropriated annually to the Department of State, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment by the United States of its share of the expenses of the United Nations as apportioned by the General Assembly in accordance with article 17 of the Charter, and for all necessary salaries and expenses of the representatives provided for in section 2 hereof, and of their appropriate staffs, including personal services in the District of Columbia and elsewhere, without regard to the civil-service and classification laws; travel expenses without regard to the Standardized Government Travel Regulations, as amended, the Subsistence Expense Act of 1926, as amended, and section 10 of the Act of March 3, 1933, and, under such rules and regulations as the Secretary of State may prescribe, travel expenses of families and transportation of effects of United States representatives and other personnel in going to and returning from their post of duty; allowances for living quarters, including heat, fuel, and light, as authorized by the Act approved June 26, 1930 (5 U.S.C. 118a); cost

of living allowance under such rules and regulations as the Secretary of State may prescribe; communication services; stenographic reporting, translating, and other services, by contract, if deemed necessary, without regard to section 3709 of the Revised Statutes (41 U.S.C. 5); local transportation; equipment; transportation of things; rent of offices; printing and binding; official entertainment; stationery; purchase of newspapers, periodicals, books, and documents; and such other expenses as may be authorized by the Secretary of State.

Approved December 20, 1945.

EXECUTIVE ORDER DESIGNATING THE UNITED STATES MISSION TO THE UNITED NATIONS AND PROVIDING FOR ITS DIRECTION AND ADMINISTRATION*

April 28, 1947

By virtue of and pursuant to the authority vested in me by the United Nations Participation Act of 1945 (59 Stat. 619) and as President of the United States, and for the purpose of defining further the functions of the Representative of the United States at the seat of the United Nations in connection with the participation of the United States in the United Nations, it is hereby ordered as follows:

1. The Representative at the seat of the United Nations, the Deputy Representative to the Security Council, Representatives in the Economic and Social Council and its Commissions, the Trusteeship Council, the Atomic Energy Commission, the Commission for Conventional Armaments and the Military Staff Committee, and representatives to organs and agencies of the United Nations hereafter appointed or designated and included within the United States Mission to the United Nations herein provided for, together with their deputies, staffs and officers, shall be known as the United States Mission to the United Nations.

2. The Representative of the United States at the seat of the United Nations shall be the Chief of Mission in charge of the United States Mission to the United Nations. The Chief of Mission shall coördinate at the seat of the United Nations the activities of the Mission in carrying out the instructions of the President transmitted either by the Secretary of State or by other means of transmission as directed by the President. Instructions to the Representatives of the Joint Chiefs of Staff in the Military Staff Committee of the United Nations shall be transmitted by the Joint Chiefs of Staff. On request of the Chief of Mission, such Representatives shall, in addition to their responsibilities under the Charter of the United Nations, serve as advisers in the United States Mission to the United Nations.

* 12 *Federal Register* 2765.

3. The Chief of Mission shall also be responsible for the administration of the Mission, including personnel, budget, obligation and expenditure of funds, and the central administrative services; provided that he shall not be responsible for the internal administration of the personnel, budget, and obligation and expenditure of funds of the United States Representatives in the Military Staff Committee. The Chief of Mission shall discharge his responsibilities under this paragraph in accordance with such rules and regulations as the Secretary of State may from time to time prescribe.

4. This order shall be published in the *Federal Register*.

HARRY S. TRUMAN

The White House
April 28, 1947

UNITED NATIONS

REPORT OF THE COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION ON THE METHODS FOR ENCOURAGING THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS EVENTUAL CODIFICATION*

1. The Committee on the Progressive Development of International Law and its Codification, established by the Resolution of the General Assembly of 11 December 1946, held its first meeting 12 May 1947, at Lake Success, New York. It adopted the provisional agenda drawn up by the Secretariat, and agreed to commence the general discussion on Item 3 (a) of its agenda relating to the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification.

2. At its fifteenth meeting, 29 May 1947, the Committee concluded its consideration of this item and succeeded in formulating detailed methods for recommendation to the General Assembly at its next session.

3. The Committee agreed that effect could best be given to the provisions of Article 13(i)(a) of the Charter by the establishment of a Commission, composed of persons of recognized competence in international law. They discussed the question whether it would be desirable to establish separate commissions for public, for private, and for penal international law, but decided unanimously to recommend the General Assembly to establish a single Commission for the purpose of carrying out the progressive development of international law and its eventual codification. This Commission would be called the International Law Commission (ILC).¹

4. Different views were expressed on the question of the number of the members of the International Law Commission, the numbers nine, eleven, thirteen and fifteen being suggested. The Committee by a majority of nine votes to five decided to recommend that it consist of fifteen members.²

5. Two main methods for the selection of the members of the International Law Commission were suggested, one that the judges of the International Court of Justice should be invited to make the appointments, the other a plan based, with some slight modifications, on the method prescribed for

* Doc. A/AC.10/51, 17 June 1947. Texts of three following documents kindly provided by the Division of the Development and Codification of International Law of the Legal Department of the Secretariat of the United Nations.

¹ It appeared to be the feeling of the Committee that the ILC should not do anything which might detract from the valuable work being done in the field of the development and codification of private international law by the Hague Conferences on Private International Law. It is therefore recommended that the ILC when dealing with questions in the field of private international law should consider the appropriateness of consultation with the Netherlands Government.

² For minority views see document A/AC.10/SR.23 of 10 June 1947.

the election of the Judges of the Court. A large majority of the Committee preferred the second of these methods, and the Committee therefore recommends the following procedure:

(a) The government of each State member of the United Nations should nominate, as candidates for membership of the ILC, not more than two of its own nationals, and not more than eight persons of other nationalities. In making their nominations, the Governments are recommended to consult their highest courts of justice, their legal faculties and schools of law, their national academies and national sections of international academies devoted to the study of law and, where such exist, the national groups in the Permanent Court of Arbitration.

(b) The Secretary-General of the United Nations should submit this panel of candidates to the Security Council and the General Assembly, which would elect fifteen persons following the principle laid down in Article 3 and the procedure contained in Articles 8-12 of the Statute of the International Court of Justice. The Committee desires to recommend that special emphasis be laid on the provisions of Article 9 of the Statute.

(c) In the event of a casual vacancy occurring in the membership of the Commission, a majority of the Committee thought that the Commission itself might nominate a certain number of persons from among those whose names were on the panel of candidates, and that the Security Council might choose from among the persons so nominated a member of the Commission to hold office until the next General Assembly, when the vacancy could be filled by the same procedure as that followed in the election of the original fifteen members.

(d) All the members of the Committee were agreed that the members of the International Law Commission should receive a salary proportionate to the dignity and importance of their office, but there was some difference of opinion on the question whether they should be required to render full-time service. By a majority of nine votes to five the Committee thought that this would be both desirable and necessary. It was agreed that the Commission should have its headquarters at the seat of the United Nations, though it might decide from time to time to hold its sessions at other places; and that the Secretary-General should be requested to make available to it the services of the Division for the Development and Codification of International Law of the Secretariat. The Budget of the Commission should include items for the salaries of members, for the expenses of meetings, travel, etc.

6. The Committee hopes that the ILC may be a permanent body, but they also feel that it might be desirable, in the first instance, to establish it on a provisional basis. They recommend therefore that its members be elected

for a term of three years, but that they be eligible for re-election if the Commission is continued in being after this experimental period.

7. The Committee recognized that the tasks entrusted by the General Assembly to the ILC might vary in their nature. Some of the tasks might involve the drafting of a convention on a subject which has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of states. Other tasks might on the other hand involve the more precise formulation and systematization of the law in areas where there has been extensive state practice, precedent and doctrine.³ For convenience of reference, the Committee has referred to the first type of task as "progressive development" and to the second type of task as "codification," and it suggests the following procedures which it considers would be appropriate respectively in each of these cases. The Committee recognizes that the terms employed are not mutually exclusive, as, for example, in cases where the formulation and systematization of the existing law may lead to the conclusion that some new rule should be suggested for adoption by states.

8. If the General Assembly should refer to the Commission a project for the progressive development of the law (as defined in the preceding paragraph) the Committee recommends that the Commission should follow a procedure on the following lines:

(a) The Commission should appoint a Rapporteur. By a majority of eight votes to seven the Committee recommends that in the choice of Rapporteur the Commission should be free to go outside its own membership.

(b) The Commission, in conjunction with the Rapporteur, should formulate a plan of work.

(c) A questionnaire should be circulated to governments, inviting them to supply information and data relevant to the plan of work within such time as the reference from the General Assembly may demand.

(d) The Commission should appoint a small sub-committee to work with the Rapporteur on the preparation of interim drafts pending receipt of replies to this questionnaire. By a majority of eight votes to six the Committee thought that membership of this sub-committee need not be limited to members of the Commission itself.

(e) The Committee decided to recommend that the Commission should be authorized to consult as desired with scientific institutions, and by a majority, that it be authorized to consult, if necessary, with individual experts.

(f) It was agreed that the Commission should periodically consider the drafts; and

³ The representative of Sweden dissented from this view in his statement annexed to the Summary Record of 11 June 1947, document A/AC.10/SR.24.

(g) That when the Commission considers a draft to be in satisfactory form it should be issued as a Commission document by the Secretariat with such explanations and supporting material as the Commission considers appropriate, and should be given the widest possible publicity. The publication should include any information supplied to the ILC in reply to the questionnaire referred to in sub-paragraph (c) above. The governments should be requested to submit any comments on this Commission document within a reasonable time.

(h) The Rapporteur and the sub-committee would reconsider the draft, taking into consideration any comments or suggestions which have come to the attention of the Commission through the Secretariat. They would prepare a final draft and explanatory report which the Commission would consider, and, if adopted, would submit, together with its own recommendations, through the Secretary-General to the General Assembly.

9. By a majority the Committee decided to recommend that the ILC should be authorized to consider projects and draft conventions recommended by governments, other United Nations organs,⁴ specialized agencies, and those official bodies established by inter-governmental agreement to further the progressive development of international law and its codification, transmitted to it through the Secretary-General, and that in such cases the Commission should follow a procedure on the following lines:

(a) If the Commission is asked to consider a project not yet formulated as a draft convention, it should:

- (i) formulate a plan of work;
- (ii) circulate a questionnaire to governments and to such of the organs of the United Nations, specialized agencies, and official bodies mentioned above, as are concerned, inviting comments to be transmitted within a reasonable time; and
- (iii) submit a report with recommendations to the General Assembly.
- (iv) If the General Assembly should then invite the Commission to continue working on the project, the Commission should follow in substance the procedure outlined in paragraph 8 above, except that the questionnaire referred to in 8 (c) may not in such a case be necessary.
- (v) In the case of some projects submitted to the Commission in this way it might be sufficient that the Commission should consult with and tender advice to the government, organ, or body concerned, and in such cases the procedure suggested in this paragraph might not be necessary; but the full record of each such case should be made public by the ILC.

⁴ The Committee unanimously recognized that the Economic and Social Council possesses the right of initiative in proposing conventions.

(b) If the Commission is asked to consider a draft convention already formulated but not signed by plenipotentiaries, it should:

- (i) study the draft and compare it with any other drafts or projects on the same or on a cognate subject;
- (ii) circulate a questionnaire as in (a) (ii) above; and
- (iii) report with recommendations to the General Assembly.

(c) If the Commission is asked to consider a draft convention already signed by plenipotentiaries, it should take into consideration any decisions which the General Assembly may adopt in pursuance of the recommendations made in paragraph 17 below.

According to the view of three of the members of the Committee, the initiative for undertaking studies and making recommendations for the progressive development of international law, lies solely⁵ with the General Assembly under the terms of the Charter. It was therefore their view that the ILC was constitutionally precluded from making recommendations to the General Assembly on projects other than those referred to it by the General Assembly itself.

10. For the codification of international law, the Committee recognized that no clear-cut distinction between the formulation of the law as it is and the law as it ought to be could be rigidly maintained in practice. It was pointed out that in any work of codification, the codifier inevitably has to fill in gaps in and amend the law in the light of new developments. The Committee by a majority vote, however, agreed that for the purposes of the procedures adopted below, the definition given in paragraph 7 above would be applicable.

11. The Committee by a majority decided to recommend to the General Assembly that it adopt a resolution instructing ILC to survey the whole field of customary international law, together with any relevant treaties, with a view to selecting topics for codification, having in mind previous governmental and non-governmental projects; that if the ILC finds that codification of a particular topic is desirable or necessary, it should present its recommendations to the General Assembly in the form of draft articles of multipartite conventions: and that, if the General Assembly should request the ILC to prepare a draft convention on any subject, or to explore the necessity or desirability of preparing such a draft convention, ILC should give precedence to complying with such request.

12. The Committee then decided that a procedure on the following lines would be appropriate for giving effect to the above resolution of the General Assembly:

⁵ In the view of one of these members, the Economic and Social Council, under the authority of the General Assembly, also has the right of initiative in matters within its competence.

(a) Unless the topic has been selected by the General Assembly the Commission should make the survey indicated in the resolution of the General Assembly and select a topic or topics to be considered for treatment, having in mind previous governmental and non-governmental projects.

(b) The Commission should appoint a Rapporteur for each topic to be treated.

(c) The ILC in conjunction with the Rapporteur should formulate a plan of work and circulate a request to governments for the texts of pertinent laws, decrees, judicial decisions, treaties, diplomatic correspondence, and other comparable data, to be submitted within a reasonable time.

(d) The Commission should appoint a small sub-committee to work with the Rapporteur on the preparation of interim drafts pending receipt of the information requested in the preceding sub-paragraph.

13. The work should proceed according to the following plan:

(a) The results of the study of any particular topic should take the form of one or more sets of draft articles of multipartite conventions.

(b) The text of each draft article should be followed by comment containing:

(i) Complete presentation of all precedents and other relevant data including treaties, views of leading publicists, etc.

(ii) Conclusions relevant to:

(1) The measure of agreement in the practice of states and in doctrine on each point involved;

(2) The areas of divergence or disagreement in practice and doctrine.

(iii) The arguments which have been advanced in favour of one or another solution, in cases where divergence or disagreement exist.

(c) There should be consultation as desired with scientific institutions, and, if necessary, with individual experts. The consultation with individual experts was recommended by a majority of the Committee.

(d) The Commission should periodically consider the drafts, and

(e) When the Commission considers a draft to be in satisfactory form it should be issued as a Commission document by the Secretariat with such explanations and supporting material as the Commission considers appropriate, and should be given the widest possible publicity. The publication should include any information supplied to the Commission in reply to the request referred to in sub-paragraph 12 (c) above. The governments should be requested to submit any comments on this Commission document within a reasonable time.

14. The Rapporteur and the Sub-Committee would then reconsider the draft, taking into consideration any comments or suggestions which have come to the attention of the ILC. They would prepare a final draft and explanatory report which the ILC would consider, and, if adopted, would submit, together with its own recommendations, through the Secretary-General, to the General Assembly.

15. These recommendations might be either:

(a) that no further action be taken in view of the fact that the report has already been published, or

(b) that the General Assembly should adopt all or part of the report by resolution,⁶ or

(c) that the General Assembly should recommend the draft to States for the conclusion of a convention, or

(d) that the General Assembly should convoke a special conference to consider the conclusion of a convention.

The Committee appreciates the fact that the General Assembly might in any of these cases think fit to refer the drafts back to ILC for reconsideration and redrafting.

16. The Committee also considered a number of suggested means of encouraging the progressive development of international law by improvements in the technique of multipartite instruments. It was pointed out, for instance, that absence of uniformity in the drafting of the formal clauses of multipartite conventions sometimes leads to unnecessary delays in concluding them as well as creating certain difficulties of interpretation afterwards. A majority of the Committee therefore desired to recommend that the ILC should consider this matter and the ways and means of bringing about improvements in the technique of multipartite instruments in relation to such matters as uniform treaty clauses with a view to ultimate recommendations to the General Assembly. It was understood, of course, that the adoption of any clauses as the ILC might draw up would be entirely optional for the parties to any multipartite convention, and that the recommendations of the ILC would only concern the formal clauses of multipartite conventions.

17. Another matter considered by the Committee was the utility and importance of encouraging the ratification of and accession to multipartite conventions already concluded. A majority of the Committee desired that the ILC should consider this matter with a view to ultimate recommendation to the General Assembly.

18. In connection with the development of customary international law, as well as with the development of the law through the judicial process, the Committee desired to recommend that the ILC consider ways and means for making the evidences of customary international law more readily available by the compilation of digests of State practice, and by the collection

⁶ This sub-paragraph was adopted by a majority of the Committee.

and publication of the decisions of national and international courts on international law questions.

19. The Committee was also asked by the General Assembly to study methods of securing the coöperation of the several organs of the United Nations in the task of the progressive development of international law and its eventual codification. On this point the Committee recommends

(a) That the ILC should be authorized, if need be, to consult with any of the organs of the United Nations on any draft or project the subject matter of which is relevant to the functions of the particular organ.

(b) That in projects referred to it by a competent organ of the United Nations the ILC should be authorized, if it thinks it desirable, to make interim reports to the organ concerned prior to submitting its final report to the General Assembly. This resolution was carried by a majority in the Committee. A minority of the members dissented from it on the ground that, in their view, it would not be in accordance with the provisions of the Charter for any organ of the United Nations, other than the General Assembly,⁷ to refer a project to the ILC.

(c) That all ILC documents which are circulated to governments should also be circulated to the organs of the United Nations for their information, and that such organs should be free to supply any data or make any suggestions to the Commission.

20. The Committee was also asked to study methods of enlisting the assistance of such national or international bodies as might aid it in the attainment of its objective of encouraging the progressive development of international law and its eventual codification. On this point the Committee recommends

(a) That the ILC should be authorized to consult any national or international organization, official or non-official, on any matter entrusted to it, if and when it believes that such a procedure might aid it in the attainment of its objectives. A minority of the members of the Committee were of the opinion that such consultation should be limited to organizations included in the list referred to in the sub-paragraph following.

(b) That for the purpose of the distribution of ILC documents the Secretary-General, after consultation with ILC, should draw up a list of national and international organizations dealing with questions of international law. In drawing up this list the Secretary-General would take into account the necessity of having the national organizations of all the members of the United Nations represented on the list.

⁷ Two members of this minority desire to add to this sub-paragraph the following words: "or the Economic and Social Council under the authority of the General Assembly."

(c) That in the consultations referred to in sub-paragraph (a), and in the compilation of the list referred to in sub-paragraph (b) of this paragraph the Commission and the Secretary-General should take into account the resolutions of the General Assembly and of the Economic and Social Council concerning relations with Franco Spain, and that organization which collaborated with the Nazis and Fascists should be excluded both from consultation and from the list.

(d) By a majority, the Committee decided to refer specially to the necessity and importance of frequent consultation between the ILC and the organs of the Pan-American Union whose task is the codification of international law in the Inter-American System, without, however, disregarding the claims of other systems of law. Three members of the minority dissenting from this resolution, desire it to be recorded that in their opinion this resolution, by singling out the Pan-American Union for special mention, creates for that Union a privileged position, and thereby violates the principle of equality between nations and between systems of law. They are of the opinion that the resolution might be taken to imply that the work of states other than those represented in the Pan-American Union is of less importance for the ILC, and that the ILC need not maintain equally close contact with such other states.

**REPORT OF THE COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL
LAW AND ITS CODIFICATION ON THE PLANS FOR THE FORMULATION OF THE
PRINCIPLES OF THE NUREMBERG CHARTER AND JUDGMENT***

1. By a Resolution of 11 December 1946 the General Assembly directed this Committee "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."

2. The Committee considered the nature of the task entrusted to it by this Resolution. In particular it noted that the General Assembly had requested it to propose "plans for the formulation" of the Nuremberg principles, and the Committee by a majority decided not to undertake the actual formulation of those principles, which would clearly be a task demanding careful and prolonged study. The Committee therefore concluded that it was not called upon to discuss the substantive provisions of the Nuremberg principles, and that such a discussion would be better entrusted to the International Law Commission, the establishment of which it had decided to recommend to the General Assembly. It recommends unanimously that the ILC should be invited to prepare

* Doc. A/AC.10/52, 17 June 1947.

(a) A draft convention incorporating the principles of international law recognized by the Charter of the Nuremberg Tribunal¹ and sanctioned by the judgment of that Tribunal,² and

(b) A detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the principles mentioned in sub-paragraph (a) of this paragraph.

The Committee further desires to record its opinion that this task would not preclude the ILC from drafting in due course a code of international penal law.

3. The Committee also decided by a majority to draw the attention of the General Assembly to the fact that the implementation of the principles of the Nuremberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions may render desirable the existence of an international judicial authority³ to exercise jurisdiction over such crimes.

The Representatives for Egypt, Poland, the United Kingdom, the Union of Soviet Socialist Republics, and Yugoslavia desired to have their dissent from this decision recorded in this Report. In their opinion the question of establishing an international court falls outside the terms of reference from the General Assembly to the Committee.

REPORT OF THE COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION ON THE DRAFT DECLARATION ON THE RIGHTS AND DUTIES OF STATES, PRESENTED BY PANAMA *

1. By a Resolution of 11 December 1946 the General Assembly instructed the Secretary-General to transmit to all Member States of the United Nations and to national and international bodies concerned with international

¹ The Representative of France submitted a memorandum on 27 May 1947 concerning draft texts relating to the Principles of the Charter and Judgment of the Nuremberg Tribunal. (A/AC.10/34.)

² The Representative of Poland desired to have it placed on record that the Polish Government considers that propaganda of aggressive wars constitutes a crime under international law and falls under the scope of preparation to such wars as listed in Article 6a of the Statute of Nuremberg. This crime is a dangerous form of preparation, likely to cause and increase international friction and lead to armed conflicts. It is a form of psychological armaments as opposed to the notion of moral disarmament. The Criminal Code of Poland, which is in force from 1 September 1932, contains the prohibition of propaganda of wars of aggression in its Article 113.

The Polish Government expects that a similar provision will be incorporated into the codification of Crimes against Peace and Security, and requests that the International Law Commission take appropriate action on this matter as one of primary importance.

The Representatives of Yugoslavia and the Soviet Union associate themselves with this statement.

³ The Representative of France submitted a memorandum on 15 May 1947 concerning a draft proposal for the establishment of an international court of criminal jurisdiction.

* Doc. A/AC.10/53, 16 June 1947.

law the text of a draft Declaration on the Rights and Duties of States presented by Panama, with the request that they should submit their comments and observations to the Secretary-General before 1 June 1947. This Resolution also referred the Declaration to this Committee, and requested the Secretary-General to transmit to it the comments and observations as they were received.

2. The Committee, noting that a very limited number of comments and observations from the Member States of the United Nations (6) and national and international non-governmental bodies (3) had been received on the Draft Declaration on the Rights and Duties of States presented by Panama, and considering that the majority of these comments and observations recommended postponement of the study of the substance of this question, recommends:

(a) That the General Assembly entrusts further studies concerning this subject to the ILC in accordance with the procedure finally adopted by the General Assembly for the progressive development of international law and its codification.

(b) That the ILC should take the Draft Declaration on Rights and Duties of States presented by Panama as one of the bases of its study.

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VOL. 41

October, 1947

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THE TURKISH STRAITS IN THE LIGHT OF RECENT TURKISH-SOVIET RUSSIAN CORRESPONDENCE

By CEMIL BİLSEL *

Member of the Turkish Great National Assembly

INTRODUCTION

It will be remembered that notes were exchanged between the United States, Great Britain, Soviet Russia, and the Republic of Turkey on the subject of the Turkish Straits which it was desired during the Potsdam talks to link with the general problem of peace. It is our intention to discuss the problem of the Straits in the light of these notes.

The Turkish Straits constituted one of the knotty problems of general European politics in the 19th century, and three Conferences convened to solve it, resulting in the following agreements: The London Agreement of 1841, the Paris Agreement of 1856, and the Straits Agreement (London) of 1871. Entering the 20th century under the provisions of these agreements, the Turkish Straits formed one of the main issues in the First World War and assumed importance on a world scale. This was why the question was included among the subjects forming the basis of world order: the first Straits regime was decided upon at the Lausanne Peace Conference after the Treaty of Sévres failed to be ratified and therefore remained a mere project. The Lausanne Straits Agreement of 1923 was modified at the Montreux Conference by the Straits Convention of 1936, which forms the basis of the present Straits regime, but in view of the fact that Soviet Russia wants this regime changed on the ground that it failed to function well during the Second World War, it may yet be that the 20th century will see a third conference on the subject. Because of its importance from the standpoint of international law no less than from that of world politics it is not out of place to study the question of the Turkish Straits again at this stage.

Let me deal first with the name of these Straits. Most of those who treat of the Turkish Straits in international law or write books and theses on the subject refer to them as the Dardanelles and the Bosphorus while others speak of the Turkish Straits. In his *Manuel Élémentaire de Droit Internationale Public* published in 1943,¹ Professor George Scelle had employed the latter form, and that is also the case in the *Traité de Droit International* by that most prominent Russian authority on international law, F. de Martens, who wrote:

* Translated by L. Nezih Manyas.

¹ Pp. 339-343.

If a strait is situated within cannon-range of a single state, it is considered to be dependent on such a state and included among its territorial possessions. . . . Thus the Dardanelles and the Bosphorus, surrounded by Turkish territories, must be considered as a Turkish Strait.²

On the day of the signing of the Montreux Convention which established the present regime governing the Turkish Straits, the conviction was paramount that this was calculated to satisfy not only the states most closely concerned but also all other world states. Mr. Litvinoff, Commissar for Foreign Affairs, who represented Soviet Russia with authority at the Montreux Conference, made a long and significant speech (to which we shall return later) on the day when the Convention was signed, and interpreted the general feeling as follows:

It seems to me that all who have participated in this Conference will depart satisfied, and that there will be no malcontents. The Conference has given absent states no reason for dissatisfaction, and their peaceful interests have been fully respected.

It was on the strength of this universal atmosphere of satisfaction that, in analyzing the nature of the Montreux Convention in an article entitled *La Vie Internationale de la Turquie*, I said:

Conventions which lay down rules in the domaine of law achieve less from the viewpoint of reconciling opposing interests than they do in emphasizing interests which do not conflict; but in this case conflicting interests have been obviated and replaced by new rules which take the best care of interests in common. The final clauses are those most compatible with the exigencies of the present situation.³

To consider the Montreux Convention as a *Traité-Lci* drawn up to meet the requirements of a most important problem of special character would have obviated the possibility of political difficulties in the future, which is why I endeavoured to underline this aspect of the agreement in my lectures at the University and the War Academy.

In an article on International Law in Turkey⁴ I mentioned the general satisfaction expressed by all concerned in face of the Montreux arrangement, and explained also that it was on this basis that Turkey had replied to the four or five points raised by other states during the war. When I first spoke before Committee No. 1 of Commission No. 1, the Russian scholar and authority on international law Professor Krylov (with whom I worked together both at the Washington Committee of Jurists and at the San Francisco Conference, before Professor Krylov was elected to the International Court of Justice) was kind enough to cross the length of the room to congratulate me on my speech, and when we sat next to each other at another

² Vol. I, p. 506.

³ *La Turquie*, in *La Vie Juridique des Peuples*, pp. 342-385.

⁴ This JOURNAL, Vol. 38 (1944), p. 546.

meeting he stated that he always kept on his desk the copy of the *American Journal of International Law* in which my article had appeared. It may be remembered that in referring to the Turkish Institute of International Law I had mentioned the fact that the Institute intended to invite several experts on international law from the United States, Great Britain, and Soviet Russia.⁵ Under the impression that he was referring to this paragraph I explained how pleased we should be if he too could make it convenient to come to Turkey; he replied that this would not be possible just yet, but he would be delighted to do so later, when relations between our two countries improved. As a sincere supporter of Turco-Russian friendship I made no secret of my hope that this would not be long delayed.

I still nurture the same hope. In the second volume of my work *Lausanne*, reviewed in this JOURNAL in 1934, I had underlined the fact that Turco-Russian friendship was an historical necessity, and as a person who knows the characteristics of both peoples I am of the same opinion today. Misunderstandings between our two countries can lead to very harmful results for the two parties concerned no less than for the world in general, and can lead to developments not envisaged by those who are responsible for the present situation; in view of the fact that Turco-Russian friendship must be considered an historical necessity, it would be well to recall here very briefly just how this friendship was established.

The Turkish Grand National Assembly held its very first meeting on the 23rd of April, 1920, and a message received from the Soviet Union was read out at its meeting on the 11th day of May. This message called on all Eastern Moslems to rise and fight against the invaders, and assured us that the Tsarist plan for the forcible occupation of Istanbul was a thing of the past, for "the Union of Soviet Socialist Republics repudiates the forcible occupation of Turkey and announces that Istanbul shall remain in Moslem hands: projects to partition Turkey and set up an Armenia on Turkish territories are torn up and forgotten."

On receiving this message from the East Turkey (waging a War of Independence against the Western Powers) sent a delegation to Moscow. Like Turkey, Soviet Russia was in a difficult position, and if Turkey had joined in the Allied operations against Russia a rising on the part of Turks in Russia might have resulted in the collapse of the Soviet regime. Lenin saw the truth of this and, by overruling the difficulties raised by Commissar for Foreign Affairs Chicherin, saw to it that the Agreement of March 16,

⁵ In the course of the scholastic year 1946-1947 Professor Herbert Smith (London University), Professor Phillip Jessup (Columbia University), Professor Herbert Briggs (Cornell University) and Professor Gilbert Gidel (former Rector of the University of Paris) were so invited. Professor Smith arrived in October, 1946 and lectured on *The Changing Law of Nations*. Professor Briggs lectured in Turkey in March of this year. I should like to express our gratitude to United States Ambassador Wilson who is greatly admired by all concerned and to whom we are indebted for his kindness in ensuring the visit of the American professor.

1921, was signed. The Preamble to this Agreement put the two countries on record as recognizing the need for brotherliness among nations and the right of every people to determine its own fate and future in absolute freedom, mentioning also the determination of the two countries concerned to act in complete solidarity "in the struggle against the policy of invasion." Art. 4 of this Agreement drew attention to the similarity between the Turkish movement for national independence and the struggle of Russian workers to establish a new Socialist order.

The Turco-Russian friendship established in this manner proved most advantageous for both countries, but it appeared to suffer a slight setback at the Lausanne Peace Conference when Soviet Foreign Commissar Chicherin's exaggerated claims that Russian views represented Turkish interests were not supported by Turkey which, following the conclusion of peace, reëntered into normal friendly relations with the Western Powers. Those who directed Turkish policy continued to be imbued with the most sincere sentiments of straightforward friendliness towards Russia, but there remained the equally evident fact that Turkey had fought her war of independence in order to retain and safeguard her national sovereignty, and (irrespective of whether it came from the West or the East) the Turkish nation could accept no pressure or influence aimed against that sovereignty. There remained the fact that Turco-Russian friendship had been built on that foundation, and confirmed by the 1921 Agreement. Seeing that Turkey's relations with the West were in no way calculated to impair Turco-Russian friendship, and because the Soviets themselves had faith that Turkey would always remain faithful to it, friendly relations with the Soviets developed and paved the way for new Agreements.

As a case in point Turkish Prime Minister Ismet İnönü went to Moscow and this visit was returned the following year (1933) by a Soviet delegation headed by Defense Commissar General Voroshilov. The words uttered by Litvinoff at the Montreux Conference expressed the friendship existing in 1936 between two energetic countries full of hope for the future. It may be recalled that after saying that the place of the weak Ottoman Empire had been taken by the young Turkish Republic full of hope and energy which was taking long strides forward on the road to progress under the leadership of its creator and greatest reformer Atatürk, Litvinoff declared that Turkey was playing an increasingly important and independent rôle in organizing European peace. In the same way, he said, the Conference must have realized that the old imperialist Russia had given place to the socialist Soviet State which follows an unswerving policy of peace. "This Conference must have seen," he went on, "that the close friendship which has united for the past fifteen years the two regenerated countries of Turkey and the Soviet Union is indissoluble, and by no means a temporary makeshift."⁶

⁶ *Actes de la Conférence de Montreux concernant le Régime des Détroits*, p. 181.

Right up to the outbreak of World War II we continued to consider Turco-Russian friendship as constituting the foundations of our political relations with other countries. It was at this stage that discussions took place and an understanding was reached with Vice-Commissar for Foreign Affairs Potemkin, who visited Ankara and himself drew up the text of the key clause in the projected Agreement. Then the Turkish Foreign Minister was sent to Moscow to sign the Pact in accordance with the agreement achieved in Ankara. He was astonished to find there that the atmosphere had changed completely in the meantime. An "escape clause" emphasizing Turkey's friendship with Soviet Russia was inserted in the Treaty of Alliance which we signed with France and Great Britain, but this did not prevent our relations with Russia failing to improve from that date on.

In the present article we intend to discuss (a) the importance of the Straits; (b) its historical background, (c) juridical aspect, (d) the Soviet notes and Turkish replies, and (e) the solution of the problem.

A. IMPORTANCE OF THE STRAITS

The Turkish Straits are politically, economically, and strategically important, and this importance is the outcome of their geographical situation which in turn gives rise to political interests.

A glance at the map is sufficient to account for the geographical importance of the Straits which constitute the only passage between two important stretches of sea. The passageway formed by the Straits is narrow and contained within the territories of a single nation, thus being well adapted for defence. It is a fact of course that even the most powerful navies have failed to penetrate these waters, nor have the strongest armies met with greater success in their efforts to occupy them. Likewise the Straits form the core of the world-problem known as the Eastern Question; one other factor which makes the Turkish Straits one of the most important in world politics is the position of Soviet Russia.

The territories of this huge state which stretch from the centre of Europe to the end of Asia are bounded on the South by the Caspian and the Black Sea. Leaving to one side the Caspian, which is a closed sea, Russia has busy ports on all her coasts, but her busiest ports are those on the Black Sea (Nikolayev, Kerson, Sebastopol, Rostov, Batum), and Chicherin had stated at the Lausanne Conference that over 70 percent of Russian grain was sent to world markets through the Straits. The White Russian memorandum submitted to the Paris Peace Conference in 1919 stated that 88 percent of Russian oil, 93 percent of her manganese, 61 percent of Russian iron, and 54 percent of all Russian exports by sea also had to go out via the Straits. These figures are sufficient to indicate the economic importance of the Straits for the Russians, and also serve to give an idea of its importance from the viewpoint of strategy as it concerns Russian security. This

explains why Gorianoff, who is the author of one of the best works on the Straits⁷ despite the fact that it expresses an essentially Russian viewpoint, summed up the Eastern Question by saying that everything depended on who was in possession of the Straits. Professor Renouvin of the Sorbonne, who wrote the preface to the two volumes in French,⁸ publishing secret documents concerning Istanbul and the Straits, says that no matter which Russian Government is in power the question of having access to the warm waters of the Mediterranean is not and can never be a problem of passing interest for geographical conditions bring it up ceaselessly. Chicherin had underlined at Lausanne the importance of the Straits for Russia while Litvinoff had described them at Montreux as Russia's vital lifeline. These views are based on fact, and I made a point of emphasizing this during the lecture which I gave at the Istanbul Halkevi in October, 1946, thus proving how well I understood the Russian position, a realization of the true state of affairs which will also serve to show how impartial is the solution which I shall submit later.

Having dwelt at some length on the importance of the Straits for Russia, let us answer the question, are the Straits important only from the Russian viewpoint? Another glance at the map, and the answer is definitely in the negative. In the first place the Straits are far more important for Turkey than either for Russia or any other state for they constitute the major factor of national interest, existence, sovereignty, and security for Turkey. For five centuries Turkey has based her whole existence and security on the Straits. The Straits are situated in Turkish territories of which they form an integral part; both the Bosphorus (some 27 kilometres long and narrowing down to as little as 550 metres) and the Dardanelles (64 kilometres long and between 1,800 and 7,000 metres wide) are internal waters subject to absolute Turkish sovereignty. Tsarist Russia itself admitted this; outlining his views to Prince Gorchakoff, Tsar Alexander the Second telegraphed in 1855 that, because the Ottoman Sultan was the owner of the two Straits and adjoining territories, his "ancient rule" of keeping the Straits closed to all warships was unavoidable. Attention could also be drawn again to the words of the Soviet scholar F. de Martens whom I quoted earlier to the effect that "the Dardanelles and the Bosphorus, surrounded by Turkish territories, must be considered Turkish Straits." Therein lies the justification for the fact that the Chief Turkish Delegate to the Lausanne Conference insisted that, as the owner of the Straits, Turkey had a right to know all about every plan regarding the Straits and was entitled to study them in the light of its own sovereign rights and absolute independence. Speaking at the Montreux Conference the Chief Roumanian Delegate described the Straits as "the very heart of Turkey"⁹ while Pro-

⁷ S. Gorianow, *Le Bosphore et les Dardanelles*, 1907.

⁸ Paris, 1910; for Renouvin's opinion see *Revue de Droit International*, T. V., p. 568.

⁹ *Actes de la Conférence de Montreux*, p. 23.

fessor Philip Marshall Brown has declared that Turkey is the nation most closely interested in the Straits.¹⁰

In the same way the Straits are important for other countries too; speaking at the Lausanne Conference the British Foreign Minister and Chief Delegate to the Conference Lord Curzon stated that only some 20 percent of the ships passing through the Straits were owned by Black Sea states, the remaining 80 percent belonging to other countries. This is another indication of the deep interest which many countries have in the Straits and the Black Sea, and as a matter of fact it is these conflicting interests that make the Straits problem international.

The countries with a coastline along the Black Sea are four (including Turkey) or five if we take the Danube into account, while there are eleven countries bordering on the Mediterranean and each of these countries, to say nothing of others connected with them, have their own views and interests to protect. Roumania failed to support the Soviet view at Lausanne and went so far as to demand the neutralization of the Black Sea, and her Chief Delegate at Montreux, who described the Straits as "the very lungs of Roumania," followed the Turkish stand. During the discussions at Lausanne Chicherin declared that Russia's relations with Roumania were more by land than by sea; but Dascoviçi's work on the Straits,¹¹ coupled with the statements by Roumanian delegates both at Lausanne and Montreux, show clearly that Roumania holds a different opinion which her present position does not permit her to express.

Because she is a Mediterranean state the centuries-old greatness of which has been based on its ability to control world seaways, Great Britain, who signed with Turkey the Straits Regime of 1809, is one of the countries most closely interested in the Straits. This is also true of the United States in its capacity as a great World Power which has now foresaken isolationism; Child, the American Observer at the Lausanne Conference, very properly emphasized the right of every world state to an interest in the Straits problem.

B. HISTORICAL BACKGROUND

In view of the fact that a very great deal can be said on this subject we shall confine ourselves to its most salient points alone.

First Period (1475-1841): closed Straits. The Turks occupied both banks of the Dardanelles in 1356, both banks of the Bosphorus in 1453, and the whole coastline of the Black Sea in 1475. The Sea of Azov, the Black Sea, and the Sea of Marmara were thus transformed into "internal" seas, and the Straits were henceforth kept closed. F. de Martens¹² admits that when Turkey was in sole possession of the whole Black Sea coastline

¹⁰ This JOURNAL, Vol. 37 (1943), p. 640.

¹¹ N. Dascoviçi, *La Question du Bosphore*, 1915.

¹² *Traité de Droit International*, Vol. 2, p. 357.

there was no possibility of contesting her right to regulate the passage of shipping through the Straits as she saw fit. After Russia's descent to the Northern shores of the Black Sea, however, she sought freedom of passage for her own ships and finally the Black Sea was opened to trade, with right of passage through the Straits for the merchant shipping of all nations, although the Straits remained closed to warships.

Three Agreements with Russia and one with England signed during this period contained clauses governing the passage of warships. Art. 11 of the Agreement signed with England in 1809 says that the Straits are to be closed to the warships of foreign powers in peace time and that England will support this principle. The Treaties of Alliance signed with Russia in 1798, 1805 and 1833 (concluded when Napoléon made his expedition into Egypt and, later, when the Turkish army in Egypt revolted against the Sultan and began to advance in Anatolia) stipulated special concessions in Russia's favor during the term of the alliance. The privileged position which Russia obtained by means of these three Agreements, signed at a time when the Ottoman Empire was at its weakest, is that situation which, according to newspaper reports, Russian scholars in Moscow have recently been recalling as the ideal era of Russian security. The reason for this can best be shown by having recourse to Russian documents: in a letter sent to the Ottoman Sultan in 1833, Tsar Nicholas the First wrote:

The ability of your country to live in peace and prosperity depends on its being able to count on the friendship of Russia. . . . I shall demonstrate that Russia is worthy of any confidence which you evince toward her, but it is essential that this confidence be unconditional, for even the smallest hesitation in this respect may give rise to most fatal results. . . .

In connection with the 1833 Agreement Soviet Foreign Minister Nesselrode wrote to the effect that the proposed treaty would leave no room for doubt that Turkey was decided to place herself under the protection of Russia, and that Russia was determined not to withhold such protection; this alliance would provide Russia with a lawful excuse to keep a certain number of troops on Turkish soil and place Russia in a position from which she would be the first to arrive on the scene of any new developments, thus making it possible for Russia to solve the Eastern Question in conformity with her own interests and ambitions, irrespective of whether it was decided to consider the continued existence of Turkey or deemed the collapse of the Ottoman state inevitable. These official expressions of the meaning and aims of the Russian alliance with Turkey show the true face of Russian friendship at that time.

The countries which desired to see the continued existence of the Ottoman state did not fail to note these ambitions of Tsarist Russia.

Second Period: Straits remain closed on the basis of Agreements. Three Agreements were concluded during this period, the first being the London Agreement signed on the 13th of July 1841. The second crisis in Egypt (1839) led to the conviction that the matter ought to be discussed at a European Conference. As is the case today, Russia at first opposed this plan. Let us see what Russian documents of that period have to show us.

The lack of confidence which the Turks evince in Russia which has been dragging the Ottoman State towards its doom for the past hundred years will reappear. . . . A guarantee such as is being envisaged by the other Powers will take away from us everything we have won since the Treaty of Kairardja (1774). . . . The so-called pro-Turkish guarantees are in truth anti-Russian moves calculated to tie us hand and foot. . . . We cannot participate in a Conference while such facts are evicent for all to see.

But when it became apparent that the Conference would meet without Russia she agreed to participate and endeavored to arrange that keeping the Straits closed to warships should be made a rule of European Public Law. The four-point London Agreement proclaimed that the Ottoman Empire should keep the Straits closed once more to the warships of all foreign nations, and that all foreign states would abide by this decision.

The second agreement was the Paris Agreement of 1856 which contained the important provision that the Black Sea should be neutralized, as decided at the Vienna Conference of 1855. Of the three alternatives, that she should limit her navy in the Black Sea, abolish her fortifications and shipbuilding yards, or agree that foreign forces should be entitled to enter the Black Sea, Russia tried to decide which would prove least harmful to her interests and, after corresponding with his Government, Prince Gorchakoff finally proposed the second alternative. The Russian plan was that the Sultan would be entitled to permit the passage of all warships through the Straits, modify this rule in times of emergency, and deny passage to warships if Turkey herself was at war or a war broke out between other Powers which threatened Turkish security. Thus we see that in the middle of the last century Russia had accepted the principle that the Straits should be open to all warships. Nevertheless the Russian proposal was rejected and the Black Sea was neutralized.

This neutralization, arising out of the fact that the Russian fleet had sunk the Ottoman Fleet and virtually turned the Black Sea into a Russian lake, was a kind of servitude impairing its sovereignty to which Russia could not bow her head for long. It continued in force until the Franco-Prussian War of 1870 when Russia took the opportunity to denounce it, and this unilateral denunciation led to the London Conference of 1871. The situation was critical. The Russian delegate Brunnov (who had represented Russia at the other two Conferences also) went so far as to envisage the opening of the Straits to warships and informed England of

the fact. This constituted the second time when the Russians agreed to the Straits being opened. The Conference emphasized that international law prohibited the unilateral denunciation of a treaty without the consent of the other signatories, but, taking into account the changed conditions, abrogated the neutralization of the Black Sea. As a concession Turkey was authorized to open the Straits to the warships of friendly or allied Powers in peace time. These provisions regarding the Straits were confirmed by the Berlin Treaty of 1878 which reviewed the Eastern Question.

Such was the Straits Regime prior to World War I, that is to say, the Straits were to be open to merchant vessels and closed to warships; but it should be remembered that this applied to peacetime, and there was no provision governing the Straits during a war in which Turkey participated or remained neutral.

Did such a regime conform to international law? Let us refer again F. de Martens, an expert on the subject and Legal Adviser to the Russian Foreign Office.¹³ He wrote:

Positive measures of an international character regarding straits are of two kinds: some are motivated by the necessity to suppress all needless obstacles in the path of peaceful transactions taking place within the area of these maritime corridors; and others are linked to strategic considerations, to the security of states that are masters of the coastline, and to the right possessed by such states to make use of the straits for their own defence in wartime. . . . When Turkey was in sole possession of the whole Black Sea coastline, she had the incontestable right to regulate as she saw fit the passage of shipping through the Straits. Following the Russian conquest of its Northern shores, this closed sea was transformed into an open one; and this resulted in the fact that free navigation through the Bosphorus and the Dardanelles became a matter of vital interest for Russia as well as an absolute right for every nation which recognized the freedom of open seas. This is the reason why, ever since the end of the last [18th] century, Russia has contested the principle that it should be necessary to obtain the permission of the Sultan in order to enable Russian vessels to pass through the Straits. The Sublime Porte consented to free passage being accorded to all merchant vessels in general; but, keeping in mind the danger to which the capital of the Ottoman Empire might become exposed if this facility were accorded also to foreign warships Turkey did not give up her right to close the Bosphorus and the Dardanelles to the warships of all nations, and Russia raised no objection in this connection.

Martens states that Russia raised no objections but the fact remains that, right up to the collapse of Tsarist Russia, she spared no effort to ensure passage for her own warships through the Straits and even to lay hands on them. Included among the events of almost every year since the Berlin Treaty we perceive some action on the part of Russia trying to

¹³ *Traité de Droit International*, Vol. 2, pp. 356-358.

realize this aim. We can recall, for instance, the years 1881, 1882, 1887, 1892, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1902, 1903, 1904, 1907, 1908, 1909, 1910, 1913, 1914 and 1915 when, in her Agreements signed with Germany, Austria, Italy, England, France and Turkey, Russia sought to solve the Straits Question according to her own wishes. During World War I Russia obtained from her allies (Britain and France) a promise to the effect that the problem of the Straits would be liquidated at the general peace settlements in line with Russian desires, but this lost its value when Russia collapsed and signed a separate peace with Germany and her allies, so that she was not represented when the Straits were discussed at Sèvres. When the Sèvres treaty was torn up following the heroic victory won by Turkey in its War of Independence on the outcome of which her very existence depended, the Straits were discussed again at great length during the Lausanne Conference which drew up the conditions of peace with Turkey. And this time, on the insistence of Turkey, Russia was present, as well as the United States.

At the Lausanne Conference Soviet Russia insisted on closing the Straits to warships of all Powers including Russia, and accused Tsarist Russia of having followed a policy of conquest. The Allies had agreed on the Straits being kept open to warships too (as decided at Sèvres) and defended this viewpoint. Lord Curzon maintained that keeping the Straits closed would turn the Black Sea into a purely Russian sea, while Chicherin said keeping them open would place it under Allied control. In the end a compromise solution was agreed upon, Russia signed it, but failed to ratify it, because the Agreement stipulated that any Power might send into the Black Sea (in peacetime) a force equal to that of the most powerful fleet maintained in that sea by a Black Sea state. This meant that the Allies could send into the Black Sea, and keep there as long as it pleased them to do so, a naval force totalling several times the size of the Russian fleet, although this was not to apply in time of war with Turkey remaining neutral.

C. JURIDICAL ASPECTS

The juridical aspect of the Turkish Straits problem is set forth in the Montreux Convention of July 20, 1936, which was the outcome of the Conference which met at Turkey's request to discuss modifications in the Straits Regime rendered essential by various developments. Turkey's action in seeking an international agreement was received with approval, and the Conference was in session from the 22nd of June to the 20th of July. The Montreux Convention comprises 29 Articles, 4 Annexes and one Protocol. Its signatories were Turkey, Great Britain, Bulgaria, France, Greece, Japan, Roumania, Soviet Russia, and Yugoslavia; Italy adhered later.

Agreeing on the freedom of passage in principle, the Montreux Convention followed the example of the Lausanne Agreement and laid down four rules for passage of warships and merchant vessels, to apply in the following cases: (1) in time of peace, (2) in time of war, Turkey being neutral, (3) in time of war, Turkey being belligerent, (4) in case of threat or danger of war (this last was not included in the Lausanne Agreement).

Merchant vessels were accorded complete freedom of passage in time of peace. In time of war (Turkey being neutral), complete freedom of passage for all belligerent and neutral vessels irrespective of nationality or cargo. In time of war (Turkey being belligerent), only neutral merchant vessels should pass, on condition that they offer no aid to the enemy.

As for warships, the Convention takes care of the security measures desired by Turkey for the Straits and by Russia for the Black Sea. The total tonnage of ships entering the Black Sea in peace time did not exceed 45,000 tons, with no more than two-thirds of this tonnage being allowed any one Power, passage to be denied to first-line battleships and aircraft-carriers and submarines, and the duration of stay in the Black Sea not to exceed 21 days. Special provision exists for the passage of a force of eight thousand tons for humanitarian purposes. Over and above these provisions, calculated to safeguard the security of Russia, she was also granted a concession which had always been sought in the time of the Tsars but never obtained, namely, right of passage for Russian warships (surface ships or underwater craft).

In the event of a war in which Turkey remains neutral, the provisions for warships of neutral nations are the same, and only vessels of war belonging to belligerent Powers are not allowed to pass through the Straits (except in order to assist a State which has become the victim of aggression). This meant an important modification in Russia's favor, a modification regarding which Litvinoff too expressed approval. In time of war (Turkey being belligerent) passage would be allowed to neutral warships only. In time of danger of war the provisions for wartime shall apply but on the question of whether danger of war existed, the decision of the League of Nations was to be final.

Because separate provision was made for warships and merchant vessels, "warships" were described in detail, and it was stated that all vessels not coming under the heading of "warships" would be considered "merchant vessels."

The basis of the descriptions in question was the London Naval Agreement of March, 1936. The Montreux Convention was to run for twenty years, and each of the signatories had the right to demand that the agreement should be reconsidered at the end of each five-year period. Arts. 14 and 18 may be modified if the modification demanded is supported by one other signatory, but at least two others must support a demand for modification of any of the other Clauses. If a new conference is convened to

discuss possible modifications its decisions must be unanimous, although a three-fourths vote is sufficient for modifying the provisions for the passage of warships in peacetime, on condition that three-fourths of the Black Sea powers figure among the three-fourths who vote for the adoption of the proposed modification.

Of the four Annexes attached to the Montreux Convention, the really important one is Annex II which contains the descriptions of warships. No such descriptive list was attached to any of the four Straits Agreements previously concluded, nor was one included in the Turkish Plan submitted to the Montreux Conference. Such a suggestion was contained in Art. 7 of the British Plan, demanding that warships should be described on the basis of the explanations set forth in Art. I par. B6 of the London Naval Agreement of March 25, 1939. At the Thirteenth Sitting of the Technical Committee on the 15th of July, 1936, Politis, Chairman of the *Comité de Rédaction*, pointed out that certain naval Powers had not participated in the London Naval Agreement, which meant that it would not suffice merely to refer to the descriptive text contained in that Agreement, and he would suggest that the descriptive text should be attached in its entirety to the new Agreement. This resulted in Annex II. But it should be noted with emphasis at this point that although the proposal was to include the descriptive text in its entirety, the London text described seven different categories of warships, with the seventh category referring to small vessels of war of under 100 tons, while this seventh category was not included in Annex II of the Montreux Convention; the minutes of the meetings contain no indication as to whether this was the result of carelessness or whether it was decided that no need existed to include it. It was only during the war, in 1944, when misunderstandings and disputes arose over the smaller vessels, that we noticed this omission.

D. SOVIET NOTES AND TURKISH REPLIES

Let us now turn to the recent Soviet and Turkish notes exchanged on the subject of the Straits.

Russia, which had opened a war of nerves against Turkey after the end of the fighting in Europe, presented a note to the Turkish Ministry of Foreign Affairs on the 7th of August, 1946, which gave formal expression to Russia's views as to what should constitute a new Straits regime. The Turkish Government replied to this note on the 22nd of August. Russia said it found the Turkish reply inadequate, and delivered a second note on September 24, 1946, to which the Turkish Government again replied on October 18. Great Britain and the United States also sent notes to Soviet Russia, the United States on August 19 and October 9, 1946, Great Britain on August 21, 1946. The Soviets replied to Great Britain on the 13th of October, 1946.

For the purpose of analysis it is possible to summarize the Soviet claims and suggestions under 4 heads: namely (1) The Potsdam Decisions, (2) Turkey's responsibility, (3) the inadequacy of the present Straits regime, and (4) principal points of the proposed new regime.

(1) The Potsdam Decisions. When the Chiefs of State of the three victorious Powers met at Potsdam in the Summer of 1945 the problem of the Straits figured among the matters discussed. According to the Soviet note Russia suggested at this meeting that the Straits regime based on the Montreux Convention was not of a nature calculated to meet present-day requirements and that new discussions should be initiated with a view to setting up a new Straits regime. In view of the fact that we have not seen the minutes of the Potsdam talks, I do not know what discussions actually did take place; from a logical and technical point of view, however, it is obvious that the three victorious Powers, who had the right to take decisions regarding the nations which had surrendered unconditionally, could, when and if confronted with a matter concerning Turkey, at the most decide to discuss this matter with Turkey and that any further action would constitute a *res inter alios acta*. It will be remembered that when France wanted to include the "Zone Franche" in the Versailles Peace Treaty, the President of the Swiss Republic, Motta, declared that Switzerland could not pretend to know nothing about treaties and agreements which were changing the face of the world but that these treaties could not be deemed to place Switzerland under any obligations, and France had no option but to discuss the matter with Switzerland too. There remains the fact that both the United States and Great Britain made it clear in their notes to Russia that the Potsdam decision in this connection was that the three Powers should get in contact with the Turkish Government.

(2) Turkey's Responsibility. The Soviet Government holds Turkey responsible for the violation of the Montreux Straits Convention and for the harm which this caused to Russian interests. To support its allegations the first Russian note mentioned the passage through the Straits of a coastguard vessel named the *Seefalke*, on July 9, 1941, the Italian auxiliary war vessel the *Tarvisio*, on August, 1941, 8 *Ems* and 5 *Kriegs-transport* types of ships in May and June, 1944, adding that on November 4, 1942, Russia drew the attention of the Turkish Government to the fact that 140,000 tons of German shipping (auxiliary warships disguised as merchantmen) were about to pass through the Straits. In her second note Russia mentioned the presence of enemy lighters in the Black Sea, and complained that she had been compelled to divert troops from the fighting fronts to the Black Sea area.

As pointed out in the Turkish reply, the *Seefalke* was a 37-ton unarmed motorboat, and in no way came under the description of a warship or auxiliary warship as defined by Annex II of the Montreux Convention;

she only had a single lifebelt and lifeboat on board. The *Tarvisio* had been allowed to pass as a merchant vessel, although, on the initiative of Soviet Russia, the Italian Ambassador admitted that she was an auxiliary warship which had subsequently been deleted from the list of such ships. The Turkish Government declared that it could not accept a warship which had been changed into a merchantman in wartime, and refused permission when the *Tarvisio* appeared at the Dardanelles a second time; the Soviet Government thanked Turkey for its action in this matter. Of the 140,000 tons of suspect German shipping, only ten vessels of undoubted commercial character (totalling 19,000 tons) passed, and the rest never materialized. As for the *Ems* and *Kriegstransport* types of ships, these two did not come under the categories of war vessels described under Annex II of the Montreux Convention. The pressing needs of war had resulted in various countries constructing types of vessels different from those described under this Annex. When, however, the British Embassy pointed out that these were in the service of the German navy as auxiliary vessels which also carried troops, one of them, the *Cassel*, was stopped, and no others were permitted to pass. Finally the lighters mentioned in the Soviet note were constructed on the Danube and Turkey cannot be held responsible for their presence in the Black Sea. If the Russian Government had to divert troops to the Black Sea area this was because the Germans had descended on the Black Sea. Contrary to all allegations, Turkey made many sacrifices to keep the Straits open, and, despite the advantages which this would have ensured, the Axis never dared to attempt their seizure. This constitutes real service on Turkey's part to the Allied Cause; and Turkey, which did its utmost to apply the provisions of the Convention with the best good-will and greatest straightforwardness, cannot be blamed for the fraudulent passage of a few small vessels. Nevertheless on this point also Turkey informed the Soviets that she would be willing to submit the matter to arbitration which is the shortest cut to determining the degree of responsibility, if any.

(3) The Inadequacy of the Present Straits Regime. The Soviet Government has suggested that the present Straits regime no longer adequately meets the requirements of the present day and claims that a new Straits regime is essential. The United States and Great Britain have agreed that certain changes could be made with advantage, and Turkey sees eye to eye with them on this point. There is, however, a divergence on whether the present regime should be merely modified and brought into line with new conditions or whether a totally new regime should be set up. Russia demands the establishment of a new regime, while Turkey defends the other view, believing that the provisions of the existing Montreux Convention which fall short of meeting present-day requirements are only those which concern the description of what constitutes a vessel of war and that these are not of a nature calculated to necessitate the scrapping of the whole

regime. Turkey also claims that the allegations made by Soviet Russia merely serve to prove the truth of her own assertion. Furthermore, she points out that the Montreux Convention is in force until 1956, only modifications being proper before that date, the manner in which these modifications are to be effected being outlined in the Convention itself; as a result she claims that it is necessary that a Conference should be convened to decide on the desirability and character of such changes.

(4) Principal Points of the Proposed New Regime. The Soviet Union has made the following five proposals in connection with its views regarding a new Straits regime: (1) The Straits must be kept open to merchant vessels of all nations in time of war or peace; (2) The Straits must always be kept open to war vessels of Black Sea Powers; (3) Except when permission is granted under special circumstances, no vessel of war belonging to non-Black Sea Powers shall be allowed to pass through the Straits; (4) Authority to draw up a new regime of the Straits should be vested in Black Sea Powers alone; and (5) in order to prevent the Straits from being used in a manner contrary to the interests of the Black Sea Powers, the Straits should be defended by the common (joint) actions of Turkey and Soviet Russia.

It is our opinion that the provisions which reconcile the passage of vessels through the Straits in the best possible manner with the requirements of Turkish sovereignty and security are those embodied in the present Montreux Convention. Nevertheless the Turkish Government has agreed to accept as a basis for discussion (with certain conditions and reservations) the first three points mentioned in the note which the United States sent to Turkey on November 2, 1945. The fourth point of the Russian note (disregarding the interests of the other Powers concerned), and its fifth point (which attempts to build the security of Black Sea Powers on the destruction of Turkey's own security), were categorically turned down by Turkey, with the United States and Soviet Russia supporting this refusal.

The suggestion that Black Sea Powers alone should have the right to draw up the Straits regime is based on the claim that the Black Sea is a "closed" sea, but this has no support in the actual facts, and scholars are united in describing the Black Sea as an "open" sea. Suffice it to quote here the words of the great Russian jurist F. de Martens who never misses an opportunity to defend the Russian viewpoint. He wrote: "The Bosphorus and the Dardanelles also join two 'free' seas,"¹⁴ and "Following the Russian conquest of its Northern shores, this closed sea (the Black Sea) was transformed into an open one."¹⁵

At the Montreux Conference the question of whether the Black Sea was an "open" or a "closed" sea twice constituted a subject for debate. The British delegate said that the Lausanne Conference had agreed to the prin-

¹⁴ *Traité de Droit International*, Vol. I, p. 507.

¹⁵ Same, Vol. II, pp. 357-358.

ciple that the Black Sea was an international sea, but Litvinoff urged that the Soviet Government had not recognized this ruling and that the Black Sea could not be likened to the Mediterranean or the Baltic Sea. The Turkish delegate maintained that the Black Sea and the Mediterranean were not exactly similar in every respect and that Turkey considered the Black Sea to have its own peculiarities and be in a class by itself; and the Convention was drawn up on this basis. In any case, never once did Litvinoff suggest at Montreux that the Straits regime should fall within the competence of Black Sea Powers alone, and there could be nothing more natural than that this Russian demand, contrary as it is to essential principles, former agreements, and to the interests of the states concerned, should have been rejected by Turkey which is also a Mediterranean Power.

The fifth Russian demand, aiming at establishing joint Turco-Russian defence of the Straits, is absolutely contrary to Turkish sovereignty and territorial integrity. Turkey, the product of the Turkish War of Independence, rejected this demand also, and recalled the guarantees formulated by the United Nations, guarantees which should satisfy those who felt doubts as to their own security. Great Britain and the United States also expressed the same views. Then the Soviet Union went so far as to claim that its demand for joint defense of the Straits was in no way contrary to the aims and principles of the United Nations. I represented my country at the San Francisco Conference in the Committee which discussed these aims and principles, and on the strength of this I can say definitely that it is contrary to the Charter for one country to formulate demands for joint defense of the territories of another country, or seek to establish bases on such territories. As I pointed out before the Turkish Grand National Assembly, the Straits constitute the keystone of our existence and independence and there can be no question of agreeing to any joint defense of that area.

Before broaching the subject of a rational solution for the problem of the Straits it would not be out of place to analyze the factors which led the Soviet Union to formulate such demands.

Tsarist Russia's policy regarding the Straits had shifted between three positions, depending on the situation of the moment: (A) In times of difficulty Russia has suggested that the Straits should be declared open to warships. During the neutralization of the Black Sea of 1856, when she denounced this neutralization in 1871, and during the crisis caused by the annexation of Bosnia in 1908, Russia has advocated the open-door policy; but these constitute exceptions to the rule. (B) When she felt weak Russia has demanded that the Straits should be kept closed to all warships; this was her defensive policy. (C) When she felt strong, Russia has followed an aggressive policy which requires that the Straits shall be kept open to Russian warships only, and aims at Russian possession of the Straits. This policy has taken the form of an openly aggressive and imperialist course of

action, or has been camouflaged in roundabout methods alleged to aim at ensuring Russian security. This policy, also known as a "national" policy, is obviously an imperialist and aggressive one aimed at making Russia the possessor of the Straits and of Istanbul with its wide adjoining territories. Let us add at once that this imperialist plan is not likely to stop short once a part of it is realized, for it is stated in the Melidov memorandum of 1882 that possession of the Straits would ensure a dominating position in the Near East which could not possibly be secured by other means, and that Russia would then be in a position to exert wide influence on the future of the Balkans and Asia Minor. In the same way Bazili's report of 1914 pointed out that Russia could not rest content with merely possessing the Straits but would also have to get control of the Aegean Sea. Thus it is evident that access to warm waters is to be ensured by way of laying hands on the whole of the Balkans and the Near and Middle East so as to descend into the Mediterranean; seeing that the main objective will not have been achieved because the passageways out of the Mediterranean will not be in her possession, Russia will have to take Iran and Iraq also in order to descend on the Indian Ocean to set foot in North Africa on her way to the Atlantic Ocean.

In following this policy Tsarist Russia always sought to weaken the Ottoman Empire and make the most of her difficulties in order to realize Russian ambitions.

All of this should be kept in mind in analyzing the factors which activate the Soviet Union at the present time. One theory is that the Soviets have reverted to the old Russian "national" policy, and there are indications which support this belief: (A) the former Roumanian Foreign Minister and last Roumanian Ambassador to Moscow, Gafencu, states in his book that Soviet Russia has reverted to the national Russian policy and declares that on the day that Germany turned to Russia and Ribbentrop arrived in Moscow to sign the Russo-German Treaty Russia awakened to full realization of her strength and decided to follow the national policy of the Tsars; (B) the demands for joint defense of the Straits made to the Turkish Foreign Minister Şükrü Saracoğlu during the Moscow conversations in September, 1939, also tend to lend weight to this view, for this demand was made in 1939, and makes it obvious that the pretext of Turkey having violated the stipulations of the Montreux Convention during World War II must have been invented later; (C) Molotov, who suggested to Hitler during the Berlin talks that Russia should be permitted to establish bases on the Bosphorus and the Dardanelles, was only following in the footsteps of his predecessors of the Tsarist era; (D) there is no lack of indications in the world press that Soviet Russia is applying the policy of the Tsars; (E) in the *Revue Politique et Diplomatique* of January, 1947, J. F. Kover cites many examples to show the lack of difference between the policy of Tsarist Russia and that of the Soviet Union; (F) on the tenth of February, 1947,

the United States' Assistant Secretary of State underlined the fact that present-day Soviet policy was one of aggression and expansion.

It is bitter indeed for idealist Soviet and Turkish reformers who consider that Turco-Soviet friendship is an historical necessity to have to admit that Russia has reverted to the policy of inordinate ambition and conquest which cost Tsardom its existence and which the leaders of the newly-formed Soviet Union repudiated in no uncertain terms. Dreams of conquest may be sweet, but they are dangerous in direct ratio to their sweetness, and the fate of Hitler's Germany is nothing other than the latest example of this which history has to show us; it is impossible that a farsighted Soviet policy can fail to see that any attempt by Russia, even with a population of some two hundred millions, to dominate the world will drag her to the same fate.

Another theory is that Russia is activated by the desire to safeguard her own security, and that, having had to make many heroic sacrifices in the Second World War, she desires to establish security-zones which will obviate the danger of her having to meet with a similar disaster again. Prior to World War I, the Great Powers were in the habit of establishing Zones of Influence in areas which they could not annex directly to their own territories. It was in the process of applying this policy that Africa was parcelled out amongst them, and this same policy was the motivating factor behind efforts to divide the territories of China, Iran, and the Ottoman Empire. It is also known that the system of securing *Lebensraum* resorted to by the Axis Powers both before and during World War II aimed at nothing less than that these states should rule the world. The system of establishing "security zones" is in no way different, for beyond every security-zone there lies yet another; there is no telling where the advance will stop but it is certain that it will cost each neighboring country its existence as an independent unit. And yet the future happiness and prosperity of the world depends on establishing a system of collective security under which all nations (large or small) may live in peace and without fear.

E. SOLVING THE PROBLEM

The task of solving the problem of the Straits in a rational manner will become more simple in direct proportion to the success achieved in ridding it of the political factors which have made it so difficult of solution all along its history.

The factor which makes the Straits problem such a difficult one is the ambitious and conquest-seeking policy of Soviet Russia. It follows therefore that either Russia will persist in this policy and make it inevitable that the Straits problem must be solved by way of international world politics, or else she will change her policy and make it possible for the problem of the Straits to be solved through normal juridical channels.

Let us explain our meaning.

Once the Straits are kept open to merchantmen of all nations in time of peace or war, once it is prohibited for foreign warships to enter the Black Sea, and once Russian warships are accorded the right to pass through the Straits into the Mediterranean, every Russian aim and demand will have been met except those that are based on her ambition for conquest. The only reason which lies behind the Russian demand for the Black Sea Powers alone to be authorized to formulate a new regime for the Straits and her desire to bring the Straits under her own domination by participating in their defense, is the reason that she wants to make sure the Straits shall not be used to threaten her own security. Therefore the question arises of which country is likely to use the Straits to threaten Russian security? Can it be Turkey? No such danger can come from Turkey which follows a policy of "peace within and without the Motherland" and has never failed to underline the fact that she has no desire beyond her own present-day frontiers. Can it be Great Britain that Russia has in mind? But Britain's policy regarding the Black Sea and the Straits has been a defensive one from the outset. Or can it be that she is afraid of the United States? But the interests and policies of that country in the Black Sea and the Near East are also based on considerations of a defensive nature only. Thus we arrive at the conclusion that making use of the Straits against the interests of Russian security would or could become necessary only in case she resorted to a policy of expansion and conquest and it is just as unjustifiable for Russia to ask for guarantee in such an eventuality as it is unthinkable that Turkey or any of the other interested states would consent to extend them.

In discussing the importance of the Straits we quoted Professor Renovin of the Sorbonne, who expressed the opinion that, no matter which Russian Government is in power, the question of having access to the warm waters of the Mediterranean can never be a problem of transitory interest, for geographical conditions continue to bring it up ceaselessly. In this same article Professor Renovin says also that exhaustion and general war-weariness had reached such a degree that treaties concluded providing that the Straits and Istanbul had been promised to Russia failed to create any impression from the viewpoint of inciting the people to war; and Gorianoff (also quoted earlier as having summed up the Eastern Question by saying everything depended on who was in possession of the Straits) complains in the last few pages of his book that the Turco-Russian war of 1877-1878 had lasted much longer than was anticipated at the outset because of lack of sufficient correct information about Turkey, that Russia made superhuman efforts during this war, and suffered unheard-of sacrifices, and that the unimportant gain she got out of it was out of all proportion to what they cost her. There is a warning significance in these voices from the past. When I was Governor of Batum, the brother of a former Russian Prime Minister said to me: "We have been neighbours for

two centuries, but our countries do not know each other; it is only here that we have got to know you, and have voted for you." It is possible that today, too, the Russians do not know us well.

Today Russia is very strong, and she has emerged from the war with a victory perhaps unparalleled in history. If she goes in search of new victories and decides to try her luck at the Straits, she will find that she was again mistaken as to the true situation of Turkey.

The determination of the Turkey which was born of the Turkish War of Independence has been expressed in the words of President İsmet İnönü to which History has already accorded a place of honor: "We shall live and die as an honorable people." Turkey's determination in this respect aroused admiration and was accorded support throughout the world, especially in Great Britain and the United States.

As against the path which leads to no one knows where, there appears another path, the path leading to a normal and rational solution of the Straits problem calculated to satisfy the legitimate aspirations of Russia and everyone else: a Straits regime guaranteed by the United Nations and placed under the responsibility of Turkey. Such a regime, ensuring freedom of passage to merchant vessels, opening the Straits to the warships of Black Sea Powers, and closing the Straits to the warships of other Powers subject to certain conditions, would serve the treble purpose of giving Russia access to warm waters, protecting the Black Sea, and extending sufficient guarantees. By being allied to the United Nations and the general problem of peace, the Straits will cease to constitute a political issue and be bound only by juridical rules and considerations; and the friendship of an honest, peace-loving, and strong Turkey conscious of her responsibilities in making use of her sovereign rights will continue to remain an historical necessity for Soviet Russia.

COMPENSATION FOR WAR DAMAGE TO AMERICAN PROPERTY IN ALLIED COUNTRIES

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I. THE PROBLEM

The American national who suffered war damage to property on territory of an enemy country during World War II is encouraged by the progress already made on the peace treaties to believe that the duty to provide compensation for his damage will be imposed directly upon the government of the enemy country. Upon the coming into force of the peace treaties with Italy, Bulgaria, Hungary, Roumania, and Finland, each of those countries will be obliged to provide for damage to property of United Nations nationals in its territory compensation equal to two-thirds of the sum necessary to purchase similar property or to make good the loss suffered.¹ If a similar pattern is followed when the treaties with Germany, Austria, and Japan are written each of those countries will also be obliged to provide compensation for damage to property of United Nations nationals on its territory.

The American national who suffered war damage to property on territory under the sovereignty of the United States during the war knows that compensation is provided by his own government. If he suffered damage to property in Hawaii, he has probably already obtained compensation from the War Damage Corporation.² If he suffered damage to property aboard a United States ship on the high seas, he has at least had the opportunity to obtain insurance at reasonable rates against the risk of such damage.³ If he suffered damage to property in the Philippines, he knows that the United States Government has authorized the appropriation of \$400,000,000 for distribution by the Philippine War Damage Commission as compensation for war damage to property in the Philippines.⁴ The extent to which the United States will obtain reimbursement from enemy governments for the compensation it grants as a gratuity has not yet been determined.

* The opinions expressed in this article are those of the writer and are not necessarily those of the Legal Adviser or the Department.

¹ Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland, Department of State Publication 2743.

² The War Damage Insurance Act, 15 USCA 606b-2, 56 Stat. 175.

³ The Marine War Risk Insurance Act, 46 USCA 1128 and 1128a, 54 Stat. 689-690.

⁴ The Philippine Rehabilitation Act, 50 USCA 1751-1763, 60 Stat. 128.

In contrast, the American national who suffered war damage to property on territory of Allied countries other than the United States can only be told that he may receive compensation from the United States Government, from the government of the Allied country in which his property was situated at the time of damage, from both of these governments, or from neither of them. There has been no indication that enemy governments will be obliged to provide compensation for war damage to property on Allied territory directly to the property owners. Whatever compensation is supplied by enemy governments for such damage will be supplied to the property owners indirectly through the appropriate Allied government. The problem is to determine the appropriate Allied government.

Under the United States war damage legislation already described compensation is provided in the form of outright cash payments, benefits payable for the reconstruction or replacement of property, and sums payable on policies of governmental insurance against war risks. Other Allied countries have also employed these three forms of compensation in their war damage legislation.⁵ Furthermore, the United States, the United Kingdom, and other Allied countries may regard their readiness during the war to provide insurance against war risks at reasonable cost as, in effect, a provision of compensation for damage even if the property owner failed to take out insurance. The United States, for example, has specifically excluded from compensation under the Philippine Rehabilitation Act certain types of losses for which insurance was available.⁶

War damage is defined very broadly in the legislation of the United States and the other Allied countries. Benefits under the Philippine Rehabilitation Act are payable for damage from any of the following causes: enemy attack, action taken by United States forces to prevent property from coming into the possession of the enemy, action taken by the enemy occupation authorities, action taken by the United States forces in opposing, resisting or expelling the enemy, or looting, pillage or other lawlessness or disorder accompanying the collapse of civil authority.⁷ Included in the French Government's definition of war damage is damage resulting from the enemy occupation such as dispossession or damage caused in dwellings used by the enemy, from requisitioning without full compensation, from mine and shell-clearing operations, and from the explosion, combustion, or dispersion of dangerous substances which have been abandoned or which are in the custody of the State, or of Allied armies, or of an enterprise working on their behalf.⁸ The Netherlands Government

⁵ United Kingdom: See R. M. Montgomery, *War Damage Act 1941*, and supplements. France: Law No. 46-2389 of October 28, 1946, published in the *Journal Officiel* of October 29, 1946. Netherlands: Staatsblad F255 of November 9, 1945.

⁶ 50 USCA 1760(5).

⁷ 50 USCA 1752(a).

⁸ Law No. 46-2389 of October 28, 1946, Article 6.

defines as war damage "any damage as a direct result of acts of war, of actions or measures of the enemy and of wartime conditions."⁹

Compensation is payable, under legislation of the United States and Allied countries, for war damage to real property, merchandise, commodities, household furniture, and clothing. The American, British, French, and Dutch Governments have not undertaken to provide compensation for the loss of currency or intangible property. And they either exclude completely from compensation, or provide only limited compensation for, articles of luxury such as jewelry and works of art.

*Recognition of Responsibility to Provide Compensation
on a Territorial Basis*

There has been some recognition that an Allied nation should provide compensation for nationals of other Allied countries, or even for nationals of neutral countries, who sustained property damage on its territory to the same extent as it provides compensation for its own nationals, that is, that a nation should provide compensation on a territorial basis.

The eighteen Allied Governments which participated in the Paris Conference on Reparation unanimously resolved that:

... in the administration of reconstruction or compensation benefits for war damage to property, the treatment accorded by each Signatory Government to physical persons who are nationals and to legal persons who are nationals of or are owned by nationals of any other Signatory Government, so far as they have not been compensated after the war for the same property under any other form or on any other occasion, shall be in principle not less favourable than that which the Signatory Government accords to its own nationals.¹⁰

The participating Governments stated, however, as the concluding sentence of the resolution, that there are "many special problems of reciprocity related to this principle" and recognized that "in certain cases the actual implementation of the principle cannot be achieved except through special agreements between Signatory Governments."

Independently of reciprocity agreements, several countries have made their systems of compensation for property damage sustained on their territory applicable to their own nationals and other Allied nationals on equal terms. In all the legislation of the United Kingdom, whether compensation is paid as a gratuity, or in return for insurance premiums or compulsory contributions, no distinction has been made between the rights of British and other Allied nationals to obtain compensation. Similar

⁹ Staatsblad F255, November 9, 1945, Article 1.

¹⁰ Resolution 3 of the Final Act of the Conference, State Department Publication 2584, *The Distribution of Reparation from Germany*, p. 19.

non-discriminatory systems of compensation were adopted in Australia,¹¹ India,¹² and New Zealand.¹³ Insurance schemes were also put into effect in such British colonies as Singapore and Malaya sufficiently in advance of the Japanese occupation to enable American property owners to take advantage of them.¹⁴ The United States, which combined a system of voluntary war risk insurance to cover property damage sustained on United States territory other than the Philippines with a system of gratuitous payments for damage occurring prior to the adoption of the insurance system, made policy payments and gratuitous payments to American and non-enemy nationals on equal terms.

Some countries have extended the benefits of their compensation laws to nationals of another Allied country in return for a pledge by the Allied country that their own nationals will receive reciprocal treatment under the laws of the Allied country. The French Government has extended the benefits of its legislation providing gratuitous compensation for war damage to property in France to American and British nationals.¹⁵ The Netherlands Government has recently announced that it grants equal treatment to American nationals in the administration of gratuitous compensation which it provides for its own nationals for war damage to property in the Netherlands.¹⁶

A few countries have indicated that the benefits of their war damage legislation may be extended to foreigners, but do not disclose on what basis the extension will be granted. Shortly after the invasion of Norway a series of laws were enacted of which the law on war risk insurance for buildings may be taken as an example.¹⁷ Every building which was insured against fire on or after April 8, 1940 (the day before the invasion) was automatically covered by war risk insurance. Although this legisla-

¹¹ Australia: See the recital of laws appearing in Part I, National Security (War Damage to Property) Regulations, Statutory Rules 1946 No. 176, published in the *Commonwealth Gazette* on December 5, 1946.

¹² India: The War Risks (Goods) Insurance Ordinance (No. IX of 1940), War Risks (Factories) Insurance Ordinance (No. XII of 1942), and War Risks (Inland Vessels) Insurance Ordinance (No. XXV of 1943).

¹³ New Zealand: War Damage Act, 1941, No. 17, as amended, and Earthquake and War Damage Act, 1944, No. 15.

¹⁴ See reference to Malayan War Risks (Goods) Insurance legislation in paragraph 4 of the Terms of Reference of the Malayan War Damage Commission.

¹⁵ Declaration by United States and French Governments on Commercial Policy and Related Matters, May 28, 1946, Article VII; *Department of State Bulletin*, June 9, 1946, p. 997; Exchange of Notes between British and French Governments on December 3, 1946, British Treaty Series No. 60 (1946). See with reference to filing of claims by American nationals under French law, *Department of State Bulletin*, January 26, 1947, p. 166 and July 20, 1947, p. 143.

¹⁶ *Department of State Bulletin*, August 17, 1947, p. 332.

¹⁷ Order of April 4, 1941 on the War Damage Insurance Corporation for Buildings, published in *Norsk Lovtidend* for 1941, Nr. 15, pp. 200-211.

tion of the Quisling Government has been continued in effect by the present Norwegian Government, the insurance coverage is limited to buildings owned by Norwegian citizens.¹⁸ It is, however, stipulated in the law that "war damage to buildings in this country belonging to foreign citizens may be compensated for, if the King or his authorized representative makes provision therefor."¹⁹ A similar stipulation appears in a more recent Norwegian law which provides compensation for certain types of war losses sustained by Norwegian nationals on Norwegian territory, and not covered by war damage insurance legislation.²⁰ War damage legislation in Denmark has taken a parallel course.²¹

The United States Government in its legislation providing compensation for war damage to property in the Philippines grants compensation benefits to nationals of any non-enemy nation which "grants reciprocal war damage payments to American citizens resident in such countries [country]."²² The Swiss Government is the first government which the Philippine War Damage Commission has determined to have fulfilled the condition of reciprocity.²³ Switzerland had presented to the Commission evidence of its non-discriminatory legislation providing compensation for damage inflicted upon Swiss territory in violation of neutral rights.

Some nations may be obliged to grant equal treatment to nationals of other Allied countries, or even to nationals of neutral countries, by the terms of treaties negotiated prior to World War II. An example of such a treaty is the commercial treaty between the United States and Switzerland of 1850. By the terms of that treaty both Governments agree that:

In case of war, . . . the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.²⁴

The decision of the Philippine War Damage Commission that Swiss citizens are eligible for benefits under the Philippine Rehabilitation Act was not based on the treaty, although reference is made to the treaty in the opinion of the Commission.²⁵

Finally, several countries have encouraged the nationals of the United

¹⁸ Provisional Law of July 19, 1946 on War Damage Insurance for Buildings.

¹⁹ Same, Section 9, para. 2.

²⁰ Provisional Law on Compensation for Certain Damages and Losses as a Result of the War, 1940-1945, effective April 25, 1947, published in *Norsk Lovtidend*, Nr. 15, 1947, pp. 247-251, Section 17.

²¹ See, for example, Danish Law No. 218 of 1940 concerning War Risk Insurance of Household Goods, effective April 30, 1940.

²² 50 USCA 1752(b) (1).

²³ Philippine War Damage Commission, Opinion L-7 of July 8, 1947.

²⁴ Malloy, *Treaties*, Vol. II, p. 1765, Article II.

²⁵ Philippine War Damage Commission, Opinion L-7 of July 8, 1947.

States, if not of other Allied countries, to register with them war damage to property sustained on their territory. Poland, in 1946, encouraged registration of such damage by American nationals, with the assurance that any compensation benefits to be provided would be available to Polish and American nationals without discrimination.²⁶ Belgium has accepted registration of war damage to American property in Belgium.²⁷ The Malayan War Damage Claims Commission accepts registrations of war damage to American property in Singapore and the Malayan Union.²⁸

*Recognition of Responsibility to Provide Compensation
on a Nationality Basis*

In contrast to the trend already described, there has been some recognition that an Allied nation should provide compensation to its own nationals for property damage sustained by them on territory of other allied countries, that is, that compensation should be provided on a nationality basis.

The peace treaties with Italy, Bulgaria, Hungary, and Roumania authorize each of the Allied nations to apply assets within its territory of the enemy country or of nationals of the enemy country to the satisfaction of the claims of the Allied nation or of nationals of the Allied nation against the enemy country. Substantially, if not totally, excluded from the claims to be satisfied from this source are claims of nationals of the Allied country for damage to property in the enemy country for which the enemy country is under a direct obligation to pay two-thirds compensation. The United States has already agreed to release Italian assets in this country, and Italy has agreed to pay to the United States Government before December 31, 1947, \$5,000,000 "to be utilized, in such manner as the Government of the United States of America may deem appropriate, in application to the claims of United States nationals arising out of the war with Italy and not otherwise provided for."²⁹

The United Kingdom has not as yet undertaken to provide compensation for losses of its nationals abroad. Netherlands legislation authorizes the Minister of Finance either to assimilate the rights of Netherlands nationals abroad to those of Netherlands nationals at home, or to assimilate the rights of foreign nationals to the rights of Netherlands nationals with respect to damage sustained on Netherlands territory.³⁰ French legislation leaves the door open to the provision of compensation by the French Government for its nationals abroad by the following sentence inserted in Article 10:

²⁶ *Department of State Bulletin*, June 23, 1946, p. 1083.

²⁷ Same, August 18, 1946, p. 336.

²⁸ Same, August 24, 1947, p. 398.

²⁹ Same, August 24, 1947, p. 376.

³⁰ *Staatsblad* F255 of November 9, 1945, Article 1(3).

... A subsequent law shall determine under what conditions and to what extent French natural and juridical persons who own damaged property abroad and who would not benefit by reciprocal agreements may be compensated.³¹

Several countries accept registration by their nationals of war losses sustained in other Allied countries. The nationals of China, Czechoslovakia, and Yugoslavia are required to register war losses, regardless of the country in which the damage was suffered with the government of the country of which they are nationals.³² The Department of State accepts for possible future consideration, in the event of Congressional action, claims submitted by American nationals for losses suffered in other Allied countries.

Numerous bills were introduced in the first session of the Eightieth Congress with the object of providing compensation for war losses. The only bill reported out of committee was the bill introduced in the House on June 30, 1947 for the purpose, among other things, of creating "a commission to make an inquiry and report with respect to war claims; . . ." ³³ The bill directs the commission not only to estimate the number and amount of war claims, but also to report "the extent to which such claims have been or may be satisfied under international agreements or domestic or foreign laws."

The House Committee on Interstate and Foreign Commerce reported the bill favorably on July 17, 1947.³⁴ The report contains the following statement:

War claims of individual American citizens who have suffered as a result of enemy action are a part of the sum total of claims for reparations against the respective enemy governments. If sufficient assets cannot be secured from such enemy governments to take care of the claims of the American people as a whole and the claims of individual citizens, the Congress of the United States will have to determine, after considering the report and recommendations of the War Claims Commission created by title II of this bill, whether and to what extent individual claims should be paid out of the Treasury in view of the fact that if this bill becomes law, the United States will have been the recipient of the net proceeds resulting from the liquidation of the enemy assets which are available in this country.

Congress adjourned before the bill was put to a vote.

³¹ French Law No. 46-2389 of October 28, 1946.

³² China: See note of January 27, 1947 from Chinese Ministry of Foreign Affairs to American Embassy at Nanking, reported in despatch 541 of March 5, 1947 from Embassy to the Department. Czechoslovakia: Decree No. 54 of August 31, 1945, and Order of the Minister of the Interior of September 3, 1945. Yugoslavia: Decree of Council of Ministers of April 2, 1945 (Official Gazette No. 20 of April 10, 1945) and Rules issued by Premier on June 10, 1945 (Official Gazette No. 44 of June 26, 1945).

³³ H. R. 4044, 80th Congress, 1st Session.

³⁴ House Report No. 976, 80th Congress, 1st Session.

II. THE PRINCIPLES

The reason for the development of two inconsistent bases for providing compensation for war damage to property of a national of one Allied country in territory of another Allied country lies in the fact that different principles are applicable to the distribution of compensation funds depending on whether the funds are derived from external or internal sources. External sources are reparations from enemy countries, which may consist of equipment, ships, or assets of enemy nationals. Internal sources are either voluntary payments for governmental insurance against war damage, compulsory contributions exacted from the owners of property subjected to the risk of war damage, special taxes for rehabilitation purposes, or revenues from general taxation.

Once it is recognized that funds for the compensation of war damage are derived from two sources, the reason for the growth of two different bases for providing compensation becomes apparent. Nationality is the basis usually employed in distributing funds derived from intergovernmental claims. The territorial basis is usually employed in distributing funds derived from taxation or other internal sources.

The Distribution of Compensation Funds Derived from Reparations

The question of which government should distribute reparations received from an enemy country for war damage to private property, the government of the country of which the property owner is a national or the government of the territory on which the property was situated at the time of damage, cannot be answered without asking another question. On what basis should claims be presented against enemy governments for war damage to private property, the nationality basis or the territorial basis? The basis used in distributing the proceeds of the claim should, of course, be the same as the basis used in presenting the claim.

The rule customarily followed in international law is that a government may present only the claims of its own nationals against another government.

The first essential of an international claim is a showing that the claimant is entitled to the protection of the state whose assistance is invoked. Aside from the special situation of alien seamen and aliens serving in the armed forces, concerning which considerable confusion exists, it is well settled that the right to protect is confined to nationals of the protecting state.³⁵

But when the claim is for a wrong committed by one state to property on the territory of a second state owned by a national of a third state, which is the protecting state, the state of which the property owner is a national or the state within which his property is situated?

³⁵ G. H. Hackworth, *Digest of International Law*, 1943, Vol. V, p. 802.

When a Frenchman sought compensation for damage inflicted by a British cruiser during the Civil War upon property aboard an American ship out of the fund paid by Great Britain to the United States pursuant to the Geneva award, his claim was allowed, and so were the claims of numerous other persons not citizens of the United States.³⁶ The reason for allowing the claims of foreigners was stated by the Claims Court as follows:

A foreigner may be entitled to protection either as to his person or as to his property, or both. If he is within this country, or on the deck of one of our vessels, his person and his property with him are under our protection. And if his property alone is within this country it is entitled to and everywhere receives the same protection as the property of citizens; and so of the property of an alien nonresident upon the seas in an American vessel, this government has always extended to it the same protection as to that of citizens.³⁷

When the French Government espoused claims of French citizens whose property was damaged during the bombardment of Greytown, Nicaragua, in 1854 by United States forces, Secretary of State Marcy rejected the claims not only because the United States considered the bombardment to have been justified, but also because claims for such damage should only be presented by the government of Greytown. It was not certain who was wielding sovereign power in Greytown, but, said Secretary Marcy,

... it was for them to complain of the proceedings of the United States towards the people at that place, and to make reclamation, if any was due, for injuries to foreigners whom they had received within their jurisdiction, and whom they were consequently under obligation to protect.

.....

The strength of the positions herein taken are not impaired by the fact that in some cases the claimants might be turned over for redress to a feeble power. It should be recollected that in this instance it was to such a power, without anything in its character or composition to justify confidence, that the applicants committed their property, and they can not reasonably ask to have a well-settled principle of international law changed in order to meet the exigency of their case.³⁸

During the negotiation of the peace treaties with Italy, Bulgaria, Hungary, Roumania, and Finland it was apparently recognized that each Allied country was responsible for presenting the claims of its nationals for war damage caused by those enemy countries. In each treaty the Allied Governments declare that certain rights attributed to them "cover all their claims and those of their nationals for loss or damage due to acts of war."³⁹ Each Allied Government is authorized to apply the proceeds

³⁶ Moore, *International Arbitrations*, 1898, Vol. III, pp. 2350-2360.

³⁷ Same, p. 2353.

³⁸ Moore, *Digest of International Law*, 1906, Vol. VI, p. 934.

³⁹ See, for example, Article 80 of the Italian treaty.

obtained from the liquidation of enemy assets in its territory to the satisfaction of its claims "and those of its nationals."⁴⁰ In the understandings concluded in August, 1947 between Italy and the United States, Italy agreed, in return for the release of Italian assets in the United States, to pay \$5,000,000 to the United States to be applied to the "claims of United States nationals arising out of the war with Italy."⁴¹

The agreement reached at the Paris Conference on Reparation in November and December, 1945, also provides that each Signatory Government shall regard the share of reparation allocated to it under the agreement, "as covering all its claims and those of its nationals against the former German Government. . . ."⁴² But when the Conference unanimously resolved that equal treatment should be granted by each Allied government to its own nationals and the nationals of any other Signatory Government in the administration of compensation for war damage to property on its territory, the Conference adopted a principle inconsistent with the theory that a nation presents the claims of its nationals only. A nation cannot be expected simultaneously (1) to grant equal treatment to foreigners in the administration of compensation for war damage to property on its territory, and (2) to present against enemy governments only the claims of its nationals.

The report of the United States representative at the Paris Conference discloses that it was the United States delegation which initiated the resolution on equal treatment. The report continues:

The question of whether foreign investors should look to their own Government or to the nations in which their properties were located for compensation was complicated by the fact that different nations used different bases in the computation of war damages for reparation purposes. Both the United Kingdom and French claims data included all war damage incurred on British and French soil, respectively, without regard to the nationality of owners of damaged property, but nothing for damage to British and French properties abroad. On the other hand, the United States claims data included war damage suffered by United States property holders wherever located. In Tripartite discussion between the United States, British and French delegates it was agreed that the United States data on claims representing war damages would only be for that part of such damages as was not satisfied by compensation benefits from other countries."⁴³

No issue was made of the basis for presenting claims for war damage to private property at the Paris Conference because such claims were only

⁴⁰ See, for example, Article 79 of the Italian treaty.

⁴¹ *Department of State Bulletin*, August 24, 1947, p. 376.

⁴² Final Act of Paris Conference on Reparation, Part I, Article 2A, Department of State Publication No. 2584, *The Distribution of Reparation from Germany*, p. 12.

⁴³ Unclassified portion of *Final Report on the Paris Conference on Reparation*, submitted to the Secretary of State by James W. Angell on February 18, 1946, p. 123.

a small fraction of the total monetary losses claimed, and monetary losses were only one of the factors considered in allocating reparations.⁴⁴ It is doubtful that any country's share of reparations would have been substantially affected by a shift from the territorial basis to the nationality basis, or *vice versa*, in the presentation of claims. No allocation has yet been made of reparations from Japan, but it is unlikely, in view of the announced policy of the Far Eastern Commission to determine shares on a "broad political basis," that an issue will be made of the question whether a government should put in its claims on a territorial or nationality basis.⁴⁵

The fact that a country provided compensation for war damage on a territorial basis while the war was in progress is, of course, a strong reason for that country to insist that any reparations payable for damage on its territory be paid to it. Great Britain has provided compensation on a territorial basis and has insisted on the right to receive compensation on a territorial basis. The United States may be expected to insist that any reparations payable by Japan for war damage to property in the Philippines be paid to it since the United States has undertaken to provide compensation on a territorial basis in the Philippines.

The decision as to which of two governments may present a claim may have a substantial effect upon the amount a claimant recovers. Whatever system is used to calculate how much reparations a government has received for war damage to property, it may be expected that each government will receive a different percentage of the total amount of its claim. Governments may adopt different conclusions as to the classes of property owners who are entitled to share in reparations funds. Governments differ in their ability to administer compensation. And, in days of exchange control, the currency in which compensation is payable will make a difference.

It is doubtful that claims for damage to property caused by one state to property in a second state which is owned by a national of a third state should be presented on a nationality basis. But it is because such claims are, and have been, so presented, that there is a tendency to provide compensation for war damage on a nationality basis.

The Distribution of Compensation Funds Derived from Taxation

Distribution of compensation funds which a country derives from internal sources through insurance premiums, special assessments, or general taxation, is generally made to all property owners who can be included in the insurance scheme or the taxation system, that is, to all owners of property situated within the territory of the country.

⁴⁴ See article by John B. Howard, *The Paris Agreement on Reparation from Germany*, Department of State Publication No. 2584.

⁴⁵ *Department of State Bulletin*, June 1, 1947, p. 1069.

There is a strong moral, if not a legally enforceable, obligation upon a government not to levy taxes upon property owners of all nationalities to provide benefits for property owners of its own nationality. When the French Government in 1945 levied a "solidarity tax" upon all property in France in order to raise funds for the reconstruction of war damaged property, American owners of property in France protested against the exclusion of foreign-owned property from a share in the reconstruction benefits. The injustice of the threatened discrimination by France was cited in the discussion of the equality of treatment resolution at the Paris Conference on Reparation.⁴⁶

Commercial treaties between the United States and a large number of countries contain a provision substantially similar to the following:

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.⁴⁷

The type of discrimination against which such a provision is aimed is that in which a government levies higher taxes on foreign-owned than on domestic-owned property in order to provide the same governmental benefits for both types of property.

Discrimination also exists, however, if a government taxes both types of property at the same rate in order to provide greater governmental benefits for domestic-owned than for foreign-owned property. An effort to strike at this type of discrimination appears in the commercial treaty between the United States and Belgium of 1875, which is still in force. The treaty adds to the sentence which forbids the levying of higher taxes on citizens of one of the two States than are levied on citizens of the country in which they may be, the following clause:

. . . and the privileges, immunities and other favors, with regard to commerce or industry, enjoyed by the citizens or subjects of one of the two States, shall be common to those of the other.⁴⁸

Discrimination is easy to recognize if a government raises funds for war damage compensation by special taxation on all property and pays benefits only for domestic-owned property. It exists, though the demonstration of its existence is difficult, if compensation funds are taken out of revenue from general taxation levied without distinction as to the nationality of the property owner, and benefits are paid only to property owners who are nationals.

⁴⁶ Unclassified portion of *Final Report on the Paris Conference on Reparation*, submitted to the Secretary of State by James W. Angell on February 18, 1946, p. 124.

⁴⁷ Hackworth, *Digest*, Vol. III, p. 577.

⁴⁸ Article I; Malloy, *Treaties*, Vol. I, p. 91.

The existence of discrimination is still more difficult to demonstrate when a government raises funds by taxation derived from one part of its territory to pay benefits for damage sustained in another part of its territory. Out of funds which the United States Government has raised by levying taxes in the United States, irrespective of the nationality of the taxpayer, there is authorized to be appropriated \$400,000,000 to provide compensation for war damage to property in the Philippines. The restriction of this compensation to American and Philippine nationals would appear to be discriminatory. It may be argued that the United States is under no duty to provide benefits for property in a territory which has become independent. But it may also be argued that, if the United States undertakes to provide such compensation out of taxes levied on American-owned and foreign-owned property alike, it should distribute compensation benefits to American-owned and foreign-owned property alike.

The obligation not to discriminate in taxation on grounds of nationality is not the only reason why nations adopt the territorial basis in distributing compensation for war damage derived from internal sources. Compensation so derived is not distributed on a nationality basis because a nation is reluctant to assume responsibility to provide benefits for its own nationals who are beyond the reach of its taxing power and its administrative control. It is readily understandable why the United States Government has not provided war risk insurance for American-owned property in China. It is also understandable why the United States has not undertaken to raise funds by taxation to provide benefits for Americans who suffered war damage to property in China. Since the United States Government cannot tax American owners of property in China, it hesitates to assume an obligation to provide benefits for them by levying taxes on property owners in the United States.

The fact that a property owner must look to the government which has the power to tax his property for compensation derived from funds raised by taxation has, of course, a substantial effect upon the amount of compensation he may recover. But an American owner of property in China has no more grounds for complaint that he is not receiving as much compensation from tax sources as a Chinese owner of property in the United States, than he has for complaint that the Chinese Government does not provide as good police protection or sanitation for him in China as does the United States Government for a Chinese national in the United States.

It is because the provision of compensation for war damage to property from internal sources so closely resembles other governmental functions with respect to which the rights of aliens have been assimilated to those of nationals that there has been a tendency to provide compensation on a territorial basis.

III. THE SOLUTIONS OF THE PROBLEM

If determination of the basis for providing compensation for war damage to the property of a national of one Allied country on territory of another Allied country is left to the independent action of each Allied government, it is possible that some governments will provide compensation on both nationality and territorial bases, some on the nationality basis only, and some on the territorial basis only.

There are obvious drawbacks to unilateral efforts to fix responsibility to provide compensation. Suppose the United States decides to use the territorial basis, but other countries adopt the nationality basis. American nationals will receive no compensation for losses abroad; foreign nationals may be overcompensated for losses on American territory. Suppose the United States decides to use the nationality basis, but other countries adopt the territorial basis. Foreign nationals will receive no compensation for losses on American soil; American nationals may be overcompensated for losses on Allied territory. Suppose the United States decides to use both bases to provide compensation. Some American nationals and some foreign nationals may then be overcompensated.

The danger of over-compensation is not imaginary. The French and Netherlands Governments now undertake to provide full compensation to American nationals for war damage to certain types of property on their territory. If the United States provides compensation for war damage to American property abroad, American nationals with losses to certain types of property in France and the Netherlands will be overcompensated.

A nation cannot avoid the pitfall of overcompensation solely by stipulating, in its compensation legislation, that the amount of benefits payable to any claimant shall be reduced by the amount of compensation he has received, or may receive, from a foreign government. Every government has the natural desire to pay its own nationals only to the extent they do not receive compensation abroad, and to pay foreign nationals only to the extent they do not receive compensation from their own governments. If every government acts upon that desire, the only consolation a war damage sufferer will receive will be a direction from each of two governments to seek his compensation from the other.

There is need for intergovernmental agreement on responsibility to provide compensation. There are only three possible forms which such an agreement may take: agreement to a system of dual responsibility with partial recognition of both the nationality and the territorial bases, agreement to use the nationality basis as the sole basis, or agreement to use the territorial basis as the sole basis.

Provision of Compensation on Both Nationality and Territorial Bases

Under a system of dual responsibility both the government of the country of which the property owner is a national and the government of the territory in which his property was damaged assume responsibility to provide some compensation for war damage.

Any system of dual responsibility to provide compensation for the same damage has serious disadvantages. There is duplication of effort in the assessment of the same damage by two governments. Instead of facing the jurisdictional problems presented by either the nationality or the territorial basis, governments must face the jurisdictional problems of both bases.

The necessity of eliminating the possibility of overcompensation when two governments provide compensation for the same damage obliges the two governments to agree that either the nationality, or the territorial, basis is the primary basis for providing compensation, and that the alternate basis is to be used only as a supplementary source of compensation. For example, China and the United States might agree that the nationality basis is the primary basis, that is, that either government could deduct from any compensation which might become payable on a territorial basis whatever amounts the nationals of the other were entitled to receive from their own government. France and the United States might agree that the territorial basis is the primary basis and that either government could deduct from any compensation which might become payable on a nationality basis whatever amounts its nationals were entitled to receive from the foreign government.⁴⁹

If, however, the United States stands ready to agree with some countries that the nationality basis should be used as the primary basis, and with other countries that the territorial basis should be used as the primary basis, the United States will not be able to determine the size of the fund needed to provide full compensation, nor the percentage of compensation afforded by a given fund, either for Americans in other Allied countries or for nationals of other Allied countries in the United States, until the United States knows the primary basis adopted by each Allied country and the amount of compensation provided on that basis.

Suppose, on the one hand, that the United States wants to provide compensation for American nationals abroad. No estimate can be made of the aggregate of damage for which compensation will have to be provided until the United States knows every one of the other Allied countries which will, pursuant to agreement with the United States, use the territorial basis as the primary basis, and also the amount of compensation provided by each of those Allied countries to American nationals on the territorial basis.

⁴⁹ At present, however, the French Government excludes from compensation damage for which compensation is payable under the laws of any Allied government. Law No. 46-2383 of October 28, 1946, Articles 8 and 17.

Suppose, on the other hand, the United States wants to provide compensation for foreign nationals on American soil. No estimate can be made of the aggregate of damage for which compensation will have to be provided until the United States knows every one of the other Allied countries which will, pursuant to agreement with the United States, use the nationality basis as the primary basis, and also the amount of compensation provided by each of those countries to their own nationals.⁵⁰

If each Allied government pursues a policy of waiting to see what basis of compensation is adopted as primary, and how much compensation is provided by foreign governments, there will be a stalemate. Each government will postpone the establishment of its system of compensation until the other governments have established their systems.

Allied governments would be able to go forward with the provision of compensation on a primary basis if they were able to agree that either one or the other of the two bases would be accepted by all as the primary basis. If all countries agreed that the nationality basis would be primary, each country would merely have to estimate the total losses of its nationals at home and abroad, and provide compensation accordingly. If all countries agreed that the territorial basis would be primary, each country would merely have to estimate the total losses suffered by its own and Allied nationals on its territory, and provide compensation accordingly. But even if provision of compensation on a primary basis might be made without delay, there will be delay in providing compensation on a supplementary basis.

If the United States undertakes to consider the amount of compensation provided by foreign governments it might conceivably eliminate delay in establishing a system of compensation by arranging for the recovery of benefits already paid, in the event that foreign governments subsequently provide compensation. But delay is only one of the difficulties inherent in attempting to supplement the amount of compensation provided by a foreign government.

Let us assume that the United States, wishing to compensate its nationals for losses abroad to the extent that foreign governments do not provide compensation for such losses on a territorial basis, has determined all those countries which provide no compensation for losses to American property on their territory. The United States cannot, then, simply provide compensation for all losses of American nationals in such countries. Even countries which do provide compensation for damage to American property

⁵⁰ The Philippine Rehabilitation Act says nothing about whether the Philippine War Damage Commission may deduct from the benefits payable to an eligible foreign national whatever compensation the foreign national receives from his own government. Should deductions be required, the Commission will not be able to divide the compensation fund among Philippine, American, and Allied claimants until it determines how much eligible Allied nationals will receive from their own governments.

limit the compensation to certain types of property. Articles of luxury, for example, are generally excluded from compensation. On certain types of property some countries pay varying proportions of the amount of the damage. Each country has its own list of the types of property damage for which compensation is payable, and its own standards of compensation.

The United States Government cannot justify the provision of compensation for war damage to an automobile owned by an American national in China, if an American national in France whose automobile was damaged has no way of obtaining compensation for such damage. The United States must, therefore, if it is to establish a supplementary system of compensation on a nationality basis, define the types of property damage compensable and undertake to pay a certain standard of compensation to all American nationals for such damage, with the provision that there shall be deducted from this standard in each case whatever compensation the American national may be able to receive from a foreign government.

The mechanics of deducting the amount of compensation payable by a foreign government from the amount payable by the United States Government is not a simple matter. If the foreign government has not actually paid out compensation to the American national, the United States must decide how much compensation it may be expected to pay out. And then it must determine the difference between two sums, payable in different currencies, at different times, and with different restrictions upon use. The United States must also decide, if it attempts to provide supplementary compensation on a nationality basis, whether American nationals who suffered losses in countries like the United Kingdom where insurance against war damage was available, are entitled to receive compensation from the United States Government if they failed to take out insurance policies.

The Nationality Basis as the Sole Basis for Providing Compensation

Use of the nationality basis as the sole basis means that each Allied government agrees to provide compensation for war damage to property sustained on its territory or on territory of any Allied country only if the property is owned by its nationals. To the extent that the United States undertakes to raise funds for compensation purposes by taxation, it will be faced with two objections to the use of the nationality basis. Foreign nationals will object to being forced to share the burdens of taxation without sharing the benefits. American nationals will object to being taxed to provide compensation for American owners of property in foreign countries who will be sharing the benefits of taxation without being subject to its burdens.

To the extent that other Allied countries raise funds for compensation purposes by taxation, they will be faced with similar objections. American nationals will object to being taxed in foreign countries without receiving

any benefits; nationals of the foreign countries will object to being taxed to provide compensation for fellow-nationals who are not subject to tax.

It is, of course, difficult to demonstrate to what extent a given compensation fund is derived from internal, and to what extent it is derived from external, sources. But there can be little doubt that external sources will be inadequate to supply the measure of compensation which the United States and other Allied countries have already assumed responsibility to provide.

Since reparations are not allocated solely on the basis of monetary losses, there can be no exact formula for determining the amount a nation recovers on its claim against an enemy country for war damage to private property. It might be assumed that the amount recovered for such damage is, roughly, in the same ratio to the total of reparations received as the claim for such damage is to the total of monetary losses claimed. If such an assumption is made, reparations as a source of compensation will be grossly inadequate. The House Committee on Interstate and Foreign Commerce in its report of July 17, 1947 on the bill to create a commission to study the matter of war claims stated:

The position of Germany and Japan (with respect to war claims against these countries) is somewhat analogous to that of a bankrupt against whom claims are apt to be filed in an amount greatly in excess of the bankrupt's assets. The legitimate claims of the United States alone, on account of the expense incurred in fighting World War II, will most likely exceed many times the assets available for payment even over a considerable period of years. . . .⁵¹

It might be assumed that all reparations, or reparations of a particular type such as enemy assets, are received for private war losses. Such an assumption appears to have been made when it was stipulated in the agreement for the release of Italian assets that Italy's payment of 5 million dollars should be used to satisfy private war claims of United States nationals. However, the 5 million dollar fund has been made available for private claimants as a consequence of the waiver of claims of the United States Government. It is difficult to say, therefore, whether the fund should be regarded as derived from external, or from internal, sources.

Even if the application of all reparations to claims for private war losses be regarded as justified, reparations may still be insufficient to provide substantial compensation. Claims for private war losses include claims not only for damage to property but also claims for damage to the person, such as personal injuries and death due to mistreatment of prisoners-of-war and civilian internees. The United States has already committed itself to provide \$400,000,000 worth of compensation for war damage caused by Japan to property, largely of American or Philippine nationals, in only one part

⁵¹ House Report No. 976 on H. R. 4044, 80th Congress, 1st Session, pp. 2-3.

of the area damaged as a consequence of the war with Japan. It is not known whether Japan will be obliged to match that figure with reparations.

It is, of course, not merely a question whether reparations received by the United States will be adequate to compensate all American nationals for their war losses. Adoption of the nationality basis assumes that each Allied country is willing to limit the compensation it provides to the amount of reparations it receives. In view of the much heavier damage sustained by nationals of most of the Allied countries, than was sustained by American nationals, it is not to be expected that other Allied countries will find reparations an adequate source of compensation.

The nationality basis is predicated on the theory that a government should present only the claims of its nationals against an enemy government. If this theory is rejected, there is no theoretical justification for the use of the nationality basis.

Finally, it is already difficult to secure agreement to the nationality basis because so much progress has already been made toward payment of compensation on a territorial basis. Great Britain, the United States, and other Allied countries have for years been collecting premiums from foreign owners of property within their territory for war risk insurance. Gratuitous payments have already been made to foreigners for war damage. A number of countries have entered into agreements to guarantee equal treatment in the administration of compensation benefits. These arrangements cannot easily be undone.

The Territorial Basis as the Sole Basis for Providing Compensation

If the territorial basis were adopted as the sole basis for providing compensation, each Allied country would provide compensation for war damage sustained to property of Allied, as well as its own, nationals situated on its own territory, but would provide no compensation for property of its nationals on territory of other Allied countries.

The objection to this solution of the compensation problem, as already indicated, is that, if reparations are received by a country for damage to property of its nationals in other Allied countries, the government of the country should not refuse to provide compensation for such damage. It has been disclosed, however, that some governments did not put in claims for reparations on a nationality basis. It is also doubtful that the governments which did present claims on a nationality basis thereby secured a significant increase over the share of reparations they would have received if their claims had been presented on a territorial basis.

The question is merely one of the right of a property owner to look to the government of the country of which he is a national to present his claim, rather than to the government of the territory in which his property was situated at the time of damage. Even if governments receive the same

shares of reparations whether they espouse claims on a nationality or on a territorial basis, the individual property owner may have strong reasons for preferring to have his claim presented, and compensation administered, by one government rather than the other. The brief reference to authorities on the point which has already been made indicates that it is doubtful that a property owner has the right to insist that the government of the country of which he is a national present his claim for damage caused by a second government on territory of a third government.

There are important advantages to be derived from placing sole responsibility to provide compensation for war damage upon the government of the territory in which the damage occurred. The chief advantage is that the territorial basis permits governments to tie compensation programs to rehabilitation programs. The burden of providing compensation is so heavy that most countries have not been willing to pay compensation out right. They have insisted that the compensation be used to rebuild or replace the damaged property. To make such insistence effective they have stipulated that compensation will be paid in fractional parts as the work of reconstruction progresses.

By the terms of the Philippine Rehabilitation Act, the Philippine War Damage Commission, to the fullest extent practicable, is to require that lost or damaged property be rebuilt, replaced, or repaired before payments of money are actually made to claimants. If the Commission determines that rebuilding, replacement, or repair is impossible or impractical, the Commission may waive the requirement, but is then to insist that compensation benefits be reinvested in such manner as will further the rehabilitation or economic development of the Philippines.⁵² It would be impossible, however, for a government which pays compensation for war damage to property of its nationals in a foreign country to enforce any requirement that the compensation be used either to repair, replace or rebuild the damaged property, or be invested in such a way as would further the economic rehabilitation of the country in which the damage occurred.

Another advantage of the adoption of the territorial basis is that programs to provide compensation for war damage can be brought into proper relationship with programs for the recovery of property which has been confiscated or looted during the war. Most governments include in their definitions of compensable war damage, damage resulting from confiscatory measures of the enemy or from looting. A determination cannot be made that such a loss has been suffered until there has been a prior determination that the confiscated or looted property is not recoverable. This preliminary determination can be effectively made only by the government of the territory in which the property was situated at the time of loss.

When the Allied countries of Europe were liberated, property taken over from the retreating enemy was placed under the administration of the gov-

⁵² 50 USCA 1754(c).

ernment of the Allied country in which it was found. These governments are now endeavoring to restore such property, if it can be identified, to the rightful owners. In cases where confiscated property cannot be restored, but assets have been recovered of the enemy agency which confiscated the property, some Allied governments, the Netherlands for example, are endeavoring to distribute among the owners a pro rata share of the proceeds from the liquidation of the enemy agency.⁵³ It has also been recognized that property which has been removed from Allied countries by the enemy and which is subsequently found in enemy territory will be returned by the Allied authorities in control of the enemy territory to the government of the Allied country from which the property was taken, regardless of the nationality of the owner of the property.⁵⁴

Since the responsibility for restoring confiscated or looted property has been placed upon the government of the country in which the property was situated at the time of loss, an advantage would be gained by placing responsibility to provide compensation for property which cannot be restored upon the same government. It is not desirable to have the United States assume responsibility to provide compensation for property of American nationals lost or confiscated in the Netherlands when it cannot determine whether the property has been lost or confiscated without consulting the Netherlands Government.

Adoption of the territorial basis, by emphasizing that compensation for war damage to property is derived largely from internal sources, makes it easier for governments to provide the same amount of compensation for damage to property no matter which enemy country caused the damage. When the nationality basis is used, and the emphasis is upon reparations as a source of compensation, there is a tendency, if not an obligation, to pay different proportions of compensation for damage caused by different enemy countries corresponding to the different percentages of recovery on reparations claims against the enemy countries. If it be recognized that compensation should be provided, if not from external, then from internal, sources, no point is perceived in introducing into compensation systems the vexing question of determining which enemy country was responsible for a particular item of damage.

Adoption of the territorial basis places the responsibility to provide compensation upon the government in the best position to assess the damages. It is much easier for the French Government, than for the United States Government, to evaluate damage sustained to property in France.

Administrative difficulties will arise in any attempt to use the territorial basis as the sole basis for providing compensation. There will be the problem of determining the situs of property for purposes of select-

⁵³ See with reference to the Netherlands, *Department of State Bulletin*, August 10, 1947, p. 299.

⁵⁴ Same, June 15, 1947, p. 1161.

ing the responsible government. Should a government provide compensation for movable property which was damaged while in transit through its territory? Should a government provide compensation for diplomatic and consular property of another government, or for property of foreign service officers or members of the armed forces of another government? It is believed the solution of these questions might properly be found by fixing the situs of property for compensation purposes in the same country in which its situs is fixed for taxation purposes. At any rate no administrative difficulties come to mind which would be insuperable.

It is not intended in this article to minimize the problems which must be faced in providing compensation on a territorial basis. It is contended, however, that the problems are easier to solve than those which must be faced if compensation is provided on a nationality basis or on a combination of the two bases.

THE NUREMBERG TRIAL AND THE INTERNATIONAL LAW OF THE FUTURE

By F. B. SCHICK *

Among the most controversial features of the Nuremberg Trial have been the repeated efforts of the Allied Powers to prove that the law created by the London Agreement and the Charter of the International Military Tribunal attached to this Agreement¹ was but declaratory of already existing rules of general international law, and that the verdict of the Tribunal, apart from its immediate purpose of retribution, must be considered as the first attempt in history to establish a legal precedent destined to act as a powerful deterrent against possible future resort to illegal war.² The *Final Report on the Nuremberg Trial*, submitted by the American Representative to the President of the United States, reiterates these dominant ideas by declaring: "The four nations, through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct . . . by which the Germans have been condemned" and which "will become the condemnation of any nation that is faithless to them."³ Moreover, this document emphasizes what is termed "the power of the precedent" by asserting that "no one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction."⁴

It is true that prominent international jurists have advanced the theory that individual punishment to be inflicted upon leading personalities found guilty of grave violations of international law, and particularly of resort to illegal war, can have a deterrent effect upon those potential law breakers who actually are in a position to lead their nations into war.⁵ It is highly

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¹ For the text of the London Agreement see *Nazi Conspiracy and Aggression*, Office of the U. S. Chief of Counsel for the prosecution of Axis criminality, U. S. Government Printing Office, Washington, 1946, 8 vols., Vol. I, pp. 1-3; for the Charter of the International Military Tribunal see same, pp. 4-11.

² Mr. Justice Jackson, "Summary Review of the Indictment and the Charter and Their Legal Foundations," in *The Trial of German Major War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, H. M. Stationary Office, London, 1946 (hereinafter called *Proceedings*), Part 1, p. 85.

See also Sir Hartley Shawcross, Opening Speech, in *Proceedings*, Part 2, p. 46.

³ *Prosecution of Major Nazi War Criminals*. Final report to the President from Supreme Court Justice Robert H. Jackson, in *Department of State Bulletin*, Vol. 15 (October 27, 1945), p. 776.

⁴ Same, p. 774.

⁵ Baron Descamps, in Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, The Hague, 1920, pp. 49, 129.

questionable, however, whether this theory of criminal law, which has been rejected by many authorities even with regard to the highly developed field of municipal law, can produce effective results in the realm of international relations. This doubt, in fact, was already advanced as one of the main objections to the creation of an international criminal jurisdiction at the meeting of the International Law Association which convened in Stockholm in 1924.⁶ It is hard to see why this view should be less valid now than it was some twenty years ago, especially if one agrees with a leading American authority that "the United Nations is too weak today to assure us of the security we wish."⁷ Moreover, it may be pointed out that it is the law-abiding individual rather than the prospective criminal who is impressed by the penal sanctions attached to violations of legal obligations.⁸ Self-centered as the criminal usually is he rarely takes into consideration the fact that his venture might possibly fail, and that deprivation of his life, liberty or property might ensue.⁹ This, it may be observed, is particularly the case where an attempt is made to restrain individuals, acting as leading state officials, by the somewhat remote possibility of having to answer—before an international criminal court of the future—for their present day conduct, especially if the conduct of such officials should have been considered as just and patriotic by powerful groups among their own countrymen. In support of this view attention may be drawn to the well-known fact that acts of war treason and espionage are committed out of purely patriotic motives in spite of the previous knowledge that capture by the enemy may be tantamount to capital punishment. (Certainly the prospect of this most severe of all sanctions has had scarcely any deterrent effect upon the perpetrators of these acts) Hence it would be more realistic to expect that the creation of individual criminal responsibility can even to a lesser degree prevent the commission of acts in violation of international law, and particularly of resort to illegal war, whenever the latter should be considered of vital national interest. What counts in these cases is not the remote possibility of punishment but the likelihood that the venture will be crowned by success. While this conception is rejected by the Charter of the International Military Tribunal the policy-framing authorities of the prosecuting nations clearly recognized that the desired preventative effect of the Nuremberg Trial could take place only if assurances could be given—and carried out—that the legal

⁶ Sir John Fischer Williams, "A 'New' International Law," in *International Law Association, Report of the 32nd Conference*, London, 1925, p. 435.

⁷ Clyde Eagleton, "The Beam in Our Own Eye," in *Harpers Magazine*, Vol. 192 (June, 1946), p. 481.

⁸ See for instance Julia Johnson, ed., *Capital Punishment*, New York, 1939. See also Nathaniel Cantor, *Crime and Society*, New York, 1939, and Thorsten Sellin, "Common Sense and the Death Penalty," in *Prison Journal*, October, 1932, p. 12.

⁹ Harry E. Barnes and Negley K. Teeters, *New Horizons in Criminology*, New York, 1943, pp. 426-435.

principles proclaimed by what has been called the "basic charter in the international law of the future"¹⁰ will apply to victors and vanquished alike. Hence, it was only consistent to state in a review of the Trial that "no one of the prosecuting nations can long depart from these standards in its own practice without inviting the condemnation and contempt of civilization."¹¹

One will agree with the prosecuting Powers that their legal policy inaugurated at Nuremberg can produce lasting effects only if these Powers should prove their willingness to apply the "international law of the future" also in cases involving nationals of Members of the United Nations, and among them particularly nationals of the leading victorious Powers. To be sure, the Charter of the International Military Tribunal is applicable only to "the major war criminals of the European Axis."¹² No international treaty exists giving effect to the principles proclaimed at Nuremberg as far as concerns nationals of the victorious Powers; nor have any of these Powers enacted legislation incorporating these principles in their respective municipal codes. Consequently one will be inclined to turn to the constitutional law of the United Nations and the Statute of the International Court of Justice in order to discover in these documents the incorporation of the basic concepts solemnly instituted at Nuremberg or at least indications that such incorporation may be expected. The preliminary questions, therefore, are: First, it is possible to consider the enforcement measures "for the maintenance of international peace and security" provided by the Charter of the United Nations as legal sanctions and, if so, do these provisions create individual criminal responsibility for violations of obligations accepted under the Charter? Secondly, has the International Court of Justice jurisdiction over individuals for violations of international obligations, and especially for violations of the Charter of the United Nations?

One will readily observe that it is the Security Council which, as far as coercive measures are concerned, is empowered to discharge its "primary responsibility for the maintenance of international peace and security"¹³ in accordance with the provisions of Chapter VII of the Charter. To be sure, the latter apply only and solely to collective entities, that is to states; they were never intended to apply to individuals. Even as regards states a prerequisite for any enforcement action is a decision of the Security Council which, as is well known, must be arrived at in conformance with the voting procedure stipulated by Article 27. Since a decision establishing the fact that an obligation under the Charter has been violated re-

¹⁰ *Prosecution of Major Nazi War Criminals*, p. 774.

¹¹ Text of the address of Justice Jackson at the University of Buffalo, in *New York Times*, October 5, 1946, p. 4.

For a similar view see "Report from Francis Biddle to President Truman," in *The Department of State Bulletin*, Vol. 15 (November 24, 1946), pp. 956-957.

¹² Charter of the International Military Tribunal, Article 1.

¹³ Charter of the United Nations, Article 24, section 1.

quires "an affirmative vote of seven members including the concurrent votes of the permanent members"¹⁴ it may be concluded in advance that the coercive actions envisaged by Chapter VII can not be invoked against any one of those very same states which through the mouth of their Prosecution went far beyond the scope of the Charter of the United Nations by asserting that the principle of individual criminal responsibility established by the Charter of the International Military Tribunal, in order to create a deterrent effect in the future, would have to be applicable also against nationals of the victorious nations. As far as these states are concerned even the enactment of collective sanctions, or enforcement measures, only against states in accordance with Articles 41, 42, and 45, is excluded under the Charter since the conditioning fact permitting such coercive actions, namely the decision that an obligation of the Charter has been violated, can not be established by the Security Council. As regards states not protected by the so-called "veto power" no doubt exists that the Charter of the United Nations authorizes enforcement action whenever the Security Council should "determine the existence of any threat to the peace, breach of the peace, or act of aggression."¹⁵ In order to consider any such decision as the legal basis for possible sanctions provided for by Articles 41, 42, and 45, it would seem necessary to accept a strictly positivist view-point according to which any conduct of a state declared by the Security Council to be a threat to the peace, or breach of peace, constitutes a violation of the Charter and, as such, the legal condition for the application of collective sanctions.¹⁶ It is obvious that such a decision presupposes agreement among the permanent Members of the Security Council. Lack of agreement among the principal Powers entrusted with the task of taking joint action under appropriate circumstances will mean that "the most important function of the Organization, the function which forms the core of the Charter, can not be performed."¹⁷ Moreover, it is not difficult to foresee that lack of agreement among the holders of military power might offer parties to a vitally important dispute the perhaps desired opportunity of invoking the right of self-defense as stipulated by Article 51. It is true that the Charter of the United Nations permits military action in self-defense only "if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." It is however, perfectly clear that these measures can not be taken in cases involving, directly or indirectly, opposing interests of the major

¹⁴ Charter of the United Nations, Article 27, section 3.

¹⁵ Article 39.

¹⁶ For an analysis of Chapter VII of the Charter of the United Nations see F. B. Schick, "War Criminals and the Law of the United Nations," in *The University of Toronto Law Journal*, Vol. 7 (Lent Term, 1947), pp. 57-65.

¹⁷ H. Kelsen, "Sanctions in International Law under the Charter of the United Nations," in *Iowa Law Review*, Vol. 31 (May, 1946), at p. 537.

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Powers. Apart from this fact, it ought to be observed that the decision as to whether or not the "inherent right of self-defence" may be invoked is left to each state, since the question of fact concerning the occurrence of an armed attack is answered by each state concerned and not by a competent supra-national authority. When considering that the Charter of the United Nations permits also the use of military force as a measure of collective self-defence it would seem possible to interpret Article 51 as to mean that a state may resort to war not only when directly attacked but also in accordance with its inherent right to collective self-defence, whenever such state asserts that an armed attack has occurred against any other Member of the United Nations.

Council for the Nuremberg defendants advanced the argument that every state may resort to war in self-defence, and that international law accords every state the right to decide for itself whether such a war is waged in self-defence.¹⁸ The Allied Prosecution, while admitting the validity of the principle of self-defence, pointed out that it does not apply to the facts of the case before the International Military Tribunal.¹⁹ As far as the general application of the principle in question is concerned the Prosecution pointed out that the right of self-defence, particularly with regard to the reservations made with it by nearly all of the prosecuting Powers in the Pact of Paris, "does not impair the capacity of a Treaty to create legal obligations against war."²⁰ The right of self-defence, quite to the contrary, means that a state "in the first instance" has the right to decide whether there is danger in delay and whether immediate action to defend itself is imperative. But, as emphasized by the Prosecution, the state "acts at its peril" since the state is "answerable if it abuses its discretion, if it transforms 'self-defence' into an instrument of conquest and lawlessness. . . ." ²¹ Although the idea was advanced that the ultimate decision as to the lawfulness of action claimed to be taken in self-defence does not lie with the state concerned, the Allied Prosecution did not say to whom a state is "answerable" for such action. In the absence of any legal obligation to submit this question to an impartial authority, and in the absence of any international agency or court with compulsory jurisdiction competent to decide whether the right of self-defence may be invoked the interpretation made by the Allied Prosecution, in fact, amounts to the admission that it is the right of the victor to decide whether or not the vanquished resorted to war in self-defence; or can anyone expect that the vanquished would be permitted to sit in judgment over the

¹⁸ See for instance Professor Jahrreiss as quoted in *The Trial of German War Criminals*. . . Speeches of the Prosecution at the close of the case against the individual defendants (hereinafter cited as *Closing Speeches*), p. 23.

¹⁹ Same, p. 23.

²⁰ Same, p. 56.

²¹ *Closing Speeches*, p. 56.

victor? Since the Prosecution supported its arguments by reference to the Covenant of the League of Nations and to Article 51 of the Charter of the United Nations it might, perhaps, be stated that neither one may be construed as having constituted legally binding obligations on Germany with regard to her acts allegedly committed in self-defence at the outbreak and during the last war. Moreover the analogy by the Prosecution that Article 51 of the Charter of the United Nations "leaves to the Security Council the power of ultimate action and determination"²² does not apply, as shown in the foregoing, to disputes or situations involving states with permanent seats on the Security Council; and even as far as smaller states are concerned the Security Council's "power of ultimate determination" is qualified by the provisions of Article 27, sec. 3, just as the Security Council's "power of ultimate action" is rendered nugatory, at least at the present time, by the lack of special agreements which, in accordance with Article 43, are the prerequisite for any enforcement action of the Security Council.

It is certainly true that Article 13 of the Charter of the United Nations offers the leading Powers, and beyond them all Members of the United Nations, an opportunity to encourage "the progressive development of international law" by recommending such changes of the Charter of the United Nations as are necessary in order to establish individual criminal responsibility for the commission of all those acts enumerated as crimes by the Charter of the International Military Tribunal, and above all, for resort to illegal war. The enactment of these recommendations, it ought to be realized, presupposes the creation of a permanent international criminal court with unqualified compulsory jurisdiction over states and individuals as well. The discussions during the United Nations Conference on International Organization (Commission IV, Committee 1 and 2) leave no doubt that the leading nations are not prepared to consider such proposals at the present time. While Article 93 of the Charter of the United Nations stipulates that all Members of the Organization are "*ipso facto* parties to the Statute of the International Court of Justice" the latter contains no provisions whatsoever which could be interpreted as conferring upon the Court jurisdiction over individuals. Quite to the contrary, Article 34, sec. 1, of the Statute expressly declares that "only states may be parties in cases before the Court." Obviously this provision excludes the application of the principles solemnly proclaimed at Nuremberg by the victorious Powers and incorporated into the Charter of the International Military Tribunal. Moreover it is to be noted that effective exercise of compulsory jurisdiction of the International Court of Justice over states will also depend upon the reservations which may be attached to the possible declarations envisaged by Article 36, sec. 2, of the Statute, declara-

²² Same, p. 56.

tions the existence of which are the prerequisite for any compulsory jurisdiction. Thus the declaration made, for instance, by the United States in pursuance to Article 36, sec. 2, of the Statute of the International Court of Justice contains the specific reservation that the compulsory jurisdiction of the Court shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States."²³ Obviously such qualifying stipulations are likely to render nugatory the effective application of the compulsory jurisdiction clause in nearly all important cases. Furthermore the Court's compulsory jurisdiction extends only over "legal disputes," excluding therefore all so-called "political disputes," which, *it is well known*, constitute the great bulk of all those contentious cases which are likely to lead to war; and it is important to observe in this connection that it was exactly the political attitude of the German defendants, such as the creation of the Nazi Party and other militant organizations, and the commission of "Crimes against Peace" which formed the most important part of the indictment against the accused. Everything else in the Nuremberg Trial, as stated by the United States Prosecution, was only "incidental, or subordinate to the supreme crime against peace."²⁴ This view was also confirmed by the International Military Tribunal itself when in its judgment it declared that "to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."²⁵

Finally, attention should be called to the fact that even in those cases where the International Court of Justice might be in a position to render a verdict against a state the execution of the latter will depend upon action of the Security Council whenever the convicted state should refuse to comply with the decision of the Court. It is doubtful whether the Security Council is legally permitted to take any enforcement measures against a state which fails to perform the obligations incumbent upon it under a judgment rendered by the Court, unless the Security Council should decide that non-compliance with such a judgment constitutes a threat to the peace or breach of the peace as stipulated by Article 39 of the Charter. Even in such a case the Security Council may make recommendations, or decide upon enforcement measures differing from, or even in disregard of, those which would be necessary for the faithful execution of the verdict of the International Court of Justice.²⁶ It would seem necessary, there-

²³ *Congressional Record*, Vol. 92, No. 154, p. 10850.

²⁴ *Proceedings*, Part 1, p. 143.

²⁵ *Nazi Conspiracy and Aggression*, as cited. *Opinion and Judgment*, Washington, 1947, p. 16.

²⁶ F. B. Schick, "Court and Council of the United Nations," in *Modern Law Review*, Vol. 9 (July, 1946), pp. 103-104.

fore, to admit that the legal doctrines, proclaimed at Nuremberg as being applicable to victors and vanquished alike, have not as yet been incorporated into the law of the United Nations. It is very doubtful whether such changes, involving, as they would, a complete revision of the Charter of the United Nations, are possible at present.

As shown in the foregoing, the prosecuting Powers emphasized particularly that the creation of a legal precedent was the overall purpose of the Nuremberg Trial.²⁷ Unless one is prepared to use the term "legal precedent" in a somewhat vague and perhaps popular manner, denoting, perhaps, a salutary political example to be followed by victorious nations in the future, it appears necessary to call attention to the fundamental fact that any future verdict pronounced in a similar case, and based on the "Nuremberg precedent" presupposes, of course, the existence of a court competent to try such a case. It is well to remember that the International Military Tribunal was created only for the "just and prompt trial and punishment of the major war criminals of the European Axis."²⁸ The decision of the prosecuting Powers to conduct further trials before their respective municipal courts implies that the International Military Tribunal has, in effect, ceased to continue its functions. As pointed out, no international court is in existence which has jurisdiction over individuals for crimes such as stipulated by Article 6 of the Charter of the International Military Tribunal. (Hence, such a court would have to be created by means of an international treaty which, it is quite obvious, could directly obligate only its signatories. It is an elementary principle of international law that such a treaty would have to define the jurisdiction of the court. This means, of course, that the law binding upon the court would have to be incorporated into the statute establishing the court. The idea of having established by means of the Nuremberg Trial a legal precedent binding upon courts of the future, borrowed, as it seems, from municipal law analogies, therefore must be considered as erroneous. It is, however, quite possible that the Nuremberg Trial will be claimed by victorious nations of the future as a welcome political precedent for the trial and punishment of their vanquished adversaries. Hence it is to be feared that the Nuremberg Trial may, in the long run, produce certain legal effects contrary to the sincere intentions officially proclaimed by the prosecuting Powers. While it is true, as stated by the United States Prosecution, that "every custom has its origin in some single act"²⁹ one may express the hope that the alleged right of our own day "to institute customs and to conclude agreements which will themselves become sources of a newer and strengthened International Law"³⁰ will, in the future, be

²⁷ Above, pp. 1-2.

²⁸ *Nazi Conspiracy and Aggression*, Vol. I, p. 4.

²⁹ Mr. Justice Jackson, Opening Speech, in *Proceedings*, Part 1, p. 81.

³⁰ Same.

applied in strict conformance with the prevailing rules of the law of nations. One might, perhaps, add that such hope is supported by the fortunate fact that customs are not, as the Prosecution proclaimed, instituted by a single act; it needs many acts committed in the conviction that they are, according to legal principles, "obligatory and right,"³¹ before it would seem possible to consider them as expressive of an international custom. It is highly questionable, indeed, whether this century-old rule could be disregarded with regard to the "systematic international law pertaining to war" by asserting that the latter is of "relative recent development" and that "the time-requirement for the legal validity of custom in that field must, correspondingly, be telescoped."³² Such youthful aspirations are not supported by the generally accepted rules of positive international law. Moreover, the attitude of the victorious Powers reflected in the Charter of the United Nations is not propitious to such an interpretation.

Although the Allied Prosecution declared repeatedly that the provisions of the Charter of the International Military Tribunal must not only be considered as "conclusive" upon the Judges and the Prosecution but also upon the defendants, leading jurists as well as Counsel for the Defence challenged the jurisdiction of the Tribunal from the very beginning. The cardinal question, therefore, may be formulated as follows (Did the London Agreement confer upon the International Military Tribunal jurisdiction over the defendants in accordance with existing rules of international law?) An affirmative answer to this question presupposes either the consent by treaty of Germany to the trial of her nationals before the International Military Tribunal, or the existence of rules of customary international law permitting the application of the stipulations laid down in the Charter of the International Military Tribunal.

It is, unfortunately, not possible to prove that any German government of the Hitler régime ever consented to the Nuremberg Trial.³³ It would seem, therefore, that the London Agreement and the Charter attached thereto, constitute a unilateral act of the Allied Powers committed without regard to the long established practice of states or the generally accepted rules of international law.³⁴ It is of greatest importance to emphasize this point of view since it is the scrupulous observation of this

³¹ L. Oppenheim, *International Law*, 5th ed., Vol. I, § 17.

³² Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, New York, 1946, p. 38.

³³ F. B. Schrick, "War Criminals and the Law of the United Nations," pp. 30-37.

³⁴ A different interpretation is given by Quincy Wright, "The Law of the Nuremberg Tribunal," this JOURNAL, Vol. 41 (1945), p. 49. In this leading contribution the author, while admitting that "international law does not permit states to administer criminal law over any defendant for any act," declares that "Every states does, however, have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offenses threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction given by the Charter."

fundamental principle of international law prohibiting the unauthorized interference by force of one national legal order in the jurisdictional sphere of validity of another national legal order which alone permits and guarantees the peaceful coexistence of independent states.³⁵

While it is true that the Nuremberg Court may be considered as an International Military Tribunal as far as the signatories of the London Agreement are concerned it would seem more appropriate to speak, with regard to the defendants, of an Inter-Allied court. It is fully recognized that the latter could have tried war prisoners of the enemy for certain violations of international law committed in the course of warfare before their capture. Severe doubts may, however, be raised as to whether the Nuremberg defendants had the status of prisoners of war. No precise definition of this term can be found in the Hague Conventions of 1899 and 1907. If one is prepared to accept, by analogy, the definition of the Geneva Convention of July 27, 1929, concerning the treatment of prisoners of war captured in sea and air warfare, one will find that Article 1, sec. 2, of this Convention stipulates that prisoners of war are "persons belonging to the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war."³⁶ This definition can hardly be applied to the majority of the accused Nazi leaders. With the exception of Rudolf Hess they were arrested by Allied occupation forces after the acceptance of the two General Surrender Documents by the German High Command. They were not taken prisoner in the course of military operations against the armed forces of Germany which, at that time, had already surrendered. If, however, the Nuremberg defendants lacked the international status granted to prisoners of war, it is difficult to see how military courts of the enemy could have exercised jurisdiction over them. Furthermore, the statement describing the control machinery to be exercised over Germany by the four occupant Powers,³⁷ issued at Berlin on June 5, 1945, rendered impossible the application to Germany of the rules of belligerent occupation as provided for in Section III of the Hague Convention No. IV of 1907 concerning the Laws and

³⁵ C. C. Hyde, *International Law*, Boston, 1945 (2nd ed.), Vol. I, § 2B. "Difficulties are encountered when attempt is made to change the law in the face of substantial opposition. It is improbable that, for example, the United States would admit that a large preponderant group of states could through its collective will amend the law and thereby broaden the obligations or curtail the rights of states belonging to another less powerful group without their acquiescence. In a word, changes wrought in the law of nations must receive the approval of the several states affected thereby, that is, of substantially the full international community." See also L. Oppenheim, *International Law*, 5th ed., Vol. I, pp. 15-19, and especially p. 18: "... The body of the rules of this law can be altered by common consent only, not by a unilateral declaration on the part of one state."

³⁶ For a careful analysis of this theory see H. Kelsen, *Peace through Law*, Chapel Hill, 1944, pp. 108-110.

³⁷ *Department of State Bulletin*, Vol. 15, No. 334 (November 10, 1946), p. 852.

Customs of War on Land.³⁸ It would appear, therefore, that the legal basis for the original jurisdiction of the International Military Tribunal could have been created only by means of an international treaty, preferably the Armistice Agreement, in which it would have been necessary to obtain the consent of the German Government to the trial of German nationals, in accordance with the provisions of the Charter of the International Military Tribunal.

The prosecuting Powers, in order to justify the legality of the Nuremberg Trial, advanced the argument that the London Agreement and the Charter of the International Military Tribunal constitute a legislative act of the four occupant states binding upon Germany. This opinion, it appears, is based on the Potsdam Declaration³⁹ of June 5, 1945, according to which the whole legislative and executive power previously exercised by the legitimate German Government of Grand Admiral Doenitz had been taken over, without any restriction, by the governments of the occupant state, that is, the United States of America, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic. The legal consequence of the Potsdam Declaration was that Germany as an independent state ceased to exist. It was replaced by the joint sovereignty of the occupant Powers which established a *condominium* over the German territory and the German population.⁴⁰ This *condominium* is exercised by the Control Council at Berlin, composed of the Commanders in Chief of the Four Powers. No doubt, therefore, exists that the whole legislative, judicial, and executive rights formerly possessed by the German Government are vested in the Control Council. It is true that the four Powers represented on the Control Council and the original Signatories of the London Agreement establishing the International Military Tribunal at Nuremberg are the same. Therefore, it would have been possible for the four Powers desirous of prosecuting alleged German major war criminals to create, by means of a legislative act of the Berlin Control

³⁸ James B. Scott, ed., *The Hague Conventions of 1889 and 1907*, New York, 1918, pp. 122-127.

³⁹ For the text of the Potsdam Declaration see *Department of State Bulletin*, Vol. 15, No. 384 (November 10, 1946), p. 80.

⁴⁰ H. Kelsen, "The Legal Status of Germany According to the Declaration of Berlin" in this JOURNAL, Vol. 39 (1945), p. 518.

According to a different interpretation the occupant Powers have not established a *condominium* and, therefore, have not assumed the legal obligations incumbent upon them under a *condominium*. Following this opinion the four Powers are acting as "trustees" only. This interpretation, however, is legally untenable since the prerequisite for a trusteeship system would have been a treaty concluded between the occupant Powers and Germany. Hence the argument has been advanced that the régime established in Germany is *sui generis* and has no precedent in international law. If this view is accepted one might, perhaps, ask whether it is "the right that flows from victory" which gave the four Powers authority to establish a new form of government which is admittedly not supported by prevailing rules of international law.

Council, a competent German court and to promulgate the law to be applied by this court. Such a procedure, however, was not chosen. The London Agreement by which the International Military Tribunal was established is, as previously mentioned, an Inter-Allied treaty and not a legislative act promulgated by the Control Council. In this Agreement the four original Signatories declare expressly that they are "acting in the interests of all the United Nations."⁴¹ Moreover, the Charter of the International Military Tribunal, which forms an integral part of this Agreement, provides, in Article 1, not only for the trial of Germans but of major war criminals of all European Axis countries. Obviously the Control Council has legislative authority only with respect to the territory over which, in accordance with the Potsdam Declaration, the occupant Powers exercise their *condominium*; it can certainly not promulgate laws binding upon other European Axis countries such as, for instance, Italy or Hungary, which never ceased to have their own national governments. It would seem inconsistent, therefore, to maintain that the London Agreement is also, or implies, a legislative act of the Control Council. The International Military Tribunal, in its judgment, expressed the same opinion when declaring that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered."⁴² It is not stated, one will observe, that the creation of the Charter constitutes a legislative act of the Control Council. It is true that the latter, by means of Control Council Proclamation No. 1 and Control Council Law No. 10 gave, with regard to Germany, retroactive effect to the terms of the London Agreement and the Charter of the International Military Tribunal;⁴³ but the Control Council did not create either one of them. It is noteworthy, however, that Control Council Proclamation No. 1 and Control Council Law No. 10 show the legally correct pattern by which a tribunal competent to try the alleged German war criminals could have been established at the outset. Since the London Agreement cannot be construed as a legislative act of the Control Council one will readily understand the significance attached by the prosecuting

⁴¹ The French Prosecution, quite consistently, it would seem, referred to the Tribunal as having been "established by the four nations signatory to the agreement of 8th August, 1945 . . ." (M. François de Menthon, in *Proceedings*, Part 4, p. 340).

⁴² *Nazi Conspiracy and Aggression*, as cited; *Opinion and Judgment*, p. 48.

⁴³ Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, in *The Department of State Bulletin*, Vol. 15 (November 10, 1946), p. 862, where it is stated that: "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto, . . . the Control Council enacts as follows:

Article 1

The Moscow Declaration . . . and the London Agreement . . . are made integral parts of this law. . ."

For Control Council Proclamation No. 1 see same, p. 859.

Powers to the assertion that the provisions of the Charter of the International Military Tribunal are but declaratory of the generally accepted rules of international law which were in existence before the establishment of the Tribunal. Outstanding among these provisions are "Crimes against Peace" which are defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."⁴⁴ As stated by the Allied Prosecution, crimes against peace constitute "the heart of the case." Little doubt exists that "War Crimes" *stricto sensu*, as well as "Crimes against Humanity," the other groups of charges lodged against the Nazi defendants, "would have little juridical international significance except for the fact that they were the preparation for the commission of aggressions against peaceful neighbouring peoples."⁴⁵ The crime of war may therefore be considered at once the object and the parent of all the other crimes enumerated in the Charter. While it is certainly true that—at present—the planning, preparation, and initiation of illegal war may be declared to be a threat to the peace or breach of the peace under Article 39 of the Charter of the United Nations, international law in existence at the time the Nuremberg defendants committed the incriminated offenses knew of no obligation forbidding nationals of a sovereign state to plan or perform acts which, reviewed retrospectively by the victor, may be considered as having lead to an illegal war. It is not difficult to show the highly problematical value of this innovation since, as a rule, it is impossible to know in advance whether the planning or preparation of certain acts is to promote an illegal war. Nor is it possible to ascertain whether services rendered in times of peace in order to augment the military and economic war potential of a state, and—by doing so—to strengthen national as well as international security, will be construed at some later date as contributions to the planning, the preparation or the initiation of an aggressive war. Or would anyone doubt that the present search for, and the production of, new and more effective weapons, carried on so successfully by scientists, industry, and top-ranking officials of the victorious states under the leadership of the three most powerful of all "peace-loving nations," is being intensified for any but security reasons?

In order to prove that the Nuremberg defendants resorted to aggressive war the prosecuting Powers referred, mainly by means of captured German documents and depositions made by witnesses, to the chain of events starting with the annexation of Austria, the seizure of Czechoslovakia, and leading from then on directly to Germany's war of aggression against Poland. In addition the Prosecution submitted that the numerous international attempts made between 1919 and 1939 to outlaw wars of aggres-

⁴⁴ *Nazi Conspiracy and Aggression*, Vol. I, p. 5.

⁴⁵ Sidney S. Alderman, in *Proceedings*, Part 1, p. 143.

sion, and the resolutions which declared such wars to be criminal, are sufficient proof of a generally accepted practice of states that aggressive wars are not only illegal but that the persons responsible for resort to such illegal wars bear individual criminal responsibility.

No doubt exists that any war resorted to in violation of prevailing rules of international law, and particularly in violation of treaty obligations, may be declared an illegal war. Although it would seem quite difficult—if not ambitious—to give a comprehensive definition of the somewhat popular term “war of aggression” it is quite possible to determine on the basis of positive international law whether or not the resort to, or the provocation of war constitutes a violation of an international obligation. The objective establishment of this legal fact presupposes, however, the existence of a permanent international court or authority empowered to decide without any qualification or reservations this preliminary question. No such international organ with jurisdiction over Germany existed at the time the defendants allegedly violated the Briand-Kellogg Pact and the other treaties enumerated in Appendix C attached to the Indictment against the accused.⁴⁶ As long as the exercise of the right to render this vital decision is reserved to the victor his verdict, pronouncing that the vanquished resorted to an illegal war, will constitute a legally problematical and politically hazardous act. However, the decision of the International Military Tribunal that Germany resorted to aggressive war provides, belatedly, the legal justification for the declarations of war against Germany by Poland, the United Kingdom, France, and other states. It is exactly this decision of the Tribunal which confirms the *bellum justum* theory according to which war is permitted only as a sanction, on behalf of the international community, against a state which has violated its international obligations.⁴⁷

Most controversial among the broad legal aspects of the Nuremberg Trial is the basic concept that aggressive war is not only illegal in international law but that those “who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.”⁴⁸ Relying on the provisions of the Briand-Kellogg Pact as well as on “the inter-

⁴⁶ *Proceedings, op. cit.*, Vol. 1, pp. 41–46.

⁴⁷ Hans Kelsen, *Law and Peace in International Relations*, Cambridge, Mass., 1942, p. 35: “. . . according to international law war is forbidden in principle. It is permitted only as a reaction against an illegal act, a delict, and only when directed against the state responsible for this delict.”

⁴⁸ *Opinion and Judgment*, p. 50.

See also Quincy Wright, “The Law of the Nuremberg Tribunal,” pp. 66–67. For a clear rejection of this interpretation see Pitman B. Potter, in *New York Times* (Editorial page), June 2, 1946, where it is declared that “To punish individuals for the offense of waging aggressive war or conspiracy to wage war, however, is to inject a new element, apart from the difficulty that ‘aggressive war’ had not been authoritatively defined prior to 1939.”

national history which preceded it"⁴⁹ the International Military Tribunal declared in its *dictum* that "all these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but criminal."⁵⁰

De lege ferenda the *dictum* of the International Military Tribunal according to which recourse to illegal war constitutes the commission of a crime for which its perpetrators are individually responsible, is of far-reaching importance. *De lege lata* the judgment does not correspond with the rules of general international law. / It would seem difficult to maintain that the practice or the municipal laws of the states signatories to the Pact of Paris, rendered recourse to "aggressive war"⁵¹ an individual criminal offence, nor is it possible to square with the rules of existing international law the opinion expressed in the *dictum* of the International Military Tribunal according to which the "international history" preceding the Pact of Paris supports the Court's view that the violation of the Pact is a crime.⁵² The historical impartiality of these assertions is highly questionable.⁵³ Moreover, it is legally untenable to accept draft treaties, protocols, recommendations, and resolutions which never became legally binding and which were continuously violated, as evidence that the Pact of Paris is declaratory of an already existing principle of international law according to which "resort to a war of aggression is not merely illegal, but criminal."⁵⁴

In addition to "Crimes against Peace" the victorious Powers created the concept of "Crimes against Humanity," as enumerated in Article 6, sec. c,

⁴⁹ *Opinion and Judgment*, pp. 51-52.

⁵⁰ Same, p. 52.

⁵¹ Same, p. 50.

⁵² Same, pp. 51-52.

⁵³ G. A. Finch, "The Nuremberg Trial and International Law," in this JOURNAL, Vol. 41 (1947), pp. 26-28.

⁵⁴ Same, p. 33, where the author arrives at the following conclusion: "In the light of this legislative history of the official attitude of the Government of the United States toward the interpretation of the Pact of Paris for the Renunciation of War, it is impossible to accept the thesis of the Nuremberg Tribunal that a war in violation of the Pact was illegal in international law on September 1, 1939, and that those who planned and engaged in it were guilty of international criminal acts at the time they were committed, or at the date of signature of the Charter of the International Military Tribunal at London on August 8, 1945, or on October 1, 1946, the date of the judgment of the Nuremberg Tribunal."

See also Edwin Borchard, "International Law and International Organization," in this JOURNAL, Vol. 41 (January, 1947), p. 107, where the author, commenting on the interpretation given the Pact of Paris by the victorious Powers, states: "We leave aside the fact that the judges of the Tribunal, in characterizing 'aggressive' war as a crime, were each condemning the history of their own nation, that the Kellogg Pact had numerous exceptions upon which the signatory nations insisted, and that the Kellogg Pact had not heretofore been regarded as applying to individuals. . . ."

of the Charter of the International Military Tribunal. Some of the charges preferred against the defendants in this group, such as murder, extermination, enslavement or deportation of enemy nationals, ordered or committed by the accused during the war, or permitted to be executed on their behalf, although non-existing in international law under the term "crimes against humanity," are war crimes established by existing general international law. They will be discussed later. Article 6, sec. c, of the Charter of the International Military Tribunal, however, leaves—rather abruptly—the solid ground of prevailing general international law by providing that "crimes against humanity" shall also be all "inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Apart from the fact that the exercise of Allied jurisdiction on the basis of the London Agreement⁵⁵ over acts committed before the war by German nationals against any civilian population—including, therefore, also the German population—must be considered a legal innovation of first magnitude, it is pertinent to note that the above-cited provisions disregard a rule of international law which provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order. In the case of the Nuremberg defendants, however, the Allies conferred upon the International Military Tribunal jurisdiction extending also over acts of German nationals which directly affected only other German nationals or subjects, and which were committed before the war on German territory in strict accordance with German law. This experiment, quite apart from its problematic legal value, is hardly consistent with the attitude taken a few months earlier when, at San Francisco, the Allies incorporated into the Charter of the United Nations a provision expressly forbidding the intervention of a state "in matters which are essentially within the domestic jurisdiction of any state."⁵⁶ The British Prosecution tried at length to defend this specific feature attached to "Crimes against Humanity" by limiting acts falling within this group to "crimes the commission of which was in some way connected with, in anticipation of or in furtherance of the Crimes Against the Peace or the War Crimes *stricto sensu* with which the defendants are indicted."⁵⁷ Openly admitting that "normally international law concedes that it is for the state to decide how it shall treat its own

⁵⁵ The fact that the enactment of Control Council Law No. 10 legalized this provision with retroactive effect is of no importance in the context of this analysis, which is concerned with the *international* aspects of the case.

⁵⁶ Charter of the United Nations, Article 2, section 7.

⁵⁷ Sir Hartley Shawcross, *Closing Speeches*, as cited, p. 62.

nationals," and that this "is a matter of domestic jurisdiction,"⁵⁸ the British Prosecution advanced the argument "that those things even if done in accordance with the laws of the German state, as created by these men [namely the defendants] and their ringleader, were, when committed with the intention of affecting the international community—that is in connection with the other crimes charged—not mere matters of domestic concern but crimes against the Law of Nations."⁵⁹ Justifying this part of the Indictment with reference to the writings of Grotius⁶⁰ and to the attitude of "the European Powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution"⁶¹ the British Prosecution did not minimize "the significance for the future of the political and jurisprudential doctrine which is here implied."⁶² It defended the legal policy of the four Powers by asserting that "International Law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind."⁶³

While one may only welcome the noble ideas reflected in the Prosecutions final presentation of the legal merits of its case against the defendants, and the role of the victorious Powers as defenders of the Rights of Man, one is unfortunately constrained to admit that neither the Covenant of the League of Nations, nor the Charter of the United Nations, nor the Economic and Social Council—all of which were cited by the Allied Prosecution in support of its case—have been able to formulate in a manner legally binding upon all states a "Charter of the Rights of Man." However, one will certainly agree with the Prosecution that the "political and jurisprudential doctrine" expressed with regard to "Crimes against Humanity" committed "with the intention of affecting the international community"⁶⁴ may very well be of far reaching future significance. The consistent application of these principles would mark the opening of an era of perhaps revolutionary changes in the concepts of municipal as well as international law since it is perfectly clear that there exist no important

⁵⁸ Same, p. 63.

⁵⁹ Same, p. 63.

⁶⁰ Sir Hartley Shawcross, *Closing Speeches*, p. 63.

⁶¹ Same, p. 64.

⁶² Same, p. 63. The implications of the cited conception were outlined by Quincy Wright, "The Law of the Nuremberg Trial," pp. 47-48. A legal analysis of the Charter of the United Nations does not support the view expressed by this writer that the Members of the United Nations have performed "an act of faith" by incorporating either into the law of the United Nations or into their municipal codes the principles proclaimed at Nuremberg.

⁶³ Sir Hartley Shawcross, as cited.

⁶⁴ Same.

acts of a state which do not affect, "directly or indirectly," the international community, thus permitting, according to the Charter of the International Military Tribunal, the interference of one state in the domestic affairs of another. It is pertinent to note that the International Military Tribunal, in its *dictum*, rejected the extensive definition given in the Charter to "Crimes against Humanity" by pointing out that "to constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal."⁶⁵ The Charter of the International Military Tribunal, to be sure, does not make such a distinction since "Crimes against Humanity" are, among others, also "inhumane acts committed against any civilian population before or during the war."⁶⁶

The provisions of the Charter of the International Military Tribunal applied not only to individuals but also to corporate entities such as the *Reich Cabinet*, the *Leadership Corps of the Nazi Party*, the *SS*, the *SA* and the *Gestapo*.⁶⁷ Article 9 of the Charter stipulates that "the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." It would seem that Article 9 of the Charter approaches an existing rule of general international law when applying the principle of collective responsibility to acts committed by individuals in violation of international obligations. However, it is not the executive branch of the government of a state, or any other of its branches or sub-branches, upon which devolves this responsibility but only the state in its corporate entity. The review of Article 9 would be incomplete without mentioning a most daring legal innovation incorporated in Article 10 of the Charter. There it is stipulated that once a "group or organization is declared criminal by the Tribunal" the mere proof of membership in such an organization will permit the competent national authority of any signatory to the London Agreement to bring individuals to trial "before national, military or occupation courts" for having been members of such a "criminal" organization. If consistently applied this legal innovation would have permitted the trial and punishment of large population segments of any defeated nation. No doubt exists that the prevailing rules of international law did not confer upon the International Military Tribunal such a vast jurisdiction. Fully aware of these implications the Tribunal justified the use of its discretionary powers by declar-

⁶⁵ *Opinion and Judgment*, p. 34.

⁶⁶ "This broad jurisdictional clause," as recently cited by a leading authority, is not supported by existing international law. "There is no rule of international law, customary or conventional, by which such acts committed before the commencement of hostilities can be punished by the subsequent military occupants." (G. A. Finch, "The Nuremberg Trial," p. 23.)

⁶⁷ A definition of these organs of the German State is given in Appendix B. to the Indictment, *Proceedings*, Vol. 1, pp. 38-41.

ing that "criminal guilt is personal and that mass punishments should be avoided."⁶⁸ Moreover, the Tribunal stated that "Membership alone [in any of the organizations or groups enumerated in the Indictment] is not enough to come within the scope of these declarations."⁶⁹ It would appear that this *dictum* implies a rejection of the principles incorporated into Articles 9 and 10 of the Charter, principles which had been proclaimed by the Allied Powers to be declaratory of existing international law.

The Charter also conferred upon the International Military Tribunal jurisdiction over war crimes which it defined as "violations of the laws or customs of war" (Article 6, sec. b). Whether the Nuremberg defendants committed war crimes falling under this definition is a question of evidence, the establishment of which was in the power of the International Military Tribunal. It is pertinent to note, however, that general international law—apart from cases involving espionage and war treason—provides that individuals must not be punished for the commission of war crimes *stricto sensu* if the latter were perpetrated as "acts of government" or if they were "performed at the government's command, or with its authorization" since such "acts of state" are "imputed to the state, not to the individual who has performed the act."⁷⁰ A consequence of this principle is that only the state incurs legal responsibility for such illegal acts. This means that the sanctions provided by general international law for violations of international obligations committed as "acts of state" imply "collective, not individual responsibility."⁷¹ It is of greatest importance that this rule which—in the past—had found its unqualified acceptance in the practice of states, applies not only to war crimes in the strictly technical sense of the term but equally to all other violations of international obligations, such as, for instance, the resort to illegal war. It is to be noted that the "act of state" doctrine is based upon a fundamental rule of general international law according to which the courts of a state must not claim jurisdiction over the acts of another state.⁷² To be sure, international law allows exceptions from this general rule which, as mentioned previously, does not apply in cases of espionage or war treason, even if the latter have the character of acts of state. But to go *dehors* by deducing that because of these few exceptions international law has established individual criminal responsibility for all acts of state committed in violation of the law of nations is, it would appear, a legally untenable, though at times perhaps politically quite convenient, proposition.

Articles 7 and 8 of the Charter of the International Military Tribunal reject *expressis verbis* the implications arising from a consistent applica-

⁶⁸ *Opinion and Judgment*, p. 85.

⁶⁹ Same, p. 86.

⁷⁰ Hans Kelsen, *Peace through Law*, p. 81.

⁷¹ Same, p. 81.

⁷² Same, pp. 82-83.

tion of the "act of state" doctrine by stipulating that neither the official position of the defendants nor the fact that they acted pursuant to orders of their government can free them from responsibility. In order to prove that the above-mentioned Articles conform with the rules of general international law the Allied Prosecution challenged the validity of the "act of state" doctrine on various grounds. Thus it was asserted that the latter is a "relic of the doctrine of the divine right of kings" which, "in any event, is inconsistent with the position we [Americans] take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded."⁷³ Perhaps, in order to implement the legal value of this argument it was emphasized that since resort to illegal war is an act of "piracy and brigandage," the application of the principle of personal liability is not only well established in international law but is "a necessary as well as logical one if international law is to render real help to the maintenance of peace."⁷⁴ The conclusion, therefore, was advanced that "while it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity."⁷⁵ It appears that the reference to piracy is ill chosen since it is impossible to consider resort to aggressive war as falling within the generally accepted legal meaning of piracy *juris gentium*.

Following a different line of thought the British Prosecution admitted that there is "a series of decisions in which Courts have affirmed that one state has no authority over another sovereign state or over its head or representative." But it was argued, "these decisions have been based on the precepts of the comity of nations and of peaceful and smooth international intercourse. . . . They really afford no authority for the proposition that those who constitute the organs, those who are behind the state, are entitled to rely on the metaphysical entity which they create and control when by their directions that state sets out to destroy that very comity on which the rules of international law depends."⁷⁶

The theory according to which the "act of state" doctrine is valid only in times of peace is not supported by the practice of states; it is "without foundation in positive international law."⁷⁷ It is well to remember that

⁷³ *Trial of War Criminals*, Documents, Department of State Publication 2420, U. S. Government Printing Office, Washington, D. C., 1945, *Report* of Robert H. Jackson to the President, p. 3.

⁷⁴ Mr. Justice Jackson, in *Proceedings*, Vol. 1, pp. 82-83.

⁷⁵ Same, p. 83.

⁷⁶ Sir Hartley Shawcross, in *Closing Speeches*, p. 58.

⁷⁷ Hans Kelsen, *Peace through Law*, p. 97, and the same author in *California Law Review*, Vol. 31 (1943), p. 542, where he states that "there is no sufficient reason to assume that the rule of general customary law under which no state can claim jurisdiction over the acts of another state is suspended by the outbreak of war and consequently that it is not applicable to the relationship between belligerents."

this argument against the "act of state" doctrine had already been advanced after the First World War.⁷⁸ It was forcefully reiterated by a recent commentator.⁷⁹ The latter, while admitting "that there are sound reasons for the familiar application of the act-of-state doctrine to the normal, peaceful intercourse of nations,"⁸⁰ maintains, however, that "if a doctrine so contrary to reason and justice has indeed been accepted as unconditionally valid international law, it is high time the error were remedied."⁸¹ It would seem that the proposal to remedy the error committed for centuries with the adherence to the "act of state" doctrine deserves full consideration. No doubt the theory of individual criminal responsibility for acts of state should be incorporated into the international law of the future as soon as the meaning of "reason and justice" can be agreed upon by the statesmen and jurists acting on behalf of their respective nations. However, the firm assertion according to which "the idea that the act-of-state doctrine is universally and unconditionally operative is simply bad law; and bad law should be replaced with good law"⁸² proves that agreement with regard to the meaning of "good" and "bad," or to put it differently, of "reason and justice," does not exist at the present time. Or would it be "reasonable" to suggest that the law of the United Nations, because it has not incorporated the principle of individual criminal responsibility for acts of state is simply "bad law"? In the absence of such an international agreement as to the meaning of "good law" and "bad law" the rule of existing international law, "bad" as it may be, must prevail. It has been clearly expressed with regard to the "act of state" doctrine by a prominent American authority who is quoted in the following: "It needs to be observed that if the act charged against the offender is one which can be regarded as violative of international law, the propriety of prosecution abroad merely calls for agreement designed to cut off the jurisdictional immunity which he enjoys in consequence of his relationship to, or official rank within, his own country."⁸³

It is perhaps interesting to note that counsel for the defence, when referring to the novel interpretation given by the Allied Prosecution on the act-of-state doctrine made a clear distinction between the "law in force" and the law of the future "such as it should be conceived" in the

⁷⁸ See, for instance, A. Mérignhac, *De la sanction des infractions au droit des gens, Revue Générale de droit international public*, Vol. 24 (1917), p. 49, where the author states *La théorie de l'acte de gouvernement est une théorie de paix, qui disparaît au cours des hostilités.* This assertion is without foundation in positive international law.

⁷⁹ Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, Chapter IV, pp. 46-59.

⁸⁰ Glueck, p. 49.

⁸¹ Same, p. 58.

⁸² Same, p. 59.

⁸³ Hyde, work cited, Vol. 2, § 920, p. 2415.

light of morality and progress. The defence pointed out that only the international law in force can be binding on states.⁸⁴ This serious legal objection was answered by the French Prosecution with the assertion that the law in force "is not only the law of the past . . . but also that which the judges invoke in a concrete manner from the bench."⁸⁵ This statement, it would seem, is correct so far as it applied to the Nuremberg defendants. However, as regards "the value" attached to the Nuremberg Trial, "on the subsequent development of international law"⁸⁶ this argument is highly problematical. It is a fundamental principle of international law, reaffirmed without qualifications by the victorious Powers in the Statute of the International Court of Justice that a "decision of the Court has no binding force except between the parties and in respect of that particular case" (Article 59). At best it would seem that the municipal law analogy invoked by the French Prosecution would apply in the field of international law only if a permanent international criminal court, or if national courts of the Members of the community of nations had rendered, in similar cases, substantially the same decisions over a sufficient period of time. Only then would it have been possible to consider such verdicts as declaratory of a general principle of law recognized by civilized nations.

The Tribunal in its *dictum* accepted the views of the Allied Prosecution concerning the rejection of the act-of-state doctrine. Referring to the recent case *Ex parte Quirin*⁸⁷ and to Article 228 of the Treaty of Versailles⁸⁸ the Court, however, pointed to another "principle of international law" according to which the protection granted representatives of a state "cannot be applied to acts which are condemned as criminal by international law."⁸⁹ This alleged principle, it was declared, means that "he who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."⁹⁰ Here, again,

⁸⁴ Dr. Jahrreis as quoted in *Closing Speeches*, p. 139.

⁸⁵ M. Champier de Ribes, *same*, pp. 139-140.

⁸⁶ Sir Hartley Shawcross, in *Closing Speeches*, p. 58.

⁸⁷ *Opinion and Judgment*, p. 52.

Ex parte Quirin (1942), 317 U. S. 1. It appears highly erroneous to quote this case in evidence of a general rule of international law supporting the criminal liability of the Nuremberg defendants. *Ex parte Quirin*, it is well known, dealt substantially with the crime of war treason *juris gentium*, a crime for which general international law has established individual criminal responsibility as an exception to the rule.

⁸⁸ The reference to Article 228 of the Treaty of Versailles, it would seem, is very unfortunate since it only confirms the assertion that general international law has not established individual criminal responsibility for acts of state, and that the victorious Powers of the first World War, in order to create such responsibility, had to receive Germany's consent by means of a treaty.

⁸⁹ *Opinion and Judgment*, p. 53.

⁹⁰ *Same*, p. 53.

hope may be expressed that this doctrine which, it appears, was first advanced by a brilliant French jurist after the first World War⁹¹ will, perhaps at some future date, become a generally accepted rule of international law. In the past, the practice of states has not supported such an assumption, and at present the Allied and Associated Powers have plainly rejected the incorporation of this idea into the Charter of the United Nations. According to prevailing rules of international law the perpetrator of a war crime other than espionage and war treason may be punished by the injured state only "in case it is recognized that the act is not an act of the enemy state."⁹²

Article 8 of the Charter of the International Military Tribunal stipulates that the plea of superior command shall not free a defendant from criminal responsibility. It is noteworthy that the rule *respondeat superior* would constitute a valid defense in international law only if one were prepared to regard it as expressive of "the general principles of law recognized by civilized nations." It appears, however, that the maxim *respondeat superior* has not been accepted by all nations without qualification. The new German military code of 1940, for example, stipulated that while the superior is responsible for violations of penal law, the person executing a superior order may also be punished "if he has known that the order of the superior referred to an act which had as its purpose a general or military crime or misdemeanor."⁹³ The United States *Rules of Land Warfare*, it is true, had incorporated until recently the principle of superior command as a valid defence.⁹⁴ In consistent application of the attitude taken by the United States Government since the early beginnings of the war this rule, however, was amended after 1944 to the effect that it applies only to lawful orders of superiors.⁹⁵ It is difficult, therefore, to

⁹¹ Louis Renault, "De l'application du droit pénal aux faits de guerre," in *Revue de droit international public*, Vol. 25 (1918), pp. 5-29, where the writer advances the doctrine that acts of warfare although criminal in character are not punishable under international law only if the war itself during which these acts are committed is not waged in violation of international law. See also Hans Kelsen, *Peace through Law*, pp. 93 ff., where the distinguished writer declares Renault's doctrine "untenable."

⁹² Kelsen, p. 97. See also George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," in this JOURNAL, Vol. 37 (1943), pp. 407 ff. and p. 433.

⁹³ *Reichsgesetzblatt*, Nr. 181—1940, *Ausgegeben zu Berlin, den 16.10.1940. Verordnung über die Neufassung des Militärstrafgesetzbuches vom 10.10.1940, Viertes Abschnitt, § 47.*

⁹⁴ U. S. War Department. *Basic Field Manual, Rules of Land Warfare*, U. S. Government Printing Office, Washington, D. C., 1940.

⁹⁵ After November 15, 1944, a new text, Article 345.1, was introduced, providing: "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the part that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."

speak of a generally accepted practice of civilized nations as regards the plea of superior orders, and to consider it as a binding rule of international law. The International Military Tribunal interpreted the rule *respondere superior* rather restrictively by declaring that "the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."⁹⁶

In view of the importance attached, especially in some American circles, to the maxim *nulla poena sine lege*, *nulla poena sine crimine*, *nullum crimen sine poena legali*, and to the *ex post facto* principle which, in its effects, is closely related to this doctrine, the Tribunal found it necessary to counter in greater detail the objections raised with the above doctrines.

The gist of these objections, it appears, may be summarized as follows:

Even if one accepts without qualifications the theory that resort to war in violation of the Briand-Kellogg Pact and other treaties is illegal, and even if one were prepared to admit that illegal and criminal are terms with substantively the same meaning, one has still to concede that prior to the creation of the International Military Tribunal no law existed providing for individual criminal responsibility of the accused for the commission of the acts enumerated as crimes in the Charter of the International Military Tribunal. The latter, therefore, applies with retroactive force a rule contrary to the municipal laws of all civilized nations and therefore in violation of international law.⁹⁷ The International Military Tribunal met this challenge by referring to the strictly moral motives underlying the maxim *nulla poena sine lege* and the *ex post facto* principle. "To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. . . . On this view of the case alone, it would appear that the maxim has no application to the present facts."⁹⁸ It might, perhaps, be added that neither of the municipal law principles mentioned above constitutes a rule of positive international law since it would be impossible, indeed, to prove that these doctrines are expressive of a general practice accepted as law by civilized nations.⁹⁹

While it seems difficult to support certain features of the Charter of the International Military Tribunal by reference to positive international

⁹⁶ *Opinion and Judgment*, pp. 53-54. One may severely doubt whether a soldier has a "moral choice" to disregard, in times of war, a command of his superior.

⁹⁷ For a summary of these objections see *Opinion and Judgment*, p. 49.

⁹⁸ Same.

⁹⁹ Hans Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals," in *The Judge Advocate Journal*, Vol. 2 (Fall-Winter 1945), p. 46. See also Leo Gross, "The Criminality of Aggressive War," in *The American Political Science Review*, Vol. XLI (April, 1947), pp. 205-225.

law, it is significant to note that steps have been taken in order to implement the solemn promises made by the Allied Powers at Nuremberg. On December 11, 1946, the General Assembly of the United Nations established a committee to study "the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification."¹⁰⁰ In addition, this Committee was charged by the General Assembly to study a draft on the rights and duties of states submitted by the Panamanian delegation, and "to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal."¹⁰¹ Finally, the General Assembly, on December 16, 1946, unanimously adopted a resolution affirming that genocide is a crime under international law for the commission of which individuals are punishable, inviting "Member States to enact the necessary legislation for the prevention and punishment of this crime," and requesting the Economic and Social Council to incorporate these principles into a draft convention for submission to the next regular session of the General Assembly.

It remains to be seen whether the present international situation is favorable to the successful achievement of these tasks under consideration. It is also to be noted that any recommendations of the General Assembly, in order to become internationally effective, would have to be accepted by the Members of the United Nations and supplemented by means of national legislation. Otherwise they would share the fate of the many drafts, resolutions, and proposals made for similar purposes in the past, and far from being declaratory of a general practice of states, as submitted at Nuremberg by the prosecuting Powers, would be renewed and conclusive evidence that the Members of the United Nations are not prepared to accept the international law of the future proclaimed with so much ambition and effort in the Charter of the International Military Tribunal.

¹⁰⁰ *United Nations Journal*, No. 58 (Supplement A), p. 470.

¹⁰¹ Manley O. Hudson, "Encouragement of the Development of International Law by the United Nations," in this *JOURNAL*, Vol. 41 (1947), p. 103.

CZECHOSLOVAK NATIONALIZATION DECREES: SOME INTERNATIONAL ASPECTS

By ALAN R. RADO*

On the 24th of October, 1945, the nationalization of mines, certain industrial enterprises, banks, and insurance companies was decreed in Czechoslovakia. The decrees took effect on the 27th day of October, 1945, the day of their promulgation.¹ The purpose of this study is to examine these measures² and their effects, first, on foreign-owned property in Czechoslovakia and, second, on assets of Czechoslovak nationalized enterprises located abroad. Particular emphasis will be placed on the effect of the decrees on property owned by American nationals in Czechoslovakia and on assets situated in the United States of enterprises nationalized in Czechoslovakia.

Outline of the Legislation

The decrees enumerated the categories of enterprises which were declared nationalized. By the act of nationalization, the Czechoslovak state acquires the ownership of the nationalized enterprises including all of their property, assets and rights.³ "National" enterprises are to be established out of these "nationalized" enterprises.⁴ A national enterprise which has absorbed the property of a nationalized enterprise is to succeed to the liabilities of the latter.⁵ The state is not to be liable for the debts of any nationalized enterprise.⁶ Although national enterprises are state property, they have the status of independent legal persons. They are subject to the provisions of the law-merchant and of the tax laws,⁷ and are to be entered as single merchants⁸ into the register of firms kept by the District Court

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¹ The decrees are published in the *Collection of Laws and Regulations of the Czechoslovak Republic*, 1945, under No. 100-103. Decree No. 100 concerns the nationalization of the mines and of certain industrial enterprises, decree No. 101 the nationalization of certain enterprises of the food industry, decree No. 102 the nationalization of banking corporations, and decree No. 103 the nationalization of private insurance companies.

² The basic provisions of all the decrees are similar and references will be made to decree No. 100 which is typical of the legislative purpose and method.

³ Decree No. 100, § 4.

⁴ Same, § 12(1).

⁵ Same, § 5(1).

⁶ Same, § 5(4).

⁷ Same, § 13(1).

⁸ Same, § 16(1). The term "single merchant" designates individual traders as distinguished from partnerships and business corporations.

of appropriate jurisdiction. The national enterprises are to be conducted on business principles. Their surplus earnings are to be handed over to the state but the state is not to be responsible for their debts.⁹ As each national enterprise is established, it will be announced in the Czech and Slovak Official Gazettes.¹⁰

Compensation is to be paid for nationalized property,¹¹ except in the case of property owned by German or Hungarian public and private corporations, persons of German or Hungarian nationality, and persons who engaged in certain activities directed against the Czechoslovak state.¹² If compensation is denied to a legal person, natural persons having a capital interest therein, who do not belong in the categories mentioned, are to be compensated in proportion to such interest.¹³ The compensation is to be equal to the ordinary value of the property, as computed on the basis of official prices prevailing on October 27, 1945, after deduction of the liabilities. Where such prices do not exist the compensation is to be based upon an official valuation.¹⁴ Compensation for nationalized property is to be paid (a) in securities, (b) in cash, or (c) in other value.¹⁵ For the purpose of payment of compensation a Nationalized Economy Fund having the status of an independent legal person is to be established in Prague.¹⁶ The Fund will issue interest-bearing securities which will be redeemed from the surplus earnings of the national enterprises. The payment of interest and the redemption of these securities is to be guaranteed by the state; it will be permissible to invest the moneys of infants and wards in these securities.¹⁷ The Minister of Industry, in agreement with the Minister of Finance, is to decide on compensations and the method of payment. The compensation is payable within six months from the day of service of the compensation assessment order.¹⁸ Compensation proceedings are governed by the rules of the decree of January 13, 1928, dealing with administrative process.¹⁹ Thus compensation claims will be decided by administrative and not by judicial tribunals.²⁰

⁹ Same, § 13(1) and (2).

¹⁰ *Úřední List* and *Úradný Vestník*. Same, § 12(E).

¹¹ Same, § 8(1).

¹² Same, § 7.

¹³ Same, § 7(3).

¹⁴ Same, § 8(2).

¹⁵ Same, § 9(1).

¹⁶ Same, § 9(2).

¹⁷ Same, § 9(3).

¹⁸ Same, § 10(1) and (2).

¹⁹ *Collection of Laws and Regulations of the Czechoslovak Republic*, No. 8/1928; Decree No. 10.

²⁰ A special section in the Czechoslovak Ministry of Foreign Affairs has been established to receive foreign claims. The Department of State acts as transmitting agent for filing such claims. For instructions with regard thereto, see *Department of State Bulletin*, Dec. 1, 1946, p. 1003, March 2, 1947, p. 397.

The decrees further contain detailed provisions concerning the management of the national enterprises as well as administrative and penal provisions not within the scope of this study.²¹

Certain aspects of the Czechoslovak decrees will be analyzed against the background of existing theories of international law and litigation relating to more or less similar measures taken in other countries.

Operation of Decrees Within the State

These nationalization decrees represent a general legislative reform in Czechoslovakia. In order to establish a new social order in certain branches of the state's national economy they abolish private property in various types of enterprises and transfer it to the state.²² There appears to be a controversy among legal theorists as to whether such nationalization measures are in the nature of the exercise by the state of its right of eminent domain or of its extended police power, or whether they should be considered as a novel concept involving international liability.²³ This controversy is entirely theoretical, however, and in no way affects the legal consequences attached to such measures. A more practical distinction is involved in the question of whether compensation is offered for the property taken. The first case is generally referred to as "expropriation,"²⁴ the second as "confiscation."²⁵

International law is not as a rule concerned with the manner in which a state, in the exercise of its sovereign powers, treats its own subjects. But for the treatment of foreign nationals it establishes a somewhat indefinite standard of "civilized justice" which the state cannot violate without incurring international liability. An alien is not bound to accept the treatment accorded to nationals if such treatment violates the principles of civilized justice.²⁶

Usually legislative acts do not create international responsibility on the part of the state.²⁷ But if they constitute a breach of international obligation foreign governments have ordinarily not acquiesced in the theory of non-liability and have on numerous occasions successfully enforced claims for the injuries sustained by their subjects. Examples are presented by the well-known cases of attempts to establish governmental monopolies in Sicily (1838) and Uruguay (1912).²⁸

²¹ A summary of these provisions is contained in Oatman, *The Nationalization Program in Czechoslovakia*, *Department of State Bulletin*, Dec. 8, 1946, p. 1027.

²² For an official presentation of the circumstances that led to nationalization, see E. Benes, "Postwar Czechoslovakia" *Foreign Affairs*, Vol. 24 (1946), pp. 397, 407.

²³ See H. Herz, "Expropriation of Foreign Property," in this JOURNAL, Vol. 35 (1941), p. 243, for discussion of different theories.

²⁴ See 29 C.J.S. 777, *A. J.*, Vol. 18, p. 631.

²⁵ See 15 C.J.S. 827.

²⁶ E. M. Borchard, *Diplomatic Protection of Citizens Abroad*, 1925, § 44.

²⁷ Same, § 51.

²⁸ Same, § 75. See also G. H. Hackworth, *Digest of International Law*, Vol. V, pp. 587-589.

There is little doubt as to international liability when governmental measures are discriminatory, that is, are directed against foreign nationals only. There is more difficulty in the case of measures affecting citizens and foreign nationals alike. The acts of legislation here involved are general and impersonal in their nature, do not contain any discrimination against foreigners, and concern nationals and aliens alike. The subject of the exceptional treatment accorded to Germans, Hungarians, collaborators, and traitors²⁸ will not be considered here.

The principal question is whether these decrees, in the absence of discrimination against foreign nationals, constitute a breach of an express or implied international obligation insofar as they expropriate American or other foreign-owned property. There is no special stipulation expressly forbidding expropriation in any of the treaties in force between the United States and Czechoslovakia.³⁰ Whether there is any violation of the standard of "civilized justice" is more difficult to determine.

It seems to be settled, in the theory and practice of international law, that, in the absence of an express treaty stipulation forbidding expropriation, it is the right of a sovereign state to expropriate property situated within its territory and jurisdiction. On the other hand it is agreed that the act of expropriation always obliges the state to indemnify the foreign owner. A clear demonstration of these principles is found in the exchange of notes between the Government of the United States and the Mexican Government concerning the expropriation of agrarian property owned by United States citizens.³¹

What must be the standards of indemnification or compensation so as to satisfy the standard of "civilized justice"? Apart from the fact that compensation does not mean restitution of the property taken, but payment for its value, there is no consent on this question in theory or practice. The results reached in most instances were mere diplomatic compromises with none of the governments abandoning the legal principles which they had asserted. This applies, for example, to the compromise reached between the United States and Mexican governments in the case of the Mexican agrarian expropriation.³²

The usual statement that compensation must be just and fair is too vague to be helpful in determining whether the Czechoslovak nationalization

²⁸ Decree No. 100, § 7.

³⁰ Arbitration treaty (1928), *U. S. Treaty Ser.* 781; Conciliation treaty (1928), *U. S. Treaty Ser.* 782; Extradition treaty (1925), *U. S. Treaty Ser.* 734; Supplementary extradition treaty (1935), *U. S. Treaty Ser.* 895; Naturalization convention (1928), *U. S. Treaty Ser.* 804; Reciprocal trade agreement (1938), *Exec. Agreement Ser.* 147.

³¹ Notes are reprinted in this JOURNAL, Vol. 32 (1938), Supplement, p. 181; see Hull notes of July 21 and August 22, 1938.

³² See Compensation for expropriated lands, Agreement between the United States and Mexico, effected by exchanges of notes signed November 9 and 12, 1938, and April 17 and 18, 1939, *Exec. Agreement Ser.* 158.

decrees do or do not violate the international standard of justice. The United States government, in its notes to the Mexican government in the aforementioned instance,³³ adopted the view that only prompt, adequate, and effective payment satisfies the requirement of international law. In rather forceful language Secretary Hull declared:

The taking of property without compensation is not expropriation. It is confiscation. It is not less confiscation because there may be an expressed intent to pay at some time in the future. . . . No government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.³⁴

Whether the compensation as decreed in Czechoslovakia will satisfy these requirements will largely depend on the manner in which the decrees are carried out. If compensation is given in cash³⁵ the requirement of promptness will probably be held to be satisfied. It is questionable whether it will be so held³⁶ if payment is made in securities redeemable from the surplus earnings of the national enterprises.³⁷ The answer to this depends upon whether we consider the state's guaranty of the payment of interest and of the redemption of the securities sufficient to counterbalance the lack of promptness.³⁸

If compensation is to be adequate and effective it must indemnify the owner for the full loss sustained by him.³⁹ According to Art. 8 (2) of decree No. 100 the owner will be compensated for the "ordinary value" of the expropriated property.⁴⁰ Will this include compensation for "good will" and such other intangible assets as patent rights, trade marks, and so on? If not the compensation will hardly be adequate. It could also be maintained that such indirect damages as cessation of profits should be included for full indemnification when a going concern is expropriated.

³³ Above, note 31.

³⁴ See Hull note of August 22, 1938, above, note 31, at pp. 191, 193.

³⁵ Decree No. 100, § 9(1).

³⁶ In the Mexican agrarian expropriation the Mexican government had also issued agrarian bonds for the purpose of compensating the affected landholders. See note of Mr. Hay of August 3, 1938, above, n. 26.

³⁷ Decree No. 100, § 9(1) and (3).

³⁸ Decree No. 100, § 9(3).

³⁹ For a discussion of adequacy of compensation, see C. C. Hyde, "Compensation for Expropriation," in this JOURNAL, Vol. 33 (1939), p. 108.

⁴⁰ § 8(2) of decree No. 100 reads:

Compensation shall be determined according to the status of the assets and the liabilities of the nationalized enterprise on the day when it is taken over by the national enterprise. The compensation shall be equal to the ordinary value of the property, as computed on the basis of official prices prevailing on the day of the decree's promulgation, or, where such prices do not exist, as determined by an official valuation, after deduction of the liabilities.

At least it was so held by the Permanent Court of Arbitration in the Norwegian Ships case.⁴¹

It also must be kept in mind that, even if payment in cash is made it is likely to mean payment in the official Czechoslovak currency.⁴² Not only unfavorable exchange rates but also exchange restrictions prevailing in Czechoslovakia in regard to the transfer of currency to a foreign country may considerably impair the value of such reimbursement to the foreign owner.

In January, 1946, the Czechoslovak government announced that the matter of compensation for nationalized enterprises in which foreign capital is invested will be negotiated directly with the governments of the owners. It also stated in a note to the American Ambassador that it has taken measures to ascertain the value of these foreign capital investments and it requested the aid of the Embassy in drawing up a list of enterprises in which American interest existed.⁴³ In a note dated May 7, 1946 the Czechoslovak Minister of Foreign Affairs informed the American Ambassador that it still lacked "sufficient reliable data concerning foreign capital investments in nationalized undertakings . . . to draw up a list of such holdings."⁴⁴ The procedures and principles for compensating American owners of nationalized properties were a constant subject of discussions between the two governments during the last months of 1946. In an exchange of notes on November 14, 1946,⁴⁵ a general assurance was given that the Czechoslovak state would make adequate and effective compensation to American nationals with respect to their interests in nationalized properties. It also was announced that further negotiations were to begin shortly in Prague but at this writing no agreement has been reached. In the meantime a law providing for a capital levy and a war profits tax has been passed in Czechoslovakia.⁴⁶ The application of this law to claims of foreign nationals whose property in Czechoslovakia has been nationalized will have the effect of reducing the amounts paid in compensation.

⁴¹ See Award of the Permanent Court of Arbitration at The Hague rendered on October 13, 1922, reprinted in this JOURNAL, Vol. 17 (1923), p. 362, saying at p. 392: "Just compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property."

⁴² Czechoslovak crown (*koruna*; abbr. *Kč*) which is worth about 2 United States cents at the present time.

⁴³ See Oatman, above, note 21, at p. 1081.

⁴⁴ Same.

⁴⁵ *Department of State Bulletin*, December 1, 1946, pp. 1004-1005.

⁴⁶ *Collection of Laws and Regulations of the Czechoslovak Republic*, No. 134/1946. The law was passed on May 15, 1946, promulgated on June 18, 1946 and declared effective as of September 30, 1946. Tax is on the increase in the value of property between January 1, 1939 and November 15, 1945. Returns were to be submitted prior to November 30, 1946. See also *Department of State Bulletin* of November 17, 1946, p. 915, and July 6, 1947, p. 46.

This may have a bearing on the question whether such compensation payments can be considered adequate.

What must be the legal status of the owner of expropriated property in order that he may obtain diplomatic protection of his right to receive compensation deemed adequate under standards of international law? It is generally agreed that a state should not press a claim for redress in behalf of an individual against a foreign government unless he was one of its own nationals from the time of injury to the time of award.⁴⁷ Consequently no derivative international claim for adequate and effective compensation can arise here unless the claimant was a citizen of the United States at the time the claim arose.⁴⁸ No distinction is made between citizens by birth or by naturalization, but naturalization must have been completed before the claim arose.⁴⁹ In the case of the Czechoslovak nationalization this date is equivocal. On the one hand it is stated in the decree that the categories of enterprises specified therein are nationalized and go over to state ownership as of October 27, 1945.⁵⁰ On the other hand it can be maintained that the general pronouncement of nationalization by the decree does not create any claim and that the claim for compensation arises only when the nationalization of the specific enterprise of the claimant is announced.⁵¹

It may be observed at this point that in the case of a former Czechoslovak national who acquired American citizenship by naturalization during World War II, a conflict of nationality may arise. The naturalization treaty between the United States and the Czechoslovak Republic⁵²

⁴⁷ Borchard, cited above, note 26, § 200.

⁴⁸ There have been instances where aliens domiciled within the territory of the United States, and who have declared an intention to become citizens thereof, appear to have been regarded as entitled to claim the benefits of American nationality when they suffered wrong at the hands of foreign States other than the country of origin. Hyde, *International Law* (1945), § 275 at 857.

⁴⁹ Borchard, § 234:

In the case of international claims, the rule uniformly adopted is that American naturalization cannot serve to nationalize a claim which arose prior to the date of naturalization of its owner. In other words a claim must be national in origin as well as at the time of presentation.

⁵⁰ Decree No. 100, §§ 1(1), 4(1), 36.

⁵¹ Same, § 12(2).

⁵² Naturalization convention (1928), *U. S. Treaty Ser.* 304. Article I provides:

Nationals of the United States who have been or shall be naturalized in Czechoslovak territories shall be held by the United States to have lost their former nationality and to be nationals of Czechoslovakia. Reciprocally, nationals of Czechoslovakia who have been or shall be naturalized in the territories of the United States shall be held by Czechoslovakia to have lost their former nationality and to be nationals of the United States. The foregoing provisions of this Article shall not be applicable to a national of either country who obtains naturalization in the other while his country is at war. . . .

Article II provides:

Nationals of either of the Contracting States naturalized as provided in Article I, shall not, upon their return to the territory of the country of which they were formerly nationals, be prosecuted or punished for expatriation or for having failed, prior to their naturalization, to answer summonses to military service which had been served upon them within a period of five years preceding their naturalization.

provides for reciprocal recognition of voluntary expatriation when a former national of one country is naturalized in the other. It contains, however, a provision to the effect that this rule shall not apply to a national of either country who obtains naturalization in the other while his country is at war. If this clause was intended to be operative during a war fought by both countries as allies, former Czechoslovak nationals recently naturalized in the United States may have a dual nationality status.⁵³ There are indications that the Czechoslovak government may take this position with regard to compensation claims presented in behalf of such individuals. In a note to the American Ambassador⁵⁴ it suggested that there might be a difference between cases of nationalization of genuine foreign investments and those of property which really represents an export of Czechoslovak capital, such as the property of emigrés. It remains to be seen whether this means that Czechoslovakia intends to oppose claims presented in behalf of American citizens naturalized during World War II by maintaining that the claimants are its nationals.⁵⁵

Effect of Nationalization on Assets Abroad

The discussion has thus far related to the effects of rationalization on property owned by foreign nationals but situated within the territory and jurisdiction of the Czechoslovak state. It is generally conceded that a wrong done to a citizen of the United States as a result of expropriation of such property by a recognized foreign government can, in the absence of local relief, be remedied only through diplomatic channels and international arbitration.⁵⁶ Our domestic courts are clearly not the appropriate forum for redress of such wrongs. As Mr. Justice Clarke stated in *Oetjen v. Central Leather Co.*,⁵⁷ "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

In contrast, the effects of expropriation upon property situated within the territory and jurisdiction of other countries have been held a subject over which the foreign courts can properly pass judgment. The question

⁵³ For a discussion of the conflict hereby created, see Borchard, § 253.

⁵⁴ See Datman, at p. 1031.

⁵⁵ In 1935, in a case where the claimants had the nationality of the Dominican Republic as well as the nationality of the United States, the Department of State held that it could not espouse their claim. Hackworth, *Digest of International Law*, Vol. III, p. 354. See also Vol. V, pp. 821-822, in relation to a settlement agreement between the United States and Turkey in 1934 in which claims of naturalized American citizens who were also nationals of Turkey were not included.

⁵⁶ See *Shapleigh v. Mier*, 299 U. S. 468 (1936).

⁵⁷ 246 U. S. 297, 303 (1917).

involved is whether, by the act of nationalization, the Czechoslovak state acquired ownership of assets of nationalized enterprises with a situs in other countries, particularly in the United States, to the exclusion of the rights of former owners residing abroad or of local and foreign creditors.

Before the question arises whether a foreign decree of expropriation or confiscation should be given extraterritorial effect, a preliminary inquiry is proper as to whether the measure was intended to have such effect. The courts of the United States have given little consideration to the question of intent. However, in *United States v. Pink*,⁵⁸ dealing with the nationalization of Russian insurance companies, such intent was regarded as decisive. The majority of the Supreme Court in this case, relying for the purpose of interpretation on the official declaration of the Commissariat for Justice of the RSFSR, found that these nationalization decrees were intended to have extraterritorial effect. The language in the Czechoslovak decrees which states the extent of acquisition of state ownership is sweeping;⁵⁹ and would indicate an intention to include property and assets located in other countries despite the absence of specific words to this effect. Should this be the interpretation given the decrees the broader question remains of the extent to which effect should be given to expropriation decrees of a foreign government.

It is useful in this connection to summarize the results reached in some of the American and British cases involving the Soviet nationalization decrees;⁶⁰ despite the fact that those decrees were of a confiscatory nature while the decrees of the Czechoslovak Government provide for compensation.

The British courts held that the Soviet measures did not affect assets of Russian corporations having a situs in England.⁶¹ In the words of Sargant, L. J., in *Sedgwick Collins & Co. v. Russia Ins. Co.*:⁶² "Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here." The New York courts likewise refused to give extraterritorial effect to the Soviet decrees, on the ground that this would be contrary to the public policy of the state.⁶³ This principle was not only

⁵⁸ 315 U. S. 203 (1941).

⁵⁹ Decree No. 100, § 4(2).

⁶⁰ For a brief description of the Soviet decrees, see *Joint Stock Co. v. Nat'l City Bank*, 240 N. Y. 368, 373, 148 N. E. 552, 554 (1925); *In re Russian Bank for Foreign Trade* (1933), Ch. 745, 757.

⁶¹ *In re Russian Bank for Foreign Trade* (1933), Ch. 745; *Sedgwick Collins & Co. v. Russia Ins. Co.* (1926), 1 K. B. 1.

⁶² (1926) 1 K. B. 1 cited above, note 61, p. 15.

⁶³ *Sokoloff v. Nat'l City Bank*, 239 N. Y. 158, 145 N. E. 917 (1924); *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369 (1925); *Joint Stock Co. v. Nat'l City Bank*, 240 N. Y. 368, 148 N. E. 552 (1925); *Petrogradsky M. K. Bank v. Nat'l City Bank*, 253 N. Y. 23, 170 N. E. 479 (1930); *Vladikavkazsky Ry. Co. v. N. Y. Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934); *Moscow Fire Ins. Co. v. Bank of N. Y. & Trust Co.*, 280 N. Y. 286, 20 N. E. (2d) 758 (1935), affirmed: 309 U. S. 624 (1939).

applied to protect creditor's rights, but even to permit former stockholders or directors to recover the assets of nationalized corporations from American banks or other debtors.⁶⁴

The United States Supreme Court in two recent decisions took a different stand, however. These cases are: *United States v. Belmont*⁶⁵ and *United States v. Pink*.⁶⁶ In them the Supreme Court accorded extraterritorial effect to the Soviet nationalization decrees and recognized their validity in transferring title to property in the United States. Both cases involved actions by the United States to recover, under the so-called Litvinov assignment from the Soviet government, assets of nationalized Russian corporations situated within the United States. In the *Belmont* case there were no other claimants to these assets; in the *Pink* case there were foreign creditors to whom the New York Court of Appeals had, in a prior proceeding, ordered the funds to be paid.⁶⁷ In the *Belmont* case the court pointed out, first, that "The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments,"⁶⁸ against which no state policy can prevail, and second, that the provisions of the Fifth Amendment have no extraterritorial operation and "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here."⁶⁹ In the *Pink* case this line of reasoning was closely followed and it was held that the result reached in the previous case was not changed by the assertion of claims by foreign creditors of the nationalized corporation. The court refused to express any opinion as to whether the New York policy of protecting local creditors would lead to a different result if such local creditors were present.

Both of these decisions were severely criticized and regarded as far-reaching encroachments upon the protection accorded private property by the Fifth Amendment.⁷⁰ Chief Justice Stone, who had written a concurring opinion in the *Belmont* case, dissented from the result reached in the *Pink* case. He was of the opinion that each state has the authority to determine what law and policy shall govern the disposition of property within

⁶⁴ *Vladikavkazsky Ry. Co. v. N. Y. Trust Co.*

⁶⁵ 301 U. S. 324 (1936).

⁶⁶ 315 U. S. 203 (1941).

⁶⁷ *Moscow Fire Ins. Co. v. Bank of N. Y. & Trust Co.*, 280 N. Y. 286, 20 N. E. (2d) 758 (1939), affirmed: 309 U. S. 624 (1939).

⁶⁸ 301 U. S. 324, 330 (1936).

⁶⁹ 301 U. S. 324, 332 (1936).

⁷⁰ Borchard, "Confiscations: Extraterritorial and Domestic," in this JOURNAL, Vol. 31 (1937), p. 675; Jessup, "The Litvinoff Assignment and the Belmont Case," in same, Vol. 31 (1937), p. 481; Borchard, "Extraterritorial Confiscations," in same, Vol. 36 (1942), p. 275; Jessup, "The Litvinov Assignment and the Pink Case," in same, Vol. 36 (1942), p. 282.

its territory and that this authority has not been curtailed by the recognition of the Soviet government and by entering into the assignment.

How relevant are these results in considering the effect of the Czechoslovak nationalization decrees? In making the comparison, two elements seem to be significant: those of political recognition and of public policy.

The Soviet decrees were issued by a government which was not at that time recognized by the United States. On November 16, 1933, by an exchange of notes between Maxim Litvinov and President Roosevelt,⁷¹ normal diplomatic relations were established between the two governments. The New York courts have repeatedly expressed the opinion that although such political recognition validated the acts of the Soviet government it did not compel our courts to give them effect here if they were contrary to the public policy of the state.⁷² However, the Federal courts held that the power of a state to refuse the enforcement of foreign laws, which run counter to the public policy of the state, must give way before the superior national policy of recognition of a foreign power.⁷³

The Czechoslovak decrees were promulgated by a recognized government with which the United States has continually maintained normal diplomatic relations. Accordingly no act of recognition has occurred as in the case of the Soviet decrees. Nor has any other agreement been effected by the two governments which could be considered a validation of the Czechoslovak decrees under the principles of the *Belmont* and *Pink* cases.

The question must therefore turn upon whether or not the nationalization decrees offend our own public policy to so great an extent that our courts will feel reluctant to give them effect here.⁷⁴ Regardless of whether the compensation offered by the Czechoslovak decrees fully satisfies the requirements of international law, it will certainly render these measures less shocking to our concepts of justice than the confiscatory Soviet decrees were.

The extreme Soviet decrees may be contrasted with the Dutch measures taken in 1940⁷⁵ avowedly to protect Dutch assets from the invading Germans. Our courts, in dealing with these measures, held⁷⁶ that where a foreign decree is conservatory in purpose, rather than confiscatory, and

⁷¹ Notes are reprinted in this JOURNAL, Vol. 28 (1934), Supplement, p. 2.

⁷² *Vladikavkazsky Ry. Co. v. N. Y. Trust Co.*, at p. 378; *Dougherty v. Equitable Life Assurance Soc.*, 286 N. Y. 71, 90 (1934); *Moscow Fire Ins. Co. v. Bank of N. Y. & Trust Co.*, 280 N. Y. 286, 303 (1939).

⁷³ *U. S. v. Belmont*, 301 U. S. 324, 332 (1936); *U. S. v. Pink*, 315 U. S. 203, 231 (1941); *Steingut v. Guaranty Trust Co. of New York*, 58 F. Supp. 623, 633 (1944).

⁷⁴ See note in *Columbia Law Review*, Vol. 41 (1941), pp. 1072, 1082, for a discussion of the public policy concept.

⁷⁵ Dutch decree of May 24, 1940, in C. C. H., *War Law Service*, Foreign Supplement, par. 91, 251.

⁷⁶ *Anderson v. N. V. Transanāine Handelmaatschappij*, 28 N. Y. S. (2d) 547 (1941), affirmed: 289 N. Y. 9, 43 N. E. 502 (1942).

the foreign government is one recognized by the United States, the decree is in accord with the public policy of the forum and is to be given full force and effect. The English courts came to a similar conclusion in passing upon the validity of a comparable Norwegian measure.⁷⁷

The Czechoslovak decrees are neither confiscatory, as were the Soviet decrees, nor are they conservatory, as were the Dutch and Norwegian measures. Accordingly the decisions here discussed will not be directly controlling when the question of their extraterritorial effect is presented to our courts. It would appear that the most important fact in determining the result will be the adequacy of the compensation paid for the expropriated property. Since the American law with respect to adequacy of compensation,⁷⁸ developed in eminent domain and similar situations, is in complete accord with the requirements of international law, the determining factors will be similar to those discussed previously.

⁷⁷ *Lorentzen v. Lydden and Co., Ltd.* (1942), 2 K. B. 202.

⁷⁸ *Olson v. U. S.*, 292 U. S. 246, 255 (1933); *U. S. v. Miller*, 317 U. S. 369, 373 (1942); *U. S. ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 275 (1942).

DENAZIFICATION LAW AND PROCEDURE

By ELMER PLISCHKE *

Denazification has uniformly been accepted as one of the primary responsibilities of American Military Government in Germany under both United States and quadripartite general occupation policy statements. The United States has assumed preponderant responsibility for leadership in promoting and developing the Denazification program in Germany, first through the establishment of a comprehensive program in the American Zone and later by inducing the other Occupying Powers to accept much if not most of this program in quadripartite regulations approved by the Control Council at Berlin.

Specific Denazification regulations applied by United States Military Government in the initial period of the occupation were issued by the combined United States-British headquarters known as SHAEF (Supreme Headquarters, Allied Expeditionary Force). These regulations were founded largely upon, and were therefore in substantial agreement with established American occupation policy, as prescribed in the "JCS 1067" series by the Joint Chiefs of Staff, which was responsible for the basic directives to the American Theater Commanders.¹ When SHAEF was dissolved early in July, 1945, and American and British Forces were free to develop individual occupation programs in their respective Occupation Zones, the United States Theater Headquarters known as USFET (United States Forces, European Theater) issued new Denazification directives.² These, however, were little changed from those previously in use.

Meanwhile the US Group CC (United States Group, Control Council for Germany) was activated as a planning and operating staff of the American Military Governor in his participation in the quadripartite control of Ger-

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¹ For final version of "JCS 1067," see "Directive to Commander in Chief of U. S. Forces of Occupation Regarding the Military Government of Germany," April, 1945 (released Oct. 17, 1945), in *The Axis in Defeat—A Collection of Documents on American Policy Toward Germany and Japan*, Department of State Publication 2425 (1945), with "Denazification" provided for in Part I, par. 6, pp. 44-46; earlier versions of this document were somewhat more severe in their treatment of Denazification.

² For analysis of origin and early development of American Denazification plans, see Harold Zink, "American Denazification Program in Germany," *Journal of Central European Affairs*, October, 1946. For a statement of Denazification policy together with a brief evaluation of the program in the American Zone, see Elmer Plischke, "Denazifying the Reich," *Review of Politics*, April, 1947. For an analysis of "American Military Government Organization in Germany," by Prof. Harold Zink, see *Journal of Politics*, August, 1946, pp. 329-349.

many, and, commencing late in 1944, Military Government planning of the American branch of SHAEF (and later of USFET) was fully coördinated with the US Group CC. A number of Divisions were established within the US Group CC organization, including a Political Division, to which responsibility was assigned for coördinating Denazification policy and directives. In March, 1945 it was decided that this Political Division should draft a single Denazification policy paper incorporating the various elements of the program provided for in a variety of Military Government laws and regulations. This was undertaken by the present author, and was designated "Annex XXXIII (Denazification)" to the US Group CC "Basic Preliminary Plan: Allied Control and Occupation of Germany (Control Council Period)."³

The Control Council (comprising the four Military Governors of Germany) did not convene in Berlin until mid-summer, 1945, immediately following the Big Three conference at Potsdam. By the time it did convene, however, substantial general agreement had been reached by the Big Three Powers as far as general Denazification policy was concerned. At Yalta, in the "Joint Report of the Crimea Conference," on February 11, 1945, they agreed "to destroy German militarism and Nazism," to "wipe out the Nazi Party, Nazi laws, organizations and institutions," and to "remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people."⁴ These very general provisions of policy subsequently were augmented at the Tripartite Conference at Potsdam, promulgated in the Joint Report known as the "Potsdam Agreement" or the "Berlin Protocol," released on August 2, 1945. Its provisions are cited in some detail below.⁵ These agreements constitute the basis of the Denazification measures adopted throughout the four Occupation Zones of Germany today.

Liquidation of the Nazi Organization

The most immediate requirement for Denazification that confronted our Occupation Forces was the wholesale eradication of the Nazi organization. To this end the Potsdam Agreement requires the Control Council "To destroy the National Socialist Party and its affiliated and supervised organizations, to dissolve all Nazi institutions, to ensure that they are not revived in any form, and to prevent all Nazi and militarist activity or propaganda."⁶

When the Big Three met at Potsdam in the summer of 1945, such liquidation of the Nazi organization already was provided for by "Military Gov-

³ This task was undertaken by the author, and the result was issued on April 26, 1945.

⁴ Excerpts, *Axis in Defeat*, p. 6 ff.

⁵ Hereinafter referred to as *Potsdam Agreement*; excerpts in same, p. 10 ff.

⁶ Part III, Sec. A, par. 3, iii, in same, p. 12.

ernment Law No. 5" in the U. S. Zone.⁷ This law, entitled "Dissolution of Nazi Party," requires the liquidation of the Nazi Party and 52 specified Nazi organizations, and prohibits their activities. Dissolution also is required for eight Nazi Party para-military organizations including the SA (*Sturmabteilung*), SS (*Schutzstaffel*), NSKK (*Nazi-Kraftfahrerkorps*), NSFK (*Nazi-Fliegerkorps*), HJ (*Hitler Jugend*), RAD (*Reichsarbeitsdienst*), OT (*Organization Todt*), and TN (*Technische Nothilfe*).⁸ The Nazi Party organization was rapidly dissolved in accordance with this law, and there have been no visible indications of its attempted revival in a large-scale organized Nazi underground, although there have been small-scale attempts at sabotage and visible remnants of Nazi fanaticism from time to time.

This, briefly, is the liquidation program for the American Zone. But the Potsdam Agreement is binding upon all four Occupying Powers, not the United States alone. The Control Council was persuaded by the American member to establish a quadripartite Denazification dissolution program, designed to achieve uniformity throughout Occupied Germany. On October 10, 1945, "Control Council Law No. 2" was therefore issued, "Providing for the Termination and Liquidation of the Nazi Organization,"⁹ published simultaneously in the 4 Zones on October 12, 1945. This law is very similar to U. S. "Military Government Law No. 5," referred to above. It declares that the Nazi Party, together with "its formations, affiliated associations, and supervised agencies including para-military organizations and all other Nazi institutions established as instruments of party domination, are hereby abolished and declared illegal," and the reconstitution of any such organization under the same or different name is forbidden. In addition to this general statement some 62 specifically enumerated organizations (including the Nazi Party) are expressly abolished, and they are virtually identical with those contained in U. S. "Military Government Law No. 5."¹⁰

Although the dissolution of Nazi para-military organizations is provided for in these laws, similar action also is required throughout Germany in

⁷ A number of Military Government Ordinances and Laws, together with Proclamation No. 1 on the "Establishment of Military Government," were compiled and issued in printed form at the date of initial occupation of Germany, Sept. 18, 1944. This was issued as the *Military Government Gazette—Germany* by the Sixth Army Group Area of Control, hereinafter referred to as *M. G. Gazette*. Various amendments and additional Ordinances and Laws were promulgated by Military Government headquarters from time to time. These Laws and Ordinances were posted and given wide circulation in every occupied German community as it was taken over by our troops, and violators were subject to arrest and conviction by Military Courts.

⁸ "Military Government Law No. 5," *M. G. Gazette*, pp. 18-20.

⁹ "Control Council Laws" apply throughout the four Occupation Zones of Germany, whereas U. S. "Military Government Laws" apply in the U. S. Zone alone.

¹⁰ "Control Council Law No. 2," Enclosure 2 to USFET directive on "Administration of Military Government in U. S. Zone in Germany," Oct. 20, 1945.

the general Control Council regulations concerned with the German Armed Forces. Such liquidation is required under "Control Council Proclamation No. 2," of September 1945, and "Control Council Law No. 34," of August 26, 1946, entitled "Dissolution of Wehrmacht," which applies not only to military and quasi-military organizations, but also to all civilian organizations and associations connected with the Wehrmacht. The law also repeals all Nazi legislation establishing and sustaining such military organizations and their affiliates.¹¹ Special action also has been directed against certain German police units. In "Control Council Law No. 31" of July 5, 1946, all German police agencies which supervised or controlled German political activities under the Nazi regime were specifically abolished and their reestablishment prohibited.¹²

It is expected that non-Nazi organizations will supersede many of those dissolved. For example, whereas the Nazi Party is prohibited, other political parties have been permitted to organize to replace it. While the DAF (German Labor Front) is banned, the old trade-unions are reviving to supplant it, and they may regain some of their property and funds, confiscated under Hitler.¹³ Again, while Nazi Party welfare agencies are dissolved, others are authorized to replace them. But the Occupying Powers are agreed that the Nazi para-military secret police, and racial organizations are prohibited in any form for all time.

Abrogating Nazi Legislation

Nazi ideology and concepts are being uprooted from the German legal system. The Potsdam Agreement requires that "All Nazi laws which provided the basis of the Hitler regime or established discrimination on grounds of race, creed, or political opinion shall be abolished. No such discrimination, whether legal, administrative or otherwise, shall be tolerated."¹⁴

Accordingly on September 20, 1945, the four Military Governors adopted "Control Council Law No. 1," entitled "Repealing of Nazi Laws." It provides for the repeal of 25 specified fundamental laws enacted after January 30, 1933, when the Nazi regime came to power, together with all supplementary and explanatory laws, ordinances, and decrees. It further declares in Article II, that:

¹¹ Military Government of Germany, *Monthly Report of the Military Governor, U. S. Zone*, No. 14, Sept. 20, 1946, pp. 1, 28; hereinafter referred to as M. G. of Germany, *Monthly Report*. Each month such general reports are issued, plus a series of special reports.

¹² M. G. of Germany, special report on *Legal and Judicial Affairs (Cumulative Review)*, No. 14, Sept. 20, 1946, p. 4.

¹³ M. G. of Germany, *Special Report on German Labor Front*, No. 3, Oct. 20, 1945, p. 16.

¹⁴ *Potsdam Agreement*, Part III, Sec. A, par. 4, p. 22.

No German enactment, however or whenever enacted, shall be applied judicially or administratively in any instance where such application would cause injustice or inequality, either (a) by favoring any person because of his connection with the National Socialist German Labor Party, its formations, affiliated associations, or supervised organizations, or (b) by discriminating against any person by reason of his race, nationality, religious beliefs, or opposition to the National Socialist German Labor Party or its doctrines.¹⁵

This Control Council Law also was adopted on the initiative of the American member, and was founded in part on our somewhat less detailed "Military Government Law No. 1," entitled "Abrogation of Nazi Law." This law nullified 9 specific Nazi laws, including those for the protection of national symbols, prohibiting the creation of political parties (other than the Nazi Party, of course), securing the unity of Party and State, protecting German blood and honor, and specifying the Nazi race-impregnated citizenship requirements. The law also contained the general suspending clause quoted above.¹⁶ In the American Zone the entire German legal system is in the process of being reviewed and purged by a Committee on Reform of German Law in order to carry out the spirit and the letter of both "Control Council Law No. 1" and the American "Military Government Law No. 1." This committee held its first meeting on March 21, 1946. Much of the detailed work is being undertaken by German legal experts under Military Government supervision.¹⁷

On January 30, 1946, a law sponsored by the United States, purging the German Criminal Code of Nazi and militaristic provisions, also was approved by the Control Council. Issued as "Control Council Law No. 11," entitled "Repealing Certain Provisions of the German General Code," it eliminates those portions of the Code and other criminal laws which most clearly needed repeal because of their contributions to either Nazism or militarism and which did not require replacement by other legal provisions. Among the repealed provisions were the laws concerning Treason and High Treason (Sections 80 to 94 of the Criminal Code), in order to assure that Germans now cooperating with the Allied Forces should not be prosecuted under these provisions by a future German Government.¹⁸

Arrest of Top Nazi Leaders

According to the Potsdam Agreement, "Nazi leaders, influential Nazi supporters and high officials of Nazi organizations and institutions and any other persons dangerous to the occupation or its objectives shall be

¹⁵ "Control Council Law No. 1," Enclosure 1 to USFET directive on "Administration of Military Government in U. S. Zone in Germany," Oct. 20, 1945.

¹⁶ "Military Government Law No. 1," *K. G. Gazette*, pp. 11-12.

¹⁷ For summary of achievements, see M. G. of Germany, *Legal and Judicial Affairs*, monthly special reports, and especially Cumulative Review, No. 14.

¹⁸ M. G. of Germany, *Monthly Report*, No. 7, Feb. 20, 1946, pp. 1, 6, 28.

arrested and interned."¹⁸ When our Occupation Forces entered Germany American Military Government arrest program plans called for the detention of two groups of Germans. The first included all those who fell within certain prescribed arrest categories and who were arbitrarily arrested simply by virtue of the positions they held in the Nazi Party or the German Government. Their arrest was based on the position held, not the particular culpability of the individual occupying the position. The second group, however, included those who were prescribed in the Allied Arrest Blacklist and were individually sought out by name. Many Nazis, of course, fell into both groups.

In general, automatic arrest of the following groups was initially required under these regulations: All persons who held office in the Nazi Party organization, down to a low level; all persons who held commissions, down to and including the equivalent rank of major, in the para-military organizations; all officers and senior non-commissioned officers of the SS; and all officials in the higher ranks of the German Civil Service.

A revised mandatory arrest directive was issued on February 4, 1946, by OMGUS (Office of Military Government for Germany—U. S., which replaced US Group CC in the fall of 1945). The new directive reduced the arrest categories, and the amended list—which was authorized by the U. S. Joint Chiefs of Staff in Washington and concurred in by the U. S. Chief of Counsel for the war criminal trials at Nuremberg—provided for the internment of members of organizations and groups contained in the the following seven specific categories:

1. Gestapo and SD (*Sicherheitsdienst* or Security Service) of the SS.
2. Officers and non-commissioned officers of the *Waffen* (Armed) SS and *Allgemeine* (General) SS, and officers of the SA holding the rank of major or higher.
3. The leadership Corps of the Nazi Party, including Nazi officials down to the rank of *Ortsgruppenleiter* (Local Party Leader).
4. Members of the Reich Cabinet since January 30, 1933.
5. Members of the General Staff and High Command of the German Armed Forces.
6. War criminals.
7. Security suspects.²⁰

It was found to be very difficult to establish early estimates of the total number of Germans affected by the initial arrest program. This was due, in part, to the large shifts of German population occasioned by the military situation and the subsequent transfer of peoples, and also to the fact that arrests were based largely upon the positions held rather than upon the individuals themselves so that it was impossible to estimate accurately the percentage of overlap, that is, the cases in which one individual held two or more of the positions whose incumbents were subject to arrest. However,

¹⁸ Potsdam Agreement, Part III, Sec. A, par. 5, p. 12.

²⁰ M. G. of Germany, *Denazification and Public Safety*, No. 7, Feb. 20, 1946, p. 3.

the figure 600,500 was given in September 1945 as the total number of arrestable persons in all Germany under established categories, and it was further estimated that approximately one-third, or 200,200, arrests would be made in the American Zone. The largest single group included among the arrestable categories was the Nazi Party leadership corps, which, it was believed, would constitute 50% of the total, or some 100,000 individuals.²¹

In actual practice arrests averaged 400 to 500 per day prior to the revised directive of February, totalling about 100,000 in the first eight months of occupation. A substantial number of these arrestees did not actually fall within the arrest categories, however, but were detained because they came under suspicion for one reason or another.²² The above figures on the other hand, do not include all prisoners of war who fell within the arrest categories; when German prisoners of war were about to be released they were screened in order to weed out those subject to continued detention under the arrest categories and were simply transferred directly from PW enclosures to arrestee detention camps.²³

This arrest program was coördinated with the war crimes trials. The prosecution at the major trial at Nuremberg argued for conviction of six indicted Nazi groups, including the Nazi leadership corps, the Reich Cabinet, the German General Staff and High Command, the SA, the SS (including the SD), and the Gestapo—with an aggregate membership exceeding 2,000,000. It was estimated that of these 2,000,000 members approximately 1,000,000 would be made liable for trial if the groups were convicted, since the total had to be halved by deaths and duplication.²⁴

In its decision the International Military Tribunal convicted the Nazi Party leadership corps, the SS (including the SD), and the Gestapo. The other three indicted groups were acquitted of war crimes charges, which, however, did not relieve their individual members from conviction and punishment under the Denazification program. Members of the three convicted groups, on the other hand, are subject to apprehension and trial as war criminals by the national, military, or occupation courts of the four Occupying Powers.²⁵ Should any member of these convicted groups be individually acquitted of war crimes, he too will nevertheless be subject to trial under the Denazification program.

The arrest directive, as amended in February, has rendered eligible for review and release all persons in civilian internment enclosures who are not members of organizations convicted as criminal. Some 20% of all persons held in detention camps in the American Zone when the revised

²¹ Same, *Denazification*, No. 2, Sept. 20, 1945, p. 3.

²² Same, *Denazification*, early reports.

²³ Same, No. 1, Aug. 20, 1945, p. 2.

²⁴ Associated Press Report, *Milwaukee Journal*, Feb. 28, 1946.

²⁵ Art. 10, "Charter of the International Military Tribunal," *Trial of War Criminals*, Department of State Publication 2420 (1945), p. 17.

directive was issued were expected to be released under these procedures. Active members of organizations convicted as criminal are detained until their cases can be disposed of by individual "membership trials," which are to take place now that the Nuremberg convictions are prescribed.²⁶ According to the most recent reliable figures available, by September 1, 1946, there were only some 66,500 active Nazis under arrest in our Zone,²⁷ due to the revisions of the February arrest directive and the release of many arrestees who initially were apprehended as threats to our military security but were subsequently exonerated.

When completed this arrest program will achieve the elimination of the top Nazi leadership from positions of influence in the political and economic life of Germany. This leadership will be tried, and upon conviction may be fined, continued under detention, or sentenced to forced labor, with an attendant loss of civil rights, depending upon the severity of the condemnation under the Denazification program.²³

Removal of Nazis From Office

Perhaps the most controverted phase of Denazification is the so-called "removal-from-office" program. The Potsdam Agreement requires that:

All members of the Nazi Party who have been more than nominal participants in its activities and all other persons hostile to Allied purposes shall be removed from public and semi-public office, and from positions of responsibility in important private undertakings.²⁹

This is a similar, but somewhat less severe, statement of the general removal policy already provided for in the American removal directive, issued on July 7, 1945, and entitled "Removal of Nazis and Militarists." This directive, quoted directly from "JCS 1067," required that:

All members of the Nazi Party who have been more than nominal participants in its activities, all active supporters of Nazism or militarism and all other persons hostile to Allied purposes will be removed and excluded from public office and from positions of importance in quasi-public and private enterprises.³⁰

Considerable controversy has been evoked in defining an "active Nazi" under these provisions. It was decided to interpret it in the American Zone as embracing all those who had:

²⁶ M. G. of Germany, *Denazification and Public Safety*, No. 7, Feb. 20, 1946, p. 3.

²⁷ See Zink, "American Denazification Program in Germany."

²⁸ Discussion of this subject is continued below, see p. 823 ff.

²⁹ *Potsdam Agreement*, Part III, Sec. A, par. 6.

³⁰ USFET directive on "Administration of Military Government in the U. S. Zone in Germany," July 7, 1945, Sec. II on "Removal of Nazis and Militarists," Part I, par. 2; this special directive on Denazification also was issued separately by USFET on 29 June 1945. For direct quotations from "JCS 1067" see Part I, par. 6c.

(a) held office or otherwise been active at any level from local to national in the Party and its subordinate organizations, or in organizations which further militaristic doctrines; (b) authorized or participated affirmatively in any Nazi crimes, racial persecutions or discriminations; (c) been avowed believers in Nazism or racial and militaristic creeds; or (d) voluntarily given substantial moral or material support or political assistance of any kind to the Nazi Party or Nazi officials and leaders.³¹

Under the initial American directives removal from public and semi-public office was either mandatory or discretionary. Mandatory removal was required for the upper levels of Nazi leadership, including officials of the Party and its affiliated organizations, for those who received certain Nazi Party decorations, and for certain higher levels of the German Civil Service. The number of Germans affected naturally was much larger than those subject to arrest. Other groups were rendered subject to removal at the discretion of Military Government, based upon individual investigation of the particular merits of the case.

The removal procedure established under this directive was founded upon a system of "vetting" or screening by Military Government. All persons used by our Occupation Forces in public or quasi-public office were required to fill out a detailed six-page personnel questionnaire called the *Fragebogen*, containing questions intended to make the individual reveal his personal history, employment record, experience, military service, membership and role in all types of organizations, and especially the Nazi Party and its affiliates, writings and speeches since 1923 when Hitlerism was being organized, income and assets since the Party first achieved power, travel and residence abroad, and the like.

When the *Fragebogen* was completed the applicant signed and certified that the answers were true and that he understood that he would be prosecuted in an American Military Government Court for falsification. It then was evaluated, and answers were checked against all available intelligence, German police, civil service, Nazi Party, and other records and documents. Military Government prosecuted cases of falsification, and offenders were sentenced from two to five years or more imprisonment by Military Government Courts. Such action was published in order to deter others from falsification.

Over 1,613,000 Germans—or one out of every 10 persons in the American Zone—were processed under this procedure by June 1, 1946, when a new procedure was adopted as described below.³² This in itself was a tremendous undertaking, achieved during a period of rapid redeployment of our troops. It entailed not only the perfunctory completing of the questionnaire and its evaluation, but also as complete a check, field investiga-

³¹ Directive on "Removal of Nazis and Militarists," Part I, par. 3a; also quoted from "JCS 1067," Part I, par. 6c.

³² See p. 823 ff.

tion, and personal interview as possible. Of the cases examined, 373,762, or roughly 23 percent, resulted in removal or exclusion from office, the remaining 77 percent being cleared by this procedure.³³ These figures tell only part of the story, however, since the elimination of the German national government and the mandatory abrogation by Military Government of numerous Nazi-created agencies, such as *Gau* units (the largest Nazi Party administrative districts) and the DAF (German Labor Front), has resulted in the automatic group removal of many more thousands of Nazis from German public and administrative life.³⁴

The above figures, moreover, include only a small proportion of removals from business enterprises. It was early discovered that satisfactory results were not being achieved in removing active Nazis from private enterprises under this procedure. Inasmuch as the eradication of Nazi economic power and influence also has been conceived to be of prime importance, a supplementary regulation was promulgated and became effective on September 26, 1945. Designated "Military Government Law No. 8," and given the cumbersome title "Prohibition of Employment of Members of Nazi Party in Positions in Business Other Than Ordinary Labor and for Other Purposes,"³⁵ it rendered unlawful employment by any business enterprise of any member of the Nazi Party or of its affiliate organizations in any supervisory or managerial capacity or otherwise than in ordinary labor, except as expressly authorized by Military Government. Such authorization could be granted, upon appeal to Military Government, only to those persons, discharged or refused employment under the law, who claimed that they were forced to join the Party and never were actively engaged in any of the activities of either the Party or its affiliate organizations. Their appeals were heard by local German Review Boards composed of reputable non-Nazis appointed by the local mayor and approved by Military Government. The Review Board recommended to the local Military Government Office whether or not the appellant should be reinstated, but the final decision rested with Military Government.

Any business enterprise desiring to open for business, the law further provided, had to certify that it had no Nazis in its employ. A business open or operating with any person employed in violation of the law was required to discharge such person immediately, failing which it was closed by Military Government. Local German Labor Officers were responsible for enforcing compliance on the part of business establishments.

Law 8 thus was expected to accord a priority acceleration to the Denazification of the economic affairs of Germany. It prohibited former active

³³ Zink, "American Denazification Program in Germany."

³⁴ M. G. of Germany, *Denazification*, No. 1, Aug. 20, 1945, p. 2.

³⁵ Issued as Annex H to USFET directive on "Administration of Military Government in the U. S. Zone in Germany," 26 Sept. 1945, and reissued as Enclosure 1 to implementing instructions, same title, Oct. 6, 1945.

Nazis from exercising influence in the economy of the Reich or dominating others through economic power. Germans falling within the purview of the law were not deprived of a minimum livelihood, but they were restricted in the type of position they could hold in the business field.

A quadripartite directive also was negotiated by the Control Council providing for removal from public office and from positions in private enterprise. This was approved on January 12, 1946, and was issued as "Control Council Directive No. 24," entitled "Removal From Office and From Positions of Responsibility of Nazis and of Persons Hostile to Allied Purposes."³⁶ In essence the new quadripartite directive contains substantially the same provisions already prescribed in the basic American removal-from-office directive of July 7, 1945. Uniformity is a great gain, because Germans removed from office or subject to removal in one Zone formerly could often find good posts in another Zone. Although it is still rumored that there are substantial discrepancies in the application of the Denazification program between the Zones, nevertheless the quadripartite directive helps to minimize inequalities by providing that no person removed in accordance with the mandatory removal provisions of the directive in one Zone may be employed in any other Zone in any position coming within the provisions of the directive.³⁷

Finding Suitable Replacements

Once Nazis have been arrested or removed from office it is necessary to replace them with suitable politically reliable German personnel. The Potsdam Agreement provides that the selection of replacements shall be made from among "persons who, by their political and moral qualities, are deemed capable of assisting in developing genuine democratic institutions in Germany."³⁸ The difficulty of locating trained and competent substitutes, free from Nazi taint, has been one of the greatest obstacles to immediate and peremptory Denazification. Shortages were particularly acute in the initial days of the occupation, and were especially significant in the upper public office brackets, in the technical services, and in the teaching profession.

Difficult administrative problems resulted, but no breakdown—as was freely predicted by Germans whose self-interests were affected—occurred because of such removals. In the early days of the occupation, owing to a fear of resultant decrease in efficiency of operation, there was some reluctance on the part of Military Government to remove occasional officials whose removal or non-employment was required under our Denazification regulations. But suitable non-Nazi replacements were found in most cases,

³⁶ M. G. of Germany, *Denazification*, No. 6, Jan. 20, 1946, pp. 4-6.

³⁷ Same, p. 5.

³⁸ *Potsdam Agreement*, Part III, Sec. A, par. 6.

and in the remaining cases new employees have been trained to fill the positions vacated.

True, it has not been easy for the local Military Government Detachment to dismiss the only qualified power-plant engineer of the city, for example, because he was an active Nazi, especially when the tactical forces required the uninterrupted services of this utility. Frequently the Detachments had a heterogeneity of pressures brought to bear upon their work engendered by public opinion in the United States, by Military Government Headquarters regulations, by their own immediate tactical Commands, by ardent anti-Nazi German groups, and by various local interests. To please all was next to impossible, and some made mistakes, but the preponderant majority who adhered to the policy that no Nazi is indispensable, have proven that effective administration could be accomplished without the services of such individuals.³⁹

Treatment of Nazi Property and Funds

In order to prevent the use of former Nazi economic resources for underground purposes or for the promotion of a Nazi revival, all property and funds of the Nazi Party and its organizations were ordered to be immediately seized and held by Military Government as each new area was taken over by our Military Forces. This was required under our "Military Government Law No. 52," entitled "Blocking and Control of Property."⁴⁰ However, in "Control Council Law No. 2"—the quadripartite regulation concerned with this matter and which has been referred to above—it subsequently was agreed not only to seize, but also to confiscate, all such properties. This multipartite law applies not only to the assets of the Nazi Party but also to all the formations, affiliated associations, and supervised agencies prescribed in this law.⁴¹

Under these provisions Military Government seized accumulated Nazi wealth, but this was no mean task. It involved great financial and economic empires such as the DAF (German Labor Front), which was the sole organization of labor permitted under Nazi law in the Reich, and which, through a series of confiscations and sequestrations, developed into an enormous economic combine with an evaluation variously estimated between 1½ and 2 billion Reichsmarks. In addition to controlling German labor it owned, operated, and managed a variety of enterprises including banks, insurance companies, building and loan societies, real estate, retail stores, warehouses, shipyards, oil concerns, publishing houses, automobile plants, building materials production plants, and amusement enterprises. It has been stated that the DAF and its subsidiaries controlled between 12

³⁹ M. G. of Germany, *Denazification*, No. 1, pp. 3-4; same, No. 4, Nov. 20, 1945, p. 2.

⁴⁰ M. G. Gazette, pp. 24-27.

⁴¹ Art. II.

and 14 percent of all assets in Germany. In our Zone Military Government was instructed in July 1945 to take over all DAF properties and assets. Some of these assets will be returned to the former organizations and individuals from whom they were taken by the Nazis, while others may be dealt with as reparations. In any case, great care is being exercised to see to it that this economic wealth is not returned to any disguised Nazi organization, and it is so broken up that its combined economic and political power has been shattered.⁴²

Since it was deemed insufficient merely to liquidate the economic might of the Nazi organizations "Military Government Law No. 52" also was applied against the property and funds of the individual Nazi leaders and German militarists. Private transfers of their property were prohibited and their bank accounts frozen, so that they and their families could withdraw only minimum amounts necessary to maintain a livelihood. Law 52 applied to those Nazis who fell within the arrest categories or who were subject to removal from office.⁴³ It is estimated that these aggregated over 400,000 families in the American Zone.

Information Services, Education, and Religion

The elimination of Nazi ideology and control from public information media is one of the more difficult and certainly one of the most important aspects of Denazification. The Potsdam Agreement requires the Control Council to "prevent all Nazi and militarist . . . propaganda."⁴⁴ To this end, German information services, including the radio, press, books and periodicals, films, theaters, concerts, and other forms of entertainment, were early placed under strict Military Government supervision in the American Zone. This was undertaken in accordance with "Military Government Law No. 191," issued by SHAEF and entitled "Control of Publications, Radio Broadcasting, News Services, Films, Theaters, and Music and Prohibition of Activities of the *Reichsministerium für Volksaufklärung und Propaganda*."⁴⁵

This control is designed to eliminate information media which propagate anti-democratic ideas or Nazi policies including racism and race hatred, which constitute an incitement to riot or disorder, or which interfere in any way with the process of Military Government. As conditions have permitted, fuller scope for self-expression has been turned over to reliable Germans, but not until it was certain that such information services would not be used for Nazi and militaristic purposes.

⁴² M. G. of Germany, *Special Report on German Labor Front*, in general.

⁴³ See especially Art. I, *M. G. Gazette*.

⁴⁴ Part III, Sec. A, par. 3 (iii).

⁴⁵ Referred to in M. G. of Germany, *Legal and Judicial Affairs (Cumulative Review)*, No. 14, Sept. 20, 1946, p. 22.

All German information services initially were placed under direct Military Government management. Publishing houses were closed down until active Nazis could be eliminated and reliable Germans with democratic leanings licensed to replace them. Constant controls are exercised over the materials published. Nazi literature has been removed from the shelves of German bookshops and its display and sale prohibited. Initially all German newspapers were required to cease publication. Then certain papers were published by Military Government, and, as suitable German personnel was recruited and cleared, to whom could be entrusted the rebuilding of a free press, the papers gradually were licensed and turned over to such Germans and published under Military Government supervision. Nearly 50 papers were licensed during the first 15 months of occupation and are currently published in the American Zone. The radio, perhaps the information medium most thoroughly infected with Nazi ideology and personnel, has been the last to be returned to German management, and 6 German stations are now in operation in our Zone. For the most part information services currently in existence in Germany are new, those existing under the Nazi regime having been dissolved, and virtually completely new German personnel has been utilized. As a result Military Government has exercised little more than policy supervision since the summer of 1946.⁴⁶

Although confiscation of Nazi and militarist literature in private libraries has been deemed undesirable and impracticable by the Control Council Coordinating Committee, comprised of the four Deputy Military Governors of Germany,⁴⁷ nevertheless there is a general "Control Council Order No. 4," providing for "Confiscation of Literature and Material of a Nazi and Militarist Nature," approved May 13, 1946. This general order was amended on August 10, 1946, to permit the preservation by Zone Commanders of a limited quantity of copies of such prohibited documents, to be retained in the interests of research and scholarship under strict supervision.⁴⁸

In the field of education the purely Nazi schools, such as the Adolf Hitler Schools, the National Political Education Institutes, and the Nazi Leaders Colleges have been closed down permanently. Ordinary schools and educational institutions, originally closed by Military Government, on the other hand, have been reopened, but only after they were purged. This entailed the elimination of objectionable courses of instruction, the screening of teaching staffs, and the revision of textbooks. Today the teaching program

⁴⁶ M. G. of Germany, *Monthly Report*, No. 1, Aug. 20, 1945, p. 3; same, No. 2, Sept. 20, 1945, p. 4; same, *Denazification*, No. 1, *op. cit.*, p. 4; same, *Information Control (Cumulative Review)*, No. 13, Aug. 20, 1946, p. 1. Detailed accounts are to be found in the various special monthly reports on *Information Control*.

⁴⁷ Coordinating Committee, "Report on Confiscation of Literature and Other Evidence of a Nazi or Militarist Character in Private Libraries," June, 1946, M. G. of Germany, *Monthly Report*, No. 12, July 20, 1946, p. 21.

⁴⁸ Same, No. 14, pp. 1, 28.

is oriented towards developing democratic and humanitarian principles and values, and towards the eradication of Nazi and militaristic influences or doctrines, especially instruction giving support to the "Führer" principle, aggression, nationalism, militarism, and discrimination on the basis of race and religion. This is in accordance with the provision of the Potsdam Agreement requiring that "German education shall be so controlled as completely to eliminate Nazi and militarist doctrines and to make possible the successful development of democratic ideas."⁴⁹

Denazification created a severe shortage of teachers in many localities, thus retarding the reopening of schools. When primary schools were reopened on the target date, October 1, 1945, it was estimated that as many as 80 to 85 percent of the teachers had to be removed in some areas. But it never has been contended that education as such is more important than education with reliable teachers, even though this has considerably retarded the formal education program.⁵⁰

On the quadripartite level, in December, 1945, the Control Council approved a policy paper dealing with the "Recruiting of Democratic Teachers," which prescribes the establishment of a system of courses of instruction in each Zone for the preparation of teaching staffs. Former members of, or candidates for, the Nazi Party, leaders and active members of the Hitler Youth movement and associated organizations, and former officers of the German Armed Forces are specifically eliminated from this teacher-training program. Another Control Council policy paper, also approved in December 1945, entitled "Non-admittance of Persons with Former Nazi Affiliations as Students to Institutions of Higher Learning," prohibits members of the Nazi Party, leaders and active members of the Hitler Youth Movement, and similar organizations, from entering institutions of higher learning. Former members of the Nazi Party who had not taken an active part in its activities, however, under certain limiting conditions may be accepted up to 10 percent of the total number of students, provided vacancies exist. Selection is made by special committees of suitable Germans only after careful examination under Military Government directives.⁵¹ In addition, in June, 1946, the Control Council approved "Directive No. 32," providing for a program of "Disciplinary Measures Against Managing and Administrative Staffs of Educational Institutions, Teaching Staff, and Students Guilty of Militaristic, Nazi, or Anti-Democratic Propaganda." This regulation requires dismissal without prejudice to supplementary disciplinary measures or sanctions that may be required under respective zonal regulations.⁵²

In the field of religious affairs Denazification was largely a matter of

⁴⁹ Part III, Sec. A, par. 7.

⁵⁰ M. G. of Germany, *Denazification*, No. 3, Oct. 20, 1945, pp. 4-5.

⁵¹ Same, *Monthly Report*, No. 7.

⁵² Same, No. 12, p. 20.

removing Nazi restraint on the freedom of religious belief and worship, of reviving an independent religious press, of protecting shrines from damage due to Nazi-abetted disrespect, of abrogating Nazi laws and decrees providing for religious discrimination, and of using religious groups and leaders for the reëducation of Germans through emphasis on moral values.⁵³

But it also involves the screenings of the clergy. Church authorities were instructed to discharge clergy whose Nazi backgrounds placed them within the application of the provisions of the removal-from-office directives. Military Government itself investigated the personnel constituting the church administration, in order to weed out both Nazis and militarists. Priests and pastors who preach nationalist or Nazi principles are treated as are laymen. The purging of the clergy and the church hierarchy has been deemed essential by Military Government because investigations established some collaboration with the Nazi organization. Military Government has proceeded slowly with church Denazification, however, in order to allow the Germans to do as much as they could to set their own religious affairs in order.⁵⁴

Prohibiting Nazi Insignia, Memorials, and Street Names

Parades of military or political nature, the public playing and singing of Nazi anthems, and the public display of Nazi flags and other paraphernalia are prohibited by "Military Government Law No. 154," entitled "Elimination and Prohibition of Military Training." The provisions of this law were reaffirmed in a Control Council policy statement approved September 20, 1945. Included are stipulations declaring illegal the use of Nazi and military uniforms and insignia, salutes, medals, anthems, and music.⁵⁵

On August 30, 1945, the Control Council also approved a separate proposal providing for the "Prohibition of the Wearing of Uniforms by Disbanded Personnel of the Former German Army." Shortly thereafter, on September 22, 1945, an implementation instrument was issued in the American Zone as "Ordinance No. 4," concerned with the "Prohibition of Wearing of German Military Uniforms," which provides that no German shall wear Nazi or military decorations, badges of rank, or uniforms of regulation color or pattern. These restrictions apply to uniforms of the Nazi Party and its organization as well as to the German Armed Forces.⁵⁶

⁵³ Same, *Denazification*, No. 2, p. 4. More detailed information is to be in the special reports on *Education and Religious Affairs*.

⁵⁴ Same, *Denazification*, No. 3, p. 5.

⁵⁵ "Military Government Law No. 154," Annex E to USFET directive, "Administration of Military Government in the U. S. Zone in Germany"; Annex E is part of a supplement issued July 18, 1945. For Control Council statement, see M. G. of Germany, *Monthly Report*, No. 3, Oct. 20, 1945, p. 24.

⁵⁶ M. G. of Germany, *Denazification*, No. 3, p. 1.

Early in the occupation SHAEF issued "Military Government Law No. 7," requiring the "Removal from Official Seals of National Socialist Emblems."⁵⁷ On July 23, 1945, the American Military Government issued a directive requiring the changing of the names of all streets, parks, institutions, and buildings named after persons or objects associated with Nazism or militarism. Such action had already been begun on a local scale and in a number of cases, partly under pressure of German anti-Nazi groups. Military Government also required the removal of movable monuments and statues associated with Nazism and militarism, and the removal of Nazi emblems, insignia, and symbols from statues, monuments, and edifices which could not readily be removed. Military Government Detachments in the field were made responsible for enforcing these provisions, but they were instructed by directives to have local German authorities present concrete plans for its implementation. When such plans were approved, they were issued as an order by the local German authority, to be accomplished within a certain time, and disobedience of this order constituted a crime punishable by Military Government.⁵⁸ Quadripartite action, though somewhat more limited in scope, has been embodied in "Control Council Directive No. 30" of May 15, 1946, providing for "Legislation Dealing with the Liquidation of German Military and Nazi War Memorials and Museums," as amended in July 1946.⁵⁹

Revisions in Denazification Laws and Procedures

With the close of 1945 the Denazification program in the American Zone had largely reached its initial objective. The Nazi Party and its affiliated organizations were dissolved. Former active Nazis had been removed from leading positions in government and business and their financial wealth taken under control. German authorities, purged of known active Nazis, were functioning at all but the national levels. Nazi pomp and color had been swept out of existence. Yet the American Denazification program was so far largely an interim program designed for the initial period of occupation. The time, it was believed, had arrived for effecting a comprehensive long-range Denazification program.

A Denazification Policy Board therefore was established within OMGUS to undertake a complete survey of the entire program. In its report of January 15, 1946, it concluded that every person who exercised leadership in support of the Nazi regime should be deprived of influence or power, and those responsible for the wrongs and suffering caused by the Nazi regime should be punished. The actions to be taken in carrying out this program, however, must commend themselves to fairminded men, and Denazification

⁵⁷ Same, *Legal and Judicial Affairs (Cumulative Review)*, No. 14, p. 21.

⁵⁸ USFET directive, "Denazification and Demilitarization of German Street Names and Memorials," July 23, 1945.

⁵⁹ M. G. of Germany, *Monthly Report*, No. 13, Aug. 20, 1946, p. 20.

should not be carried to the point of preventing the building of a democratic society in Germany. The Board further held—and this is of prime significance—that the German people themselves must be allowed to participate actively in Denazifying their country.⁶⁰

In December, 1945, the *Land* (or State-level) Ministers of Justice of Bavaria, Greater Hesse, and Württemberg-Baden submitted to Military Government a German draft proposal to be adopted as German law in each *Land*, incorporating Denazification as a regular part of the new German program of political and economic reconstruction in the American Zone. Based in part upon suggestions made in this proposed German law, and as a result of extended deliberation by the Denazification Policy Board, a new "Law for Liberation from National Socialism and Militarism" was approved and issued by OMGUS on March 5, 1945, and was reissued as German law in each *Land* in our Zone.⁶¹

This Denazification law calls for the registration and classification of all former members of the Nazi Party and specified affiliated organizations, influential Nazi supporters particularly in the business field, and the more active militarists. When classified, such Nazis fall within the following groups:

- Class 1. Major Offenders (*Hauptschuldige*).
- Class 2. Offenders (*Aktivisten*)—or Activists, Militarists, and Profiteers (that is, active participants or supporters, or recipients of excessive or unjust profits).
- Class 3. Lesser Offenders (*Minderbelastete*)—or probationers.
- Class 4. Followers (*Mitläufer*)—those who, though Party members, were never more than nominal Nazis.
- Class 5. Non-offenders (*Enlastete*)—or persons exonerated.⁶²

The removal categories prescribed in the quadripartite removal agreement referred to above are fitted into this classification in an Appendix to the law.

Penalties, forfeitures, and disqualifications are imposed upon each person falling within Classes 1 to 4, which vary in duration and type in accordance with the degree of guilt of the individual concerned. Major Offenders (Class 1) lose their property permanently, lose most civil rights, are assigned to labor camps from 2 to 10 years, may not be active in a profession or independent business for at least 10 years; may also face trial as war criminals. Offenders (Class 2) may be assigned to labor camps for up to 5 years, have their properties confiscated in whole or in part, and may not be active in a profession or business up to 5 years. Lesser Offenders (Class

⁶⁰ OMGUS Public Relations Service press release, "Program for Denazification," 18 Jan. 1946; and M. G. of Germany, *Denazification and Public Safety*, No. 6, Jan. 20, 1946, p. 1.

⁶¹ For a brief analysis of this law, see same, No. 3, March 20, 1946, pp. 1-4.

⁶² Arts. 4-13.

3) are placed on probation for 2 years and may not work during that period except as ordinary laborers, and they may also be required to make contributions to the reparations funds. Followers (Class 4) pay single or recurrent contributions and are subject to relatively minor limitations on their activities.⁶³

Each registrant is investigated by a German Special Prosecutor, and all important cases are heard by a Tribunal established at the *Kreis* (or County) level of government. In appropriate cases the decision of this Tribunal is appealable to an Appellate Tribunal. A Minister of Denazification is appointed in each *Land*, and he enjoys the right to review any case arising within his jurisdiction.

Responsibility for executing the program devolves primarily upon the Germans. The *Minister Präsident* and the Minister of Denazification of each *Land* is directly responsible for effective and just Denazification. Military Government, of course, exercises close control, through directives to the Minister of Denazification and through the prior approval of regulations issued by him under German law. While the law delegates the major burden of the work of Denazification to the German people themselves, Military Government continues to have a responsibility for ensuring that it actually is being carried out. Between the time the new law was adopted and June 1, 1946, when the penal provision went into effect, Military Government directed its interest primarily towards the transfer of its duties to German agencies. By special directives of June 14, 1946, all existing American Military Government regulations concerned with removal from office were rescinded,⁶⁴ and former removal machinery today continues in use solely for the screening of Army and Military Government German employes, German Denazification personnel, and certain key German policy-making and business agents. All other removals, exclusions, and employment restrictions are carried out under the new German Denazification law.⁶⁵

Military Government headquarters early estimated that under this new Denazification law the German courts would be required to hear some 3,000,000 cases. This would mean a hearing for every five inhabitants in our Occupation Zone. An optimistic estimate was that at the 1946 rate of progress the Tribunals would not be able to complete their task until June of 1948,⁶⁶ while less optimistic reports indicated a belief that the task is virtually endless.⁶⁷

⁶³ Arts. 14-22, same, pp. 8-12.

⁶⁴ M. G. of Germany, *Monthly Report*, No. 12.

⁶⁵ Same, No. 13, p. 1.

⁶⁶ Barry Bingham, Editor of *Louisville Courier Journal*, in article on "Screening Out the Nazis is a Tedious Business," Nov., 1946, and letter to the author.

⁶⁷ Judy Barden, in NANA despatch, *Indianapolis Star*, Oct. 30, 1946, reports that only 1 percent of the Denazification cases had been settled in Bavaria, and that at the present rate of progress it will take 72 years, or until A.D. 2018, to complete the task.

In order to hasten the tempo of Denazification and to shift attention from the Nazi small fry to the more important members of the organization, two amnesties have been granted in the American Zone in 1946. The first exempted from Denazification trials all youths born after January 1, 1919, except Major Offenders (Class 1) and officers in the Hitler Youth movement.

The second, proclaimed in his 1946 Christmas address by the Military Governor of the American Zone, provides for a general amnesty, but only for the Nazis who are not chargeable as Major Offenders or Offenders (Classes 1 and 2). Those benefitted are the "little men," including only those whose annual income during the calendar years 1943 and 1945 was less than 3,600 marks (\$360 at present rates of exchange) and whose taxable property in 1945 did not exceed 20,000 marks (\$2,000). Also exempted from prosecution under this amnesty are Nazis who are more than 50 per cent disabled, if they do not fall within Classes 1 and 2 of the Denazification law.

The following is a summary tabulation of Denazification statistics compiled as of the end of July of this year. A total of approximately 12,000,000 Germans registered under the Denazification law of March, 1945, of which 11,000,000 (92%) had their Nazi status legally determined according to established procedures. Of the latter 8,735,000 (73%) were found to be not chargeable and therefore were completely exonerated, while the remaining 3,290,000 (27%) were chargeable. Of the total number of chargeable cases, over 2,308,000 (70%) have been completed, so that some 982,000 (30%) remain to be considered, as follows:

Cases chargeable	3,290,659
Chargeable cases completed	2,308,458 (70%)
Major Offenders, Offenders, and Lesser Offenders (Classes 1, 2, and 3)	48,694 (1%)
Followers and Non-Offend- ers (Classes 4 and 5)	201,019 (6%)
Amnestied	1,998,958 (61%)
Proceedings quashed	59,787 (2%)
Chargeable cases pending	982,201 (30%)
Heavily incriminated	(23%)
Not heavily incriminated	(7%)

As of June 30, 1947, the total number of internees held under custody in German enclosures under the Denazification law totaled 47,656, including about 26,200 SS members, 12,150 Nazi Party leaders, and 1150 Gestapo agents.⁸⁸

At the present time the American Military Governor and the German Denazification authorities are considering a new Denazification law to

⁸⁸ M. G. of Germany, *Denazification and Public Safety*, No. 25, 1 June-31 July 1947, p. 1; and same, *Statistical Annex*, No. 25, 1-31 July 1947, p. 89.

further speed up the program. If approved, this new law will free about half (some 350,000 to 400,000) of those still awaiting Tribunal hearings. This will be achieved by summary procedure, and will entail merely the payment of a nominal, standard fine. Crowded Tribunal dockets will thus be cleared, permitting the authorities to concentrate solely on those Germans whose offenses, on the record, are so bad that they must be classed as criminals.⁶⁹

* * * * *

Denazification thus is a comprehensive program intended to liquidate Nazi political and economic organization and power in Germany for all time, and it is founded upon both multilateral (or quadripartite) and unilateral Military Government laws and directives. In the United States Zone it has been viewed as one of the primary phases of our initial occupation program. There are those who claim that it is not at all unreasonable to expect that, if properly enforced, the broad objectives of our Denazification regulations are not impossible of achievement.

But the real test of Denazification lies rather in the extent to which it contributes towards the achievement of our fundamental, over-all occupation objectives. If it helps to pave the way for the establishment of a stable government based upon democratic institutions and procedures that guarantee fundamental human rights, a realization that the German State is the servant of the people, and a consciousness of moral and political responsibility for German policy and action both at home and abroad—then it may have served a very useful purpose. A great deal of thought and energy have been given to Denazification in order to direct it towards this end. It now is up to the more important, positive elements of the occupation program—democratization and reëducation.

⁶⁹ *New York Times*, Sept. 18, 1947.

PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

By JOSEF L. KUNZ

Of the Board of Editors

The problem of the privileges and immunities of international organizations has become very prominent in recent times and has raised not a few difficult questions. While many aspects of this problem cannot yet be regarded as definitively settled, there is, on the other hand, a trend toward the development of a new uniform and general international law concerning this topic. It seems, therefore, timely to investigate briefly this problem in its different ramifications historical and theoretical.

A. HISTORICAL SURVEY

The problem is not quite as new as it is sometimes supposed to be. It dates from the beginning of the XIXth Century.

(1) *From the beginning of the XIXth Century to 1920.* One of the earliest examples of the grant of diplomatic immunities to non-diplomatic functionaries international is to be found in the Convention of Contingents of the Panama Congress of 1826.¹ Mexico invested its Commissioners on the Mixed Claims Commission under the United States-Mexico Convention of April 11, 1829² with diplomatic character. Diplomatic privileges were later granted to the members of the International Finance Control Commission of Greece by the Hellenic Statute of February 26 (March 10) 1898.³ The privileges of "independence and neutrality" were originally given to the Central Commission for the Navigation of the Rhine⁴ and

¹ Article 13 and 14 of this Convention created a special organ, the *Comisión Directiva*, for the Atlantic Confederate Navy. The Commission was to consist of three members, each appointed by its own government (Colombia, Central America, Mexico). To give this Commission full independence and liberty, each member of the Commission was to enjoy all the immunities and exemptions of a diplomatic agent, wherever he reside (Article 15).

² Malby's Treaties, Vol. I, p. 110.

³ Article 2: *Les Délégués des Puissances jouiront des mêmes droits que le personnel des Légations en Grèce.*

⁴ German-French Treaty of August 15, 1814, Martens, *R. G.*, Vol. VIII, p. 201, Article 231; *Jouiront de tous les privilèges de la neutralité*; Congress of Vienna, 1815, Articles on the Navigation of the Rhine, Martens, *R. G.*, Vol. II, p. 431). *Convention and Règlement* concerning the navigation of the Rhine, Mainz, March 31, 1831, Martens, *R. G.*, Vol. IX, p. 252, Article 108. But the revised Mannheim Rhine Navigation Act of October 11, 1868, Martens, *N. R. G.*, Vol. XX, p. 355, contains no clause on diplomatic immunities.

permanently to the European Danube Commission;⁵ "inviolability" was granted to the International Congo Commission provided by the Berlin Congo Act of 1885.⁶

Diplomatic privileges were granted to the judges of the Permanent Court of Arbitration.⁷ The same privileges were envisaged for the proposed Court of Arbitral Justice⁸ and the International Prize Court.⁹ Of the judges of the Central American Court of Justice it was provided that,

whilst they remain in the Country of their appointment, shall enjoy the personal immunity which the respective laws grant to the magistrates of the Supreme Court, and in the four other contracting Republics they shall have the privileges and immunities of diplomatic agents.¹⁰

The Central American Treaty of 1907 created a Central American Bureau composed of representatives of the five Republics, having its seat in Guatemala City, and provided that the delegates should have in their own country the immunities of members of the legislative body and in the other four Republics diplomatic immunities. After a long struggle between the different conceptions of the Bureau and of the governments of San Salvador and Costa Rica,¹¹ the Central American Conference of 1910 adopted the interpretative Convention of February 3, 1910, Article 4 of which provided for diplomatic immunities of the delegates in the Republic of Guatemala.

(2) 1920-1939. Prior to 1920 granting of diplomatic privileges and immunities to international organizations was clearly an exception, based on

⁵ Treaty of the Congress of Paris of March 30, 1856, Article 16, Martens, *N. R. G.*, Vol. XV, 1856, pp. 776-777. *Acte public relatif à la navigation des embouchures du Danube*, Galatz, November 2, 1865, Article 21, Martens, *N. R. G.*, Vol. XVIII, p. 144: "benefits of neutrality." London Treaty of March 13, 1877, Article 7, Martens, *N. R. G.*, Vol. XVIII, p. 303. Berlin Congress Act of July 13, 1873, Articles 52-57, Martens, *N. R. G.*, 2^e ser., Vol. III, p. 449, *dans une complète indépendance de l'autorité territoriale* (Article 53).

⁶ Congo Navigation Act 1885, Article 18. To the Commission and the agents appointed by it was granted the *privilège de l'inviolabilité dans l'exercice de ses fonctions* and the same *garantie* was extended to the offices and archives of the Commission.

⁷ Hague Convention of July 29, 1899, Article 24. Hague Convention of October 18, 1907, Article 46: "The members of the Tribunal in the exercise of their duties, and out of their own country enjoy diplomatic privileges and immunities."

⁸ Article 5 of the Draft Convention, annexed to the *vœu*, adopted on October 18, 1907.

⁹ Hague Convention of October 18, 1907, Article 13.

¹⁰ Convention of December 20, 1907, establishing the Central American Court of Justice, *U. S. For. Rel.*, 1907, pp. 692-741, this JOURNAL, Vol. II (1908), Supplement, pp. 219-265. M. O. Hudson in his study on this Court (in this JOURNAL, Vol. 26 (1932), pp. 759-786, at p. 765) surveys the attitudes taken by the Central American governments and concludes: "At no time were the privileges and immunities of the judges made very definite."

¹¹ Francis Rey, *L'Union Centro-Américaine*, in *Revue Générale de Droit International Public*, Vol. XVIII (1911), pp. 69-39.

particular treaties or statutes. No such privileges existed in the case of other Finance Control Commissions, of other River Commissions, of the International Sanitary Councils, of all the Administrative Unions, or in the case of the Pan American Union. This remained in principle the law also during the period from 1920 to 1939, but the granting of such privileges by treaty or statute was greatly extended. Only the United States took, prior to 1941, a negative attitude, on the basis that under international law diplomatic privileges were due only to members of diplomatic missions.¹² The great increase in grants of diplomatic privileges to international organizations has brought into being a rich literature on this topic,¹³ which has already begun to be studied by learned societies and international organs.¹⁴

¹² G. H. Hackworth, *Digest of International Law*, Vol. IV (1942), pp. 419-423.

¹³ See the Commentaries upon the Covenant of the League of Nations by Ray (1930, pp. 289-299), Schücking and Wehberg (3rd ed., Vol. I (1931), pp. 588-604), Göppert (1938, pp. 147-150). F. Ranshofen-Wertheimer, *The International Secretariat*, Washington, 1945, pp. 268-273. Suzanne Basdevant, *Les fonctionnaires internationaux*, Paris, 1931, p. 292 ff. See also Grunbaum-Ballin in *Revue de Droit International et de Législation Comparée*, 3^e ser., Vol. II (1921), pp. 67-82. A. Rougier in *Revue Générale de Droit International Public*, Vol. XXVIII (1921), at pp. 275-279. Ramón de Oráe, *Extensión de los privilegios diplomáticos en el Pacto de la Liga de las Naciones*, in *Revista de Ciencias Jurídicas y Sociales*, 1922, p. 167. U. Borsi, *Il rapporto d'impiego nella Società delle Nazioni*, in *Rivista di Diritto Internazionale*, Vol. XV (1923), at pp. 437-440. C. Van Vollenhoven, "Diplomatic Prerogatives of Non-Diplomats," in this JOURNAL, Vol. XIX (1925), pp. 469-474. R. Secrétan, *Les privilèges et immunités diplomatiques des agents de la Société des Nations*, in *Revue de Droit International Privé*, Vol. XX (1925), pp. 1-25. Charles Morton, *Les privilèges et immunités diplomatiques*, Lausanne, 1927. Francis Rey, *Les immunités des fonctionnaires internationaux*, in *Revue de Droit International Privé*, 1928, pp. 253-278, 432-463. J. Secrétan, *Les immunités diplomatiques des représentants des Etats membres et des agents de la Société des Nations*, Lausanne, 1928. K. G. Hirsch, *Die rechtliche Stellung der internationalen Beamten unter besonderer Berücksichtigung der Funktionäre des Völkerbundsekretariats in Genf*, Bonn, 1928. P. Frei, *De la situation juridique des représentants des Etats membres de la S.d.N. et de ses agents*, Paris, 1929. Sir Cecil Hurst, "Diplomatic Immunities—Modern Development," in *British Year Book of International Law*, 1929, p. 1. Kurt Posega, *Die Vorrechte und Befreiungen der internationalen Funktionäre*, Göttingen, 1929. F. Schmidt, *Die völkerrechtliche Stellung der Mitglieder des ständigen Sekretariats des Völkerbundes*, Cologne, 1930. N. Hill, "Diplomatic Privileges and Immunities in International Organizations," *Georgetown Law Journal*, Vol. XX (1931), pp. 44-56. L. Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," in this JOURNAL, Vol. XXV (1931), pp. 694-710. H. R. Balz, *Die besonderen Staatenvertreter und ihre völkerrechtliche Stellung*, Giessen, 1931. H. P. Benet, "Recent Developments Affecting Diplomatic Privileges," in *Journal of Comparative Legislation and International Law*, 1931, pp. 84 ff. S. Kaufmann, *Die Immunität der Nicht-Diplomaten*, Frankfurt, 1932. J. Secrétan, "The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities," in *British Year Book of International Law*, 1935, pp. 56-78. A. Hammarskjöld, *Les immunités des personnes investies de fonctions d'intérêt international*, in *Revue de Droit International et de Législation Comparée*, 3^e ser., Vol.

Such privileges and immunities were in this period confirmed and continued for the European Danube Commission,¹⁵ were granted by French decree of 1922 to representatives and agents of the Central Commission for the Navigation of the Rhine, by the Italian law of June 1930 to the members of the General Assembly and of the Permanent Committee as well as to the officials of the first and second categories of the International Institute of Agriculture at Rome, by treaty to the newly created international river commissions, the International Danube Commission,¹⁶ the Elbe Commission,¹⁷ the Oder Commission, and the Commission Technique Permanente du Régime des Eaux du Danube;¹⁸ they were granted further to many organs created by the Paris Peace Treaties or by later treaties: to the Interallied Rhineland High Commission,¹⁹ to the Reparations Commission,²⁰ the Ambassador's Conference, boundary commissions, international plebiscite commissions, to the organs and agents created to execute the Dawes Plan; by a Polish-Danzig treaty to the Polish-Danzig Harbor Board,²¹ and the Polish Commissioner General in Danzig. Diplomatic

XVI (1935), pp. 6-31. The same, *Rapport*, in *Annuaire de l'Institut de Droit International*, Session de Paris, 1934. The same, *Les immunités des personnes investies des fonctions internationales*, in Hague Academy of International Law, *Recueil des Cours*, 1936, Vol. II, pp. 110-209. A monograph by Martin Hill, "Diplomatic Privileges and Immunities of League of Nations Officials," has recently been published.

¹⁴ *Rapport Adatci-de Visscher*, *Annuaire de l'Institut de Droit International*, session de Vienne, 1924, Vol. XXXI (1924), pp. 1-19; *Rapport David Jayne Hill* (the same, session de Lausanne, 1927, Vol. XXXIII, pp. 420-430; observations by Francis Rey, pp. 442-447. *Rapport A. Hammarskjöld*, the same, session de Paris, 1934, *Annuaire*, 1934, pp. 358-413. Commission of Experts for the progressive codification of international law, 1926, in this JOURNAL, Vol. XX (1926), Supplement, pp. 148-175. J. Blociszewski, *L'Institut de Droit International*, session de Vienne, in *Revue Générale de Droit International Public*, Vol. XXXII (1925), pp. 261-267.

¹⁵ Paris Peace Treaties, *Statut définitif du Danube*, Paris, 1921.

¹⁶ Versailles Treaty, Art. 347. *Statut définitif du Danube*, Paris, July 23, 1921, League of Nations, *Treaty Series*, Vol. XXVI (1924), p. 173, Art. 37: "The property of the International Commission and the persons of Commissioners are entitled to privileges and immunities which are accorded in peace and war to accredited diplomatic agents."

¹⁷ Convention, Dresden, February 22, 1922, 26 L. of N. Tr. Ser. (1924), 219. Art. 8: "The delegates to the International Commission, the Secretary General and his assistant, will enjoy the usual diplomatic privileges."

¹⁸ Convention, October 27, 1925. Art. 19 grants diplomatic privileges for the President, the delegates and their assistants, the members and personnel of the Secretariat and of the delegations *dans l'exercice de leurs fonctions*.

¹⁹ Versailles Treaty, Art. 432. Treaty of June 24, 1919 (L. of N. Tr. Ser. (1919), No. 7), Art. 3.

²⁰ Treaties of Versailles, Art. 240: St. Germain, Art. 186: Trianon, Art. 270: Neuilly, Art. 130 (obligations for the ex-enemies). French Decree of April 30, 1920).

²¹ Polish-Danzig Convention, Paris, November 9, 1920, Art. 14. The Danzig Commissioners of the Board enjoyed diplomatic privileges and immunities in the territory of Poland, and the Polish members in the territory of Danzig, the President of the Board in both States. The President, even if appointed by the Council of the League

status of the Uruguayan delegate on the Commission of Inquiry and Conciliation in the conflict between Paraguay and Bolivia (1929)²² was recognized. Diplomatic privileges were granted to the members of the mixed arbitral tribunals created by the Paris Peace Treaties.²³ The German-Polish Convention of 1922 granted diplomatic privileges and immunities to the members and the chief of the bureau and to the agents of the member states, but not to a state's own nationals, in the Arbitral Tribunal of Upper Silesia.

Article 19 of the Statute of the Permanent Court of International Justice granted to the judges diplomatic privileges and immunities in the exercise of their functions and outside of their own country. A detailed regulation concerning diplomatic privileges and immunities of the judges and officials of the Registry in the Netherlands was brought about by the letter of President Anzilotti of the Court to the Dutch Foreign Minister Beelaerts van Blokland of May 22, 1928.²⁴

Diplomatic privileges were also envisaged for the Bank of International Settlements.²⁵ Finally Article VII, paragraph 4, of the Covenant of the League of Nations, gives to the representatives of the Members and the agents of the League diplomatic privileges and immunities.²⁶ As far as their enjoyment in Switzerland was concerned first a provisional agreement of July 17, 1921, and later a *modus vivendi*²⁷ was agreed upon between Switzerland and the Secretary General of the League on September 18, 1926.

(3) *Since 1935.*²⁸ The Charter of the United Nations contains several articles²⁹ on privileges and immunities. These articles were carefully studied by the Preparatory Commission of the United Nations in London,³⁰

of Nations, was not an official of the League, as the Council expressly stated (*O. J.* 1921, pp. 158 f.).

²² Hackworth, *works* quoted above, note 12, Vol. IV, p. 420.

²³ German Law of August 10, 1920. French Decrees of May 29, December 13, and 15, 1925.

²⁴ P. C. I. J. *Probls.*, Series D, No. 1 (3rd ed.), Leyden, March, 1936, pp. 69-79.

²⁵ Hague Convention, January 20, 1930, M. O. Hudson, *International Legislation*, Vol. V (1936), pp. 306-313.

²⁶ Art. VII, par. 4: "Representatives of the Members of the League and officials of the League, when engaged on the business of the League, shall enjoy diplomatic privileges and immunities." Slightly different the equally authentic French text: *Les représentants des Membres de la Société et ses agents jouissent dans l'exercice de leurs fonctions des privilèges et immunités diplomatiques.*

²⁷ L. of N. Doc. C. 555. 1926-V; L. of N. O. J. 1926, p. 1432. M. O. Hudson, *International Legislation*, Vol. I (1931), pp. 224-228.

²⁸ P. C. Jessup, in this JOURNAL, Vol. 38 (1944), pp. 658-662. Leland M. Goodrich and Edvard Hambro, *Charter of the UN. Commentary and Documents*, Boston, 1946, pp. 281-285.

²⁹ Arts. 104-105.

³⁰ PC/20. 23 December 1945, London, pp. 60-80. See also Henry Reiff in *Department of State Bulletin*, Vol. XV, No. 372 (August 18, 1946), pp. 305-306, 311-312.

which annexed to its Report a Draft Convention on Privileges and Immunities³¹ and a Draft Convention between the United Nations and the United States.³² The first Convention was studied by the 5th³³ and 6th³⁴ Committee of the First Part of the General Assembly of the United Nations, held in London; on February 13, 1946, the General Assembly adopted the General Convention on the Privileges and Immunities of the United Nations.³⁵ This Convention had been ratified so far only by the United Kingdom.

A Negotiating Committee of the United Nations reached an interim agreement with Switzerland, which provided privileges and immunities for the United Nations and its personnel, more extensive than those offered by this country. The League building and other buildings have been acquired by the United Nations in the former League of Nations area at Geneva. The first Report of the Secretary General and the Negotiating Committee on the interim arrangement on privileges and immunities of the United Nations concluded with the Swiss Federal Council and on arrangements concerning the Ariana site came before the 6th (Legal) Committee of the Second Part of the General Assembly of the United Nations, held in New York in November and December, 1946. The same Committee had before it also a Joint Report of the Secretary General and the Committee of Negotiations with the competent authorities of the United States regarding the arrangements required as a result of the establishment of the seat of the United Nations in the United States. The fact that the United Nations Headquarters Committee adopted a midtown site in New York City as the permanent headquarters of the United Nations, has somewhat changed the legal problem, as the original Draft Convention was made with a rural area in mind. On June 26, 1947, the second anniversary of the signing of the Charter, Secretary of State Marshall and Secretary General of the UN Trygve Lie signed at Lake Success the agreement between the UN and the United States. The agreement will be brought into force by an exchange of notes between the Secretary General and the President of the United States after they have been authorized to approve it by the General Assembly and by both Houses of Congress by a majority vote.

³¹ The same, Appendix B, pp. 72-74.

³² The same, Appendix C, pp. 75-80.

³³ Faris Al Khoury (Syria), Chairman; Aghnides (Greece) Rapporteur. *Journal of the General Assembly*, Nos. 11 and 23-, Supplement 5. See also Henry Reiff in *Department of State Bulletin*, Vol. XV, No. 373 (August 25, 1946), pp. 325, 349-351.

³⁴ R. Jiménez (Panama), Chairman; Read (Canada) Rapporteur. *Journal*, Nos. 14, 18, 26, Supplement 6. Meetings of the Sub-Committee [Vandenberg (U. S.), Chairman]. See Documents A.C/6.14, A.C/6.20, A.C/6.21, A.C/6.23, A.C/6.28 and the Report, *Reporter: W. E. Beckett (U. K.)* of the 6th Committee to the General Assembly: A/43, February 9, 1946, 41. pages.

³⁵ Annex to A/43—Cmd. 6753, London, 1946 (Miscellaneous, No. 6, 1946). *Journal of the General Assembly*, No. 34 (London, 7 March 1946), pp. 687-693.

The Statute of the International Court of Justice contains a clause,³⁶ identical with Article 19 of the Statute of the former Court, giving diplomatic privileges to the judges, "when engaged on the business of the Court"; Article 32, paragraph 8, of the Statute stipulates that salaries, allowances and compensations shall be free from taxation. New is Article 42, paragraph 3: "The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties." Part II of the General Convention on the Privileges and Immunities of the United Nations of February 13, 1946, invites the members of the Court at their first session to consider the question of ensuring that the Court shall enjoy the privileges, immunities, and facilities necessary for the exercise of its functions and the fulfilment of its purposes, in the country of its seat and elsewhere, and to inform the Secretary General of their recommendations. The problem of immunities and privileges for the judges and staff officials of the Court came before the 6th (Legal) Committee of the Second Part of the General Assembly of the United Nations, held in New York. Negotiations between the Court and the Government of the Netherlands led to an agreement, confirmed by an exchange of notes between the President of the Court and the Dutch Minister of Foreign Affairs, on June 26, 1946.^{36a} This agreement was approved by a resolution of the General Assembly of December 11, 1946, which also approved the proposals of the Court as to privileges and immunities of the Court in countries other than Holland.^{36b}

Clauses concerning privileges and immunities are frequently to be found in the Constitutions of the Specialized Agencies. The United Nations Relief and Rehabilitation Administration (UNRRA), at the first session of its Council,³⁷ adopted Resolutions 32, 34, and 36, concerning this problem. The International Labor Organization (ILO), which had enjoyed diplomatic privileges under Article VII, paragraph 4, of the League Covenant, has included corresponding clauses in its "Philadelphia Charter" (1944).³⁸

Article VIII, paragraph 4, and Article XV of the Constitution of the Food and Agriculture Organization (FAO),³⁹ Article IX of the International Monetary Fund agreement and Article VII of the agreement creat-

³⁶ Art. 19.

^{36a} *Publs. of the I. C. J.*, Series D, No. 1, p. 84.

^{36b} M. O. Hudson in this *JOURNAL*, Vol. 41 (1947), pp. 16-17.

³⁷ 1st Session of the Council of the UNRRA, Selected Documents, Atlantic City, N. J., Nov. 10-Dec. 1, 1943. Department of State, *Publ.* 2040, *Conf. Ser.* 53, p. 215.

³⁸ International Labor Conference, 26th Session, Philadelphia, 1944. *Report of Proceedings*, Montreal, 1944, p. 647.

³⁹ U. N. Conference, Hot Springs, Va., May 18-June 3, 1943, Final Act and Section Reports. Department of State, *Publ.* 1948, *Conf. Ser.* 52, p. 67. Constitution of FAO in this *JOURNAL*, Vol. 40 (1946), Supplement, pp. 76-85.

ing the International Bank for Reconstruction and Development,⁴⁰ Articles 4 and 8, points 14-17, of the European Central Inland Transportation Organization (ECITO),⁴¹ Article I, section 4, of the Provisional International Civil Aviation Organization (PICAO),⁴² Article XII of the Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO),⁴³ the Constitution of the International Refugee Organization (IRO), the Constitution of the World Health Organization (WHO),⁴⁴ Article 73 and 74 of the suggested Charter of an International Trade Organization⁴⁵ deal with privileges and immunities. Other Specialized Agencies may follow.

The same trend is also visible outside of the United Nations, particularly in the Inter-American System. We can point here to the Project of an Inter-American Court of Justice, to the Convention concerning the creation of an Inter-American Bank, to the granting of diplomatic privileges and immunities to the members of the newly organized Governing Board of the Pan American Union,⁴⁶ and to the Project of an Organic Pact of the Inter-American System.⁴⁷

We see the same trend even in respect to bilateral organs: The recent U. S.—Mexican Water Treaty,⁴⁸ which came into force on November 28, 1945, creates an International Boundary and Water Commission. Under Article 3, paragraph 4, of the Treaty

each government shall accord diplomatic status to the Commissioner designated by the other government. The Commissioner, two principal engineers, a legal adviser, and a secretary, designated by each government as members of its Section of the Commission, shall be entitled in the territory of the other country to the privileges and immunities appertaining to diplomatic officers.

⁴⁰ U. N. Monetary and Financial Conference, Bretton Woods, N. H., July 1-22, 1944, Final Act and Related Documents. Department of State, *Publ.* 2187, *Conf. Ser.* 55, p. 122; Articles of Agreement, U. S. Treasury, p. 88.

⁴¹ This JOURNAL, Vol. 40 (1943), Supplement, pp. 31-45.

⁴² International Civil Aviation Conference, Chicago, Ill., Nov. 1-Dec. 7, 1944. *Final Act and Related Documents*, Department of State, *Publ.* 2282, *Conf. Ser.* 64 (p. 284). Interim Agreement, in this JOURNAL, Vol. 40 (1946), pp. 63-76.

⁴³ London Conference, Nov. 1-16, 1945, Final Act, Department of State: The Defense of Peace. Documents relating to UNESCO, Part 1, 1946 (Constitution on pp. 13-22): Art. XII: "The privileges of Art. 104 and 105 of the Charter of the UN concerning the legal status of that organization, its privileges and immunities shall apply in the same way to this organization."

⁴⁴ Proposal for the Constitution of the WHO, *Journal of the UN Economic and Social Council*, 1st year, No. 13, May 22, 1946. Article XVI of Constitution: *Department of State Bulletin*, Vol. XV, No. 370 (August 4, 1946), pp. 211-219, Art. 66-68.

⁴⁵ Department of State, September, 1946, pp. 44-45.

⁴⁶ Inter-American Conference on Problems of War and Peace, Mexico City, Final Act, PAU, 1945, Resolution IX (pp. 44-48).

⁴⁷ PAU, 1946, pp. 33 (mimeographed) Art. 19, 45.

⁴⁸ *Department of State Bulletin*, Vol. XIII, No. 336 (December 2, 1945), p. 901.

Municipal statutes and ordinances have recently appeared in many states to the same effect; thus in China,⁴⁸ Canada,⁵⁰ Great Britain,⁵¹ and, reversing a longstanding attitude to the contrary, in the United States.⁵²

B. THEORETICAL SURVEY

It is not intended here to describe in detail the privileges and immunities of the League of Nations, of the United Nations or of any particular or of all international organizations. The purpose of this study is not to furnish a commentary on any particular treaty stipulations, but rather to study the whole problem on a comparative basis and theoretically, to give a theory of this problem. Systematically we will deal, first, with the general problems involved, and then with the problems of privileges and immunities first of the Representatives of the Members, then of the International Organizations themselves and, lastly of their agents and officials.

I. General Problems

The granting of privileges and immunities to international organizations always had and has today basically the same reason and purpose: to secure for them both legal and practical independence, so that these international organizations should be able to fulfill their task. The standard has, however, changed for calculating the action to be taken in recent times. The older principle, as applied in the case of the European Danube Commission, was formulated by reference to "complete independence from the territorial authority" and "the benefits of neutrality." From the beginning of the XIXth Century onward the favorite standard was that of diplomatic privileges and immunities. The whole problem then developed historically as one of extending diplomatic privileges and immunities to non-diplomatic functionaries. This standard also dominated, through Article VII, paragraph 4, of the League Covenant, the inter-war period.

⁴⁸ For the ILO (1943).

⁵⁰ Status of the ILO Order, August 14, 1941.

⁵¹ The Diplomatic Privileges (Extension) Act 1944 (8 Geo. 6, Ch. 44). Text also in this JOURNAL, Vol. 39 (1945), Supplement, pp. 163-167. See Egon Schwelb in *Modern Law Review*, Vol. VIII (1945), pp. 50-63, 163-167. Diplomatic Privileges (UNRRA) Order in Council, January 24, 1945 (S. R. O. 1945, No. 79). Order in Council, January 24, 1945 (the same, No. 84), applied to UN Information Organization, Intergovernmental Committee for Refugees, and European Advisory Commission.

⁵² International Organizations Immunities Act, Public Law 499, 79th Congress, December 29, 1945. Text also in this JOURNAL, Vol. 40 (1946), Supplement, pp. 85-91. See Lawrence Preuss in this JOURNAL, Vol. 40 (1946), pp. 332-345. By Executive Order 9698 of February 19, 1946 (*Federal Register*, Vol. 11, 1809; *Department of State Bulletin*, Vol. XIV (March 3, 1946), pp. 348-349) were designated the UN, the UNRRA, ILO, FAO and the Pan American Union. Further extension by the later Executive Orders 9751 of July 11, 1946 (the same, Vol. II, No. 131, p. 7713) and 9823 of January 24, 1947 (the same, Vol. 12, No. 19, p. 551).

This seemed not only logical in view of the historical development of the problem, but also highly advantageous, because of the relative clarity of international law concerning diplomatic privileges and immunities. The phrase of "diplomatic privileges and immunities," found in Article VII, paragraph 4, was, thus, technically an abbreviated form of international legislation, bringing about a reception of the whole general international law of this subject.⁵³

It seems, therefore, necessary to outline briefly the status of the law concerning diplomatic privileges and immunities. These go back to the Roman law; *Sancti habeantur legati* and *ne impediatur legatio*. In Roman law are also to be found the roots of the different doctrines on which these immunities have been justified. The three most important doctrines, which have all played a role in the development of the law, are the doctrines of the representative character of diplomatic agents, the fiction of extritoriality, and the functional theory. Extritoriality as a basis to explain these immunities can already be found in Grotius.⁵⁴ It is today universally recognized that we encounter here with an untenable fiction. But the idea that Roman ambassadors represent the *majestas populi Romani*, that modern diplomatic agents "represent their sovereign"⁵⁵

⁵³ Of the immense literature on this subject we quote here only a few writings: Hackworth, work quoted, Vol. IV, pp. 513-632; François Piétri, *Étude critique sur la fiction d'extritorialité*, 1895; E. Beling, *Die strafrechtliche Bedeutung der Extritorialität*, Breslau, 1898; Frisch, *Der völkerrechtliche Begriff der Extritorialität*, 1917; L. Strissower, *L'extritorialité et ses principales applications*, in *Recueil des Cours*, Vol. I (1923), pp. 233-286; Heyking, *L'extritorialité*, 1926; Sir Cecil Hurst, *Les immunités diplomatiques*, in *Recueil des Cours*, Vol. II (1926), pp. 119-240; J. L. F. van Essen, *Ontwikkeling en Codificatie van de diplomatieke voorrechten*, 1928; F. Deák, *Classification, immunités et privilèges des agents diplomatiques*, in *Revue de Droit International et de Législation Comparée*, 3^e ser., Vol. IX (1928), pp. 173-206, 522-567. Paul Genet, *Traité de Diplomatie et de Droit Diplomatique*, Paris, 1931, Vol. I, pp. 417-598; Sir Ernest Satow, *A Guide to Diplomatic Practice*, London, 1932 (3rd ed.), pp. 161-180; L. Preuss, *Capacity for legation and the theoretical basis of diplomatic immunities*, in *Revue de Droit International* (Sottile), Vol. X (1932), pp. 1-18; Jaime Eyzaguirre, *Privilegios diplomáticos. Síntesis teórica y de legislación comparada*, Santiago, 1932; van Praag, *Jurisdiction et droit international public*, 1935; Montell Ogdon, *Bases of diplomatic immunity*, Washington, 1936; M. M. Savelberg, *Le problème du droit international américain*, The Hague, 1946. Treaties: Vienna, 1815; Havana Convention, 1928. *Institut de Droit International, Règlement sur les immunités diplomatiques*, Cambridge, 1895 (14. Annuaire (1895/96), pp. 240 ff.). Epitacio Pessoa, *Projecto de Código de Direito Internacional Público*, Rio de Janeiro, 1927 (in this JOURNAL, Vol. 22 (1928), Special Supplement, pp. 249-524). Giulio Dienn, *Rapport au Sous-Comité pour les privilèges et immunités diplomatiques*, League of Nations document 196, M. 70, 1927. IV, pp. 78-85; also in this JOURNAL, Vol. XX (1926), Supplement, pp. 148-165; Harvard Research in International Law, Draft Convention on Diplomatic Privileges and Immunities, in this JOURNAL, Vol. 26 (1932), Supplement, pp. 15-18.

⁵⁴ *De jure belli ac pacis*, Book II, ch. 184, No. 5.

⁵⁵ *Ils sont la parole du prince qui les envoie*, Montesquieu, *Esprit des Lois*, Bk. XXVI, ch. 21.

has undoubtedly exercised a powerful influence; hence the pomp and ceremony, the importance of "diplomatic rank," and of the "problem of precedence." If the functional theory is most widely adopted today in this pragmatic age, it is, on the other hand, true that it always has played a great role, and is stressed already by Grotius and Vattel.⁵⁶

The diplomatic privileges and immunities universally recognized today under positive general international law may be distinguished according to Strisower and Verdross,⁵⁷ into two great categories: inviolability and so-called "extritoriality," which word has nothing to do with the out-dated fiction of the same name, but is only used to designate a bundle of immunities.

Inviolability means that the receiving state is under an international obligation to grant a special and extraordinary protection to diplomatic agents against illegal attacks.

"Exterritoriality" means the exemption of diplomatic agents from the criminal, administrative and civil jurisdiction of the receiving state, with a few recognized exceptions (voluntary submission, real estate, counter-claims). It must be emphasized that the exemption from local jurisdiction of diplomatic agents pertains exclusively to the private acts of diplomatic agents. Their exemption from local jurisdiction for their official acts has nothing to do with diplomatic privileges and immunities; their official acts are "acts of state" and are legally imputed not to them but to the sending state. That this is so can be seen from the fact that the same immunity from local jurisdiction pertains also to the official acts of consuls who enjoy no diplomatic privileges.

Equally the premises (offices and residences) of diplomatic agents enjoy these immunities together with goods therein, carriages, records, and archives of missions. They cannot, without the consent of the sending state, be entered, searched or detained by local authorities, even under process of law. Diplomatic officers have the right of free communication with their states, inviolability of diplomatic correspondence, pouches, and couriers.

But these immunities constitute only an immunity from local jurisdiction, not from local law.⁵⁸ That is why diplomatic agents can be held liable

⁵⁶ *Tous les privilèges qui assurent l'exercice de leurs fonctions*, Vattel, *Le Droit des Gens*, Bk. IV, chs. 7, 92.

⁵⁷ *Völkerrecht*, Berlin, 1937, pp. 207-214.

⁵⁸ *Dickinson v. Le Solar* (1930), 1. K. B. 376: "Diplomatic agents are not in virtue of their privileges, as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability but only exemption from local jurisdiction." In the Iranian Minister's case 1935 (Eckworth, work quoted, Vol. IV, pp. 515-516) Secretary Hull wrote: "This Government has at all times impressed upon its own diplomatic officers in foreign countries that the enjoyment of diplomatic immunities imposes upon them the obligation and

after the termination of the diplomatic mission. There is further the possibility of bringing civil action against them in their own countries. A means of conciliating the exemptions from local jurisdiction with the necessities of local life, is the institution of the waiver of diplomatic privileges. But as they are functional, not personal, privileges such waiver must, in the case of subordinate diplomatic officers, be made by the chief of their mission and in the case of a chief of mission by his government. Finally, the receiving state may ask for the recall of diplomatic agents.

The inviolability and immunities extend not only to the chiefs of mission and all diplomatic personnel, but also to the administrative personnel and clerks, and, in a derivative way, to the suite, members of family, and servants.

Exemption from taxation (income taxes, excise taxes) and freedom from custom duties is not a matter of strict law, but rather of international courtesy. When granted, however, it consists legally of an exemption from the laws themselves, so that no claim can be made after the termination of the diplomatic mission.

It was generally held that a state will not grant diplomatic privileges and immunities to an envoy who is a citizen of the receiving State. The legal situation of diplomatic agents in third states was hardly strictly regulated by general international law. As to the immunity of servants, nationals of the receiving state, there was no uniformity of state practice.

Contrary to the period 1919-1939, the standard has now been changed again, although privileges and immunities have been given increasingly to international organizations. Instead of the formula of "diplomatic privileges and immunities," Article 105 of the Charter of the UN grants "such privileges and immunities as are necessary for the fulfillment of its purposes."⁵⁰

Prima facie it might have seemed that the intention would be that of lowering the standard to be applied. Anxiety concerning possible abuse, or the ever increasing number of persons enjoying these privileges, and the influence of nationalistic considerations certainly played a role. "Any excess or abuse of immunity or privilege is as detrimental to the interests of the International Organization itself as it is to the countries who are

responsibility of according scrupulous regard to the laws and regulations, both national and local, of the countries to which they are accredited."

⁵⁰ Similar formulas are to be found in Art. 74 of the ITO Constitution and Art. 67 of the Constitution of the WHO. The same formula is used in Art. 19 and 45 of the Project of Organic Pact of the Inter-American System: Pan American Union, Washington, 1946. On the other hand the formula of "diplomatic privileges and immunities" is to be found in FAO, Art. XV, par. 2, Art. VII, par. 4, ECITO, Art. 8, Art. 19 of the Statute of the International Court of Justice, and in Art. IV, sec. 11, pars. f and g, Art. V, sec. 18, pars. e and f, and sec. 19 of the UN General Convention on the Privileges and Immunities of the UN.

asked to grant such immunities," states the Report of the Preparatory Commission of the U.N.⁶⁰ Even resistance to the grant of diplomatic privileges *stricto sensu* was not unknown in the inter-war period. The Italian School endeavoured to restrict the circle of persons entitled to diplomatic immunities. It excluded the non-official suite or held that only certain privileges should be granted. Some governments distinguished between diplomatic personnel and simple employees. The Draft Convention of the Harvard Research in International Law does not accord diplomatic immunity to the administrative personnel which is, therefore, subject to local jurisdiction for acts not within the scope of their official functions.

Yet the impression that the new formula means a lowering of the standard cannot be maintained if the problem is studied more closely.

First, it must be remembered that general international law knew no uniformity as to the status of servants who were nationals of the receiving state. The legal situation of diplomatic agents in third states and the exemption of diplomatic agents from taxation and custom duties were rather matters of international courtesy than of international law. There did not exist, therefore, that certainty in the general international law on the subject, which was considered to be one of the principal advantages of the formula of Article VII, paragraph 4, of the Covenant. The diplomatic privileges and immunities of general international law themselves are in need of revision and codification.

The diplomatic privileges and immunities also varied from country to country, in consequence of courtesy, special customs, different national attitudes, or special treaties, and under the influence of reciprocity. Under Article VII, paragraph 4, of the Covenant functionaries of the League were assimilated to the status of diplomatic envoys accredited to Switzerland or to Holland. Thus the second advantage of the formula of Article VII, paragraph 4, the uniformity of the law, was more apparent than real.

On the other hand this formula proved not to be applicable to all officials of the League. The *modus vivendi* with Switzerland of 1926 distinguished between members of the staff of the first category, or extraterritorial staff, and members of the staff of the second category.

Most writers argued that diplomatic privileges and immunities constitute a maximum but Schücking and Wehberg emphatically stated that they constitute a minimum; the position of officials of the League is superior to that of diplomatic agents who represent only a single state.

Percy E. Corbett⁶¹ recently wrote that "diplomatic privilege for the

⁶⁰ See also UN General Convention, Art. IV, sec. 14, Art. V, secs. 20, 21, Art. VI, sec. 23. The functional basis and the principle is stressed that these privileges are given to the officials of the UN in the interest of the Organization, and in no way for the benefit of the individual concerned.

⁶¹ *Post War Worlds*, New York, 1942, p. 173.

officials of international organizations is of doubtful utility" and declared that even "the case for maintaining diplomatic immunities in the modern world is not above controversy." But this opinion is not only erroneous, because the author thinks only in terms of the "mystical dignity of the sovereign state," not in terms of functional necessity, but is also completely isolated. All the officials of international organizations, all the writers on this subject such as Ray, Schücking and Wehberg, Göppert, van Vollenhoven, Rey, Jacques Secrétan, Roger Secrétan, S. Kaufmann, A. Hammarskjöld, and Ranshofen-Wertheimer agree that privileges and immunities are indispensable for the efficient working of international organizations. This absolute necessity has recently been sharply underlined by the legal adviser to the International Labor Organization.⁶²

But these privileges pose a new problem—and this is the main reason why the new formula cannot be considered as a lowering of the standard, but rather as a recognition that the problem is new. While most writers of the inter-war period, under the impact of Article VII, paragraph 4, of the Covenant, dealt with the problem as one of the extension of diplomatic privileges to non-diplomatists, the insight into the fact that we have here to do with a new development, different from that of the privileges of diplomatic agents, is to be found, here and there, already in this period. The Aclatei-de Visscher Report of 1924 emphasizes the difference between our problem and that of diplomatic agents. Van Vollenhoven underlines the fact that we are dealing here with a new development and similar hints can be found in the writings of Suzanne Basdevant. Sir Cecil Hurst wrote in 1929 that the formula of diplomatic privileges is "unfortunate," as international functionaries exercise no diplomatic function.

It is the confusion between the two problems which explains the negative attitude taken in the Report of David Jayne Hill in the *Institut de Droit International*,⁶³ where it is considered an exaggeration to ask for diplomatic privileges for international functionaries, as the League is not a state, there is no reciprocity, and no state responsibility. It is the same confusion which has hampered and even still hampers the building up of an adequate law of privileges and immunities for international organizations. From this confusion stems the attitude of discrimination against nationals, the restriction to the state in which the organization has its seat, the quarrel about the immunity from income tax and other aspects of the problem. Diplomatic privileges cannot serve either as a maximum or as a minimum standard. In some respects less, in others more, is necessary. New privileges and immunities, not necessary to diplomatic agents, have to be created. The problems posed by the privileges and immunities of the international

⁶² C. Wilfred Jenks, *The Headquarters of International Institutions, A Study of their Location and Status*, London, 1945.

⁶³ *Annuaire*, Vol. XXXIII. Session de Lausanne, 1927, Vol. I, pp. 420-438.

organizations themselves and, in particular, of public international corporations, are completely new.

Just as the first railroad coaches and motorcars looked like horsedrawn vehicles without horses, and it was some time before these new means of transport found a form adequate to their functions, so the problem of privileges and immunities of international organizations started historically, by analogy, as an extension of diplomatic privileges to non-diplomatists. Now the development has reached a point, however, where the different nature of the new problem is realized and where a new law, independent and emancipated from that of the privileges of diplomatic agents, has to be created. Such a creation of a new law has also become necessary through the dropping of the formula of Article VII, paragraph 4, of the Covenant which brought about a reception of the corresponding general international law.

This new law tends, first, to a codification of the privileges and immunities of the UN, and, second, to the unification of these privileges with those of the specialized agencies. Such codification and unification will have to lay down the basis, ways, and methods of granting these privileges and immunities and regulate in detail the privileges of the representatives of members, of the international organizations themselves, of international judges, and of all international agents and officials.

Finally, the ultimate end is the creation of a new, general international law on this topic. Here the already existing privileges of other international organizations will have to be taken into consideration. It will have to be considered whether and how far such privileges shall be granted the other international tribunals, international administrative unions and so on, already existing or to be created in the future.⁶⁴ The problem will, therefore, also enter into the problem of the codification of international law, with which the UN is charged by Article 13, paragraph 1a, of the Charter.

II. *Privileges and Immunities of the Representatives of the Members*

In building up a new international law, concerning privileges and immunities of international organizations, a new law independent from that of the privileges of diplomatic agents, it is logical to start with the problem of the privileges of representatives of the members. Jacques Secrétan wrote in 1928 that Article VII, paragraph 4, of the Covenant does not constitute an innovation in this respect. This is true to a certain extent, but, as we shall see, only to a certain extent. For these representatives repre-

⁶⁴ A. Hammarskjöld proposed extension even to *fonctionnaires internationaux à statut national*, such as the judges at the Mixed Courts of Egypt or the administrative officials of the International Zone at Tangiers, and even to members of private organizations, acting in the international interest, such as the members of the International Red Cross Committee.

sent a single, sovereign state which appoints, instructs, and recalls them and to which they are responsible. The Vienna Protocol of March 9, 1815, already gave full diplomatic privileges to "diplomatic agents on an extraordinary mission." True, the representatives of a member are, contrary even to extraordinary diplomatic envoys, not accredited to a sovereign state. But long ago extraordinary envoys, representatives of their states at general international conferences and accredited to these conferences, were held to be extraordinary envoys in the sense of the Vienna Protocol.

Yet the position of the representatives of members is somewhat different. They are not accredited to conferences, held within the framework of general international law, but to meetings of international organs which function on the basis of a particular, treaty-created, Constitution. They are; at one and the same time, national organs and a part of an international organ; they constitute in their person a personal union of two organs. Even so, they can be taken as extraordinary diplomatic envoys, as expressly stated in Article 2 of the Havana Convention of 1928 on diplomatic officers.

If the representatives of members are diplomatic agents or invested with "diplomatic rank" they enjoy full diplomatic privileges and immunities on the basis of general international law. That is why these privileges were given in the League also to representatives of non-members, who could not invoke Article VII, paragraph 4, of the Covenant.

Such representatives of members appear at international conferences and congresses, at the congresses of international administrative unions, on river commissions, and so on, on many temporary commissions and boards created by the Paris Peace Treaties or which will be created by the new peace treaties, at the Assembly and Council of the League of Nations, in the conferences convoked by and held under the auspices of the League and the League's consultative organisms, permanent or temporary commissions, at the General Conference and the Governing Board of the International Labor Organization, at the general conferences, commissions and boards of the special organizations of the League and of the institutes put at the disposal of the League by single states.⁶⁵

Diplomatic privileges and immunities pertain to the representatives of the American Republics at the Conferences of American States, special Inter-American Conferences, the Meetings of Foreign Ministers, and other official Pan-American or Central American Conferences. The members of the Governing Board of the Pan American Union are now, on the basis of Resolution IX of the Mexico City Conference of 1945, special envoys but they have each the rank of Ambassador and naturally enjoy full diplomatic

⁶⁵ Institute of Intellectual Coöperation, Paris; Institute for the Unification of Private Law, Institute for Educational Films, both at Rome; International University of Hygiene, Paris, 1930; International Institute for the Study of Leprosy, Rio de Janeiro, 1931.

privileges. Thus in Washington a second, "Pan-American," Diplomatic Corps has come into existence, and a third one in this country in New York, made up of representatives in the UN Security Council.

Yet Article VII, paragraph 4, of the Covenant did contain some innovations in this respect. There are to be mentioned, first, representatives of members, who are not diplomatic agents nor invested with "diplomatic rank," such as Foreign Ministers, Prime Ministers, or other non-diplomatic official personalities. Full diplomatic privileges granted to them can hardly be based on general international law. The representatives of members in the International Labor Organization were given full diplomatic privileges and immunities, even if they represented states not members of the League. Further the problem of representatives who were private persons arose. Full diplomatic privileges and immunities were granted at the General Conference of the ILO to the delegates of workers and employers. Finally a completely new issue arose with regard to the permanent delegates of Member States accredited to the League at Geneva.⁶⁶ They represented their state but were accredited to the League in the person of the Secretary General and differed from other representatives in that they were not members of international organs. The League had, contrary to the opinion of Schücking and Wehberg, no active and passive right of legation. Switzerland granted to these delegates diplomatic privileges.⁶⁷

Article VII, paragraph 4, of the Covenant granted to the representatives of the members diplomatic privileges and immunities.⁶⁸ Article 105, paragraph 2, of the UN Charter grants only "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,"⁶⁹ and Article 105, paragraph 3, enables the General Assembly of the UN to make recommendations or propose conventions to the Member States for determining the details of the application of paragraph 2.⁷⁰ But Article IV of the UN Convention, section 1, paragraphs f and g, gives to the representatives of the members diplomatic privileges and immunities. It is made clear by section 11 that these privileges pertain to all representatives of members in all the principal and subsidiary organs of the UN—the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the Military Staff Com-

⁶⁶ William Martin, *Représentation permanente des Etats membres auprès de la Société des Nations à Genève*, in *Revue de Droit International* (Sottile), April-June, 1925, pp. 150-152.

⁶⁷ Answer of Switzerland to Questionnaire 3 B of the Committee of Experts for the Codification of International Law, in League Doc. C. 196, M. 70, 1927. I. p. 249.

⁶⁸ The same formula in ECITO, Art. 8, par. 18, equally sec. 3 of the British Act of 1944. The Constitutions of some Specialized Agencies do not mention the legal status of representatives of the members.

⁶⁹ Similarly Res. 32 of the UNRRA Council, Art. 74, par. 2, of the suggested Charter of the ITO, Art. 67 of the Constitution of the WHO.

⁷⁰ Equally Art. 74, par. 3, of ITO, Art. 68, of WHO.

mittee, the Atomic Energy Commission, the Balkan Commission and so on—and to conferences convoked by the UN.

The granting of “diplomatic” privileges again results in a reception of general international law. All diplomatic privileges and immunities are granted to the representatives of members, for instance that of “inviolability.”⁷¹ Because of this reception of general international law, which does not concede diplomatic privileges to the *agent diplomatique régnicole*, diplomatic privileges are not accorded to representatives of the members in relation to the states of which they are nationals or—an innovation—of which they are or have been the representatives.⁷² These privileges are naturally enjoyed by the representatives also with regard to their private acts, and during the whole time of their being representatives of the members.⁷³

These privileges are not only enjoyed by the representatives themselves, but also by the “deputy delegates, advisers, technical experts, and secretaries of delegations.”⁷⁴

But the representatives need more privileges than those granted by general international law. Article IV, section 11, paragraphs a–e enumerates immunity from personal arrest or detention from seizure of personal baggage, inviolability of all papers and documents, the right to use codes and to receive papers or correspondence by courier or in sealed bags; all these privileges are already given by general international law. Further exemptions in respect of themselves and their spouses from immigration restrictions, aliens’ registration or national service obligations, and from currency or exchange restrictions are granted to them. The exemption from taxation is made by section 13 a matter of law. That section 11a grants them immunity from legal process of any kind in respect of words spoken or written and all acts done by them in their capacity as representatives, and that under section 12 this immunity is continued even if they are no longer the representatives of members, has, as in the case of ordinary diplomatic agents, nothing to do with their diplomatic privileges and does not constitute an innovation. These acts are “acts of state” and are imputed by law not to them but to the states they represent. But the insistence by section 12 on complete freedom of speech and independence in the discharge of their

⁷¹ See *Swiss Confederation v. Justh. Switzerland*, Federal Assizes. First District 1927 (40 *Revue Pénale Suisse* (1927), p. 179) (English translation in M. O. Hudson, *Cases and Other Materials on International Law*, St. Paul, 1936 (2nd ed.), pp. 795–797). See now also the letter of the Ukrainian Foreign Minister Dmitri Z. Mannilsky to the Secretary of State Byrnes at the occasion of the criminal attack upon two members of the Ukrainian delegation to the General Assembly of the UN: *New York Times*, November 24, 1946, p. 58.

⁷² UN General Convention, Art. IV, sec. 15. Thus also British Act of 1944, American Act of 1945, sec. 7a.

⁷³ “while exercising their functions” (UN General Convention, Art. IV, sec. 11).

⁷⁴ UN General Convention, Art. IV, sec. 16.

duties is important. Another new development, not contained in general international law, but made necessary by the functions of the representatives of members, is that all these privileges are granted them, under Article IV, section 11, also "during their journey to and from the place of the meeting" of the international organs. The privileges are, further, not only enjoyed in a single state, but in any state member of the international organization.

A special problem arises from the fact that, contrary to ordinary diplomatic agents, the state of the place of the meeting does not have at its disposal the extraordinary procedure of asking the sending state for the recall of the representatives. To conciliate and counterbalance their privileges with the territorial needs of the state of the meeting, Article IV, section 14, gives the members not only a right but imposes upon them a duty "to waive the immunity of its representative in any case where in the opinion of the member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."⁷⁵ True this is more a moral than a legal duty, as its fulfillment is left to the non-revisable judgment of the member itself.

All the representatives of the members enjoy these privileges. But they must be representatives of the members. International judges are not representatives of the members. And there are representatives of the members or non-members of the parties before the Court who are not extraordinary diplomatic envoys and were up to now not given special privileges. Article 42, paragraph 3, of the Statute of the Court of International Justice now gives—an innovation—"to the agents, counsel, and advocates of parties" (that is members or not) "before the Court the privileges and immunities necessary to the independent exercise of their duties."

Finally members of the commissions of international organizations, who are directly appointed by the organization to be partial organs of international organs, are not representatives of the members. They represent the international organization. Their privileges, therefore, constitute a different problem.

III. *Privileges and Immunities of the International Organizations*

The problem of privileges and immunities of the international organizations themselves is obviously a new problem, different from that of the immunities of diplomatic agents. While there are precedents, even dating back prior to 1920, the writers of the inter-war period, mostly concerned with the immunities of international functionaries, paid little attention to

⁷⁵ Thus the Argentinian delegate Dr. José Arce waived his immunity and paid a \$15 fine for contravention of the New York laws (*New York Times*, November 14, 1946, p. 11). Equally Dr. Yax Steemberger, financial adviser to the Netherlands Government (the same, November 23, 1946).

this specific problem. The problem does not constitute a small, secondary matter, however, but is just as is the problem of financing international organizations,⁷⁶ a vital one, and one which constitutes an indispensable condition for the efficient work of international organizations. It is from the immunities of the organizations themselves that the immunities of their different institutions, organs, and officials are derived. The building-up of a new and complete international law concerning this topic will have to take into consideration the following problems.

(1) *Basis*. The functional principle as the basis seems now almost universally recognized. Complete independence from the local authority, as granted to the European Danube Commission, in order to enable it to fulfill its international functions, constitutes the *raison d'être*. The functional principle furnishes not only the basis but also the standard of the extent of the privileges and immunities required. The "necessary" privileges and immunities must be granted. The accent obviously will have to be on the "immunities" necessary for independent functioning, rather than on "privileges," which deal more with questions of honor, courtesy, and protocol. Nevertheless the dignity and prestige of an international organization may very well be an important point. The principle of the equality of states also constitutes a basis in some respects.

(2) *Methods of granting privileges and immunities*. Jenks⁷⁷ envisages three different ways in which immunities may be granted. One way would be to grant an international organization statehood over an internationalized area, as over an internationalized Austria. But this writer would not be in favor of making a state out of an international organization. Jenks would prefer the second way, "internationalized headquarters, governed by international authority and not subject to the jurisdiction of any one state" and cites Vatican City and the District of Columbia as examples. But Vatican City is a sovereign state and the District of Columbia is certainly a part of the United States. While there was some talk to establish an "internationalized area" around Geneva, by the cession of territory by Switzerland and France, the practical possibilities of this method are slight. The UN certainly will have its headquarters in New York City, that is in the United States.

As international organizations will, in all likelihood, continue to be located on the territory of one or more sovereign states, the functional principle demands that they be made independent from the local territorial authorities. The granting of immunities merely by municipal statute, whether to a particular organization, or by an Act of a more general nature, a voluntary granting, is certainly no adequate method, as such law may at

⁷⁶ C. W. Jenks, "Some Legal Aspects of the Financing of International Institutions," in *Transactions of the Grotius Society*, London, Vol. 28 (1943), pp. 87-132.

⁷⁷ Work quoted above, note 62.

any time be changed or repealed by the state in question. It would also make impossible the uniformity of the law of immunities.

An "agreement" between the organization and the state of its seat, as the Swiss *modus vivendi* of 1926, is equally not an adequate method. The legal nature of such agreement is doubtful; it is not an international treaty; both parties can at any time renounce it in part or as a whole. It leads only to an agreement with a single Member State and "fails to afford a solid legal foundation for the permanent independence of the international organization."⁷⁵

The only adequate method is to grant these immunities in the basic international treaty, creating identical and binding international obligations upon all Member States. The Constitution, like the Charter of the UN, may contain only the standard and leave the details to further action. The UN correctly decided, for the laying down of these details, against mere recommendations to the Members, but in favor of a treaty. This "UN General Convention" is contrary to the *modus vivendi* of 1926, a genuine international treaty, which has to be ratified by each member; the vote of approval by the General Assembly was equivalent to ratification by the UN. The Contracting Parties are, on the other hand, each Member State and, on the other, the UN as such. Thus, identical norms are created for all Member States, the coming into force of which as well as amendments are controlled by the UN. Under section 36 of the General Convention the Secretary General may conclude with any Member States supplementary agreements; but he acts on behalf of the UN and this agreement is subject to the approval, i.e., ratification, of the General Assembly. As the law is laid down by the supra-ordinated treaty, it is inadmissible to put in phrases, such as "insofar as it may be possible under the constitutional procedure of a Member."⁷⁶

(3) *International Personality of International Organizations.* Prior to the problem of immunities arises the problem of the legal status of international organizations. Here the first problem is that of its international personality. This problem has been obscured by the traditional theory according to which only sovereign states can be persons in international law. For that reason the possibility of the international personality of international organizations has either been denied or untenable attempts to construe it as a sovereign state have been made.⁸⁰ But it is clear that, while sovereign states are the normal and full persons in international law, non-states may be such persons⁸¹ if international personality is granted

⁷⁵ Jenks, work quoted above, note 62, p. 46.

⁷⁶ This phrase stands in FAO, Art. XV, par. 2.

⁸⁰ See Holtzendorff's construction of the European Danube Commission as a "fluvial state."

⁸¹ R. Knubben, *Die Subjekte des Völkerrechts*, Stuttgart, 1928. M. Siotto Pintor, *Les sujets du droit international autres que les Etats*, Hague *Revue des Cours*, 1932, Vol. III, pp. 251-361.

to them, expressly or impliedly. It follows that an international organization is not *ipso facto* a person in international law, and, if it is, its legal status is not necessarily identical with that of a sovereign state. It is always a question of the analysis of positive international law. Such analysis shows that most international organizations do not have international personality.⁸² But the League of Nations, no doubt, had international personality.⁸³ The same is true of the UN, as shown by its capacity of concluding international treaties under Articles 43 and 105, paragraph 3.⁸⁴

(4) *Legal capacity of international organizations under private municipal law.* From the problem of the international personality of international organizations must be clearly distinguished the very different second problem of their legal status, namely the problem of their legal capacity under private municipal law. This latter capacity is indispensable, as these organizations have to "enter into innumerable transactions governed by the municipal law of different countries which are incidental to their daily operations."⁸⁵ Such legal capacity has indeed always been granted by the state of the seat and it can be said that this state was under an international obligation to grant it, so far as it is necessary for the fulfillment of its functions and not beyond the powers granted to it by its Constitution.⁸⁶ Such legal capacity is now expressly granted—capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings—by the Charter of the UN and the Constitutions of the Specialized Agencies. The new development consists only in that that the basic treaty imposes such obligation for each Member State.

(5) *The single privileges and immunities.* From legal capacity, which is enjoyed by any private corporation, must be distinguished special privi-

⁸² Josef L. Kunz "Experience and Technique in International Administration," in *Iowa Law Review*, Vol. XXXI (November, 1945), pp. 40-57.

⁸³ Recognized by Switzerland in the *modus vivendi* of 1926. There is a rich monographic literature on this subject. See also the literature on the international personality of the International Institute of Agriculture. Josef L. Kunz, *Die Staatenverbindungen*, Stuttgart, 1929, pp. 50 ff. and in general; Van der Luehe, *Die internationale Juristische Person*, 1931.

⁸⁴ That is why under Sec. 30 of the UN General Convention differences between the UN and a Member are to be decided by an advisory, but binding, opinion of the International Court of Justice. Different is Art. 65 of WHO which provides for the establishment of details concerning immunities by a separate agreement which is to be prepared by the Organization but is to be concluded between the Members. Jenks, work quoted, p. 39, asks for the recognition of the international personality of international institutions as the basis of their capacity to conclude with states and other international institutions agreements governed by international law.

⁸⁵ Jenks, p. 39.

⁸⁶ See for the Pan American Union Josef L. Kunz, "The Pan-American Union in the Field of International Administration," in *Iowa Law Review*, Vol. XXXI (1945), pp. 58-83, at pp. 79-80.

leges and immunities. There are earlier precedents; Article VII, paragraph 5, of the League Covenant granted inviolability to the buildings and other property occupied by the League. The *modus vivendi* of 1926 specified the details. Article 105, paragraph 1, of the Charter gives the UN the "necessary" privileges and immunities on a functional basis. The new development is here again that these immunities are granted in the territory of each Member State; for the UN can have offices and assets elsewhere than at its seat. The study of the UN General Convention, sections 2-10, exhibits the following privileges and immunities: immunity for UN property and assets, wherever located and by whomsoever held, from every form of legal process,⁸⁷ inviolability of premises, immunity from search, requisition, confiscation, expropriation and any other form of interference (whether by executive, administrative, judicial, or legislative action), inviolability of archives and premises, freedom from financial controls, regulations, or *moratoria* of any kind, right to hold funds and gold or currency of any kind and to operate accounts in any currency, freedom to transfer funds, exemption of assets, income, and other property from all direct taxes, exemption from custom duties and prohibition of and restrictions on imports and exports needed for its official use, most favored diplomatic treatment as to priorities, rates and taxes on mails, cables, telegrams, radiograms, telephoto, telephone, and other communications, freedom from censorship, and right to use codes, dispatch and receive its correspondence by courier or in bags under diplomatic privileges and immunities.⁸⁸ Nevertheless the UN Zone in New York, for example, is in the United States; there is no fiction of "extritoriality." The normal United States civil and criminal law applies also in the UN Zone. Under the UN-US agreement of June 26, 1947, the site of the New York City headquarters of the UN is declared "under the control and authority of the UN" and is granted "inviolability," but no extritorial rights. The area remains United States territory and the laws of the United States, federal, State and local, will apply in all cases, except where specifically laid down otherwise. Federal, State, or local officials can enter only with the consent of the Secretary General of the UN. Service of legal process, including seizure of private property, can take place within the area only by consent of the Secretary General. The UN has the right to establish its own radio station, airport, and postal service. Disputes between the United States and the UN on interpretation and application of the agreement are to be settled by a Tribunal of three arbitrators.

(6) *The special problems of International Public Corporations.* Special

⁸⁷ See for the PAU Penfield, in this JOURNAL, Vol. XX (1926), pp. 257-262; for the International Institute of Agriculture, Italian Court of Cassation 1931 (*Annual Digest of Public International Law Cases*, 1929-1930, No. 254).

⁸⁸ Similarly the Constitutions of the Specialized Agencies. For details as regards the UN in the state of the seat see Draft Convention, P/C, Rep. pp. 75-80.

problems arise with regard to the so-called international public corporations,⁸⁰ as they existed in the Bank of International Settlements,⁸⁰ to which special privileges and immunities had been granted. They exist today in the Inter-American Bank, in the International Monetary Fund, the International Bank for Reconstruction and Development, and they may be created on a great scale in the Atomic Energy Development Authority. They are, in Friedmann's definition, "international corporate bodies established for purposes of international government, but constituted as commercial enterprises." Such an institution must be really international in character with managerial and financial autonomy. It should have, according to this author, its Constitution in a basic international treaty, independent financial existence, legal ownership of funds, constitute an international public service, but be subject to the control of an appropriate international organ. Friedmann asked for them the status of an "international legal person." But it is clear that he is not thinking of personality in international law, but only of full corporate status in every Member State, although they remain in their private transactions subject to municipal law, to be determined according to the rules of Conflict of Laws. But he asked for corporate status in all Member States and on the basis of an international charter of incorporation.⁸¹

(7) *Methods of counterbalancing the privileges and immunities.* As international organizations are nationals of no sovereign state the counterbalance in the case of diplomatic immunities—recall, civil and criminal jurisdiction of the sending state—is here lacking. Shall international organizations be immune from any jurisdiction? Here again the new character of our problem, which calls for a solution, is demonstrated. There is another difference: The immunity of diplomatic agents from the jurisdiction of the receiving state lasts only as long as they are diplomatic agents; later action can be brought against them and a Statute of Limita-

⁸⁰ W. Friedmann, "International Public Corporations," in *Modern Law Review*, London, Vol. VI (1942/43), pp. 185-207.

⁸⁰ Created by the Hague Convention of January 20, 1930, M. O. Hudson, *International Legislation*, Vol. V, pp. 307-313; 104 L. of N. Tr. Ser., p. 441. See J. F. Williams in this JOURNAL, Vol. XXXIV (1930), pp. 665-673; C. Cereti, *La personalità giuridica della Banca dei Regolamenti Internazionali*, in *Rivista di Diritto Pubblico*, Vol. XXIII (1931), pp. 169-193; G. Beitzke, *Die Rechtsstellung der Bank für Internationalen Zahlungsausgleich im Völkerrecht*, Leipzig, 1932, Reynolds, "The Legal Structure of the Bank of International Settlements," in *American Bar Association Journal*, Vol. XIX (1933), pp. 289-293.

⁸¹ The Bank of International Settlements at Basel was, notwithstanding its creation by international treaty and its far-reaching immunities, legally a Swiss corporation that received its charter from Switzerland. In the same way the Inter-American Bank gets its charter from the United States. A recent Inter-American organ, which is not a public international corporation, the Inter-American Institute of Agriculture, which has its seat in Turrialba, Costa Rica, is incorporated under the laws of the District of Columbia.

tions cannot be set up as a defense.⁹² But international organizations are supposed to have a permanent existence.

The oldest way of effecting a counterbalance, taken from the law of diplomatic agents, is the waiver of immunity. Such waiver can be made in a special case, but must be made expressly. There is no duty to waive the immunity, and section 2 of the UN General Convention adds: "It is understood that no waiver of immunity shall extend to any measure of execution."

Section 6 of the General Convention states that in respect of freedom from financial controls the "UN shall pay due regard to any representation made by the Government of any member, in so far as it is considered that effect can be given to such representations without detriment to the interests of the UN." Here again there is no legal duty, as the decision is left within the discretion of the UN.

It must be remembered that international organizations are immune in most cases only from local jurisdiction, but not from local laws which they are, therefore, in duty bound strictly to observe. In torts cases this counterbalancing can be done by obligatory insurance against third-party risks, as now provided by Part IV of the UN General Convention.

Already writers of the inter-war period have proposed the creation of special *fora* for the settlement of conflicts in which international organizations are involved. While these suggestions have not as yet been followed, section 20a of the UN General Convention prescribes that the UN shall make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the UN is a party. The problem is of particular importance in the case of public international corporations. It is, in this respect, interesting to compare Article IX, section 3, of the Monetary Fund Constitution, which grants immunity from judicial process, except if expressly waived for any proceedings or in the terms of any contract, with Article VII, section 3, of the International Bank Constitution, which provides the conditions under which action against the Bank may be brought.

IV. *Privileges and Immunities of International Functionaries*

(1) *International Judges.* International Judges stand in a category by themselves. They are neither representatives of members, nor "officials" of an international organization. Since 1899 international conventions have granted diplomatic privileges and immunities to certain international judges. Agents, counsel, and advocates of parties before the Court are representatives of members; the Registrar and officials of the Registry are international officials.

In the agreement of 1928 with Holland the Judges of the Permanent Court of International Justice were granted the diplomatic privileges and

⁹² *Musurus Bey v. Gaddan*, Great Britain, Court of Appeals, 1884: 2 Q. B. 352.

immunities granted to heads of diplomatic missions, accredited to the Netherlands and had a position analogous with the Diplomatic Corps, enjoying precedence immediately after that body. This gave rise to interesting questions of precedence.⁹³ It shows that not only the functional principle, but also honor and prestige can be involved in these problems. Manley O. Hudson⁹⁴ calls the Dutch agreement of 1928 "hardly altogether satisfactory" and finds that the Court was not sufficiently exigent in this respect, that the proper respect for the Court as an international institution seems to demand that international judges be given precedence over the representatives of any single state. It shows also that the analogy with the Diplomatic Corps does not fit the situation, that a new law has to be created. Already van Vollenhoven had stated that the conditions and necessities of an international judge are different from those of diplomats. Hudson says that "new standards are needed for determining the status of high international officials and that they should be developed without a slavish regard for the past."

Indeed, an international judge does not need free communication with his own government. On the other hand, he needs the necessary privileges and immunities in each Member State; he needs the right of free transit on his way to and from his duties, a right which is of vital interest. Also the national discrimination, as found in the conventions of 1899 and 1907,⁹⁵ as practiced in the Dutch agreement of 1928,⁹⁶ is to be explained from the law of diplomatic privileges and immunities.

(2) *International Experts*. A special position is that of international experts, technical counsel, members of a consultative commission, appointed by an international organization, but not working under its control. They were, under Article VII, paragraph 4, of the Covenant, mostly excluded from diplomatic privileges and immunities.⁹⁷ Roger Secrétan

⁹³ E. Genet, *Un problème de préséance*, in *Revue de Droit International et de Législation Comparée*, Vol. XIV (1933), p. 254; A. Hammarskjöld, *Un problème de préséance*, in *Acta Scandinavica Juris Gentium*, Vol. IV (1933), pp. 158-165; L. Aubain, *Un nouveau Protocole de Vienne?*, in *Revue de Droit International et de Législation Comparée*, Vol. XV (1934), pp. 129-143.

⁹⁴ The Permanent Court of International Justice, New York, 1943, pp. 325-331.

⁹⁵ "In the exercise of their duties and out of their own country" (Art. 46, 1907).

⁹⁶ At the time of preparing Art. 19 of the Statute of the Permanent Court of International Justice Sir Cecil Hurst proposed to drop the phrase *en dehors de leurs pays*, but this proposal was opposed by Huber and Loder. It has now been dropped in Art. 19 of the Statute of the International Court of Justice.

⁹⁷ In *X v. Y and the Greek State* (*Annual Digest of Public International Law Cases*, 1933-34, London, 1940, pp. 387-88) the Court of Appeals of Athens (1934) held that the members of the Greco-Bulgarian Mixed Emigration Commission enjoyed no jurisdictional immunity, as the Neuilly Convention of November 27, 1919, did not confer immunity upon them and as they performed independent duties and exercised their functions not for and under the League of Nations; they were not "officials" in the sense of Art. VII, par. 4, of the Covenant.

called this regulation in 1925 a *solution bâtarde*. Sections 22 and 23 of the UN General Convention grant now to "experts on missions for the UN," such privileges and immunities "as are necessary for the independent exercise of their functions during the period of their missions."

(3) *International Officials*. That function is the true basis of the immunities of international officials is now widely recognized; not representation, not state responsibility, not reciprocity. The problem derives from that of the immunities of international organizations themselves. Sometimes the principle of the equality of states has been declared to form the real basis; thus Hammarskjöld, and, especially Suzanne Basdevant: no state must be allowed to have a privileged position *vis-à-vis* the international organization, not even the state of the seat. The principle of the equality of states has particularly been insisted upon as the true basis for the immunity of international officials from direct taxation. The problem is a new one,⁹⁸ different from that of diplomatic privileges and immunities.

(a) *Definition*. In building up this new law it is first necessary to define the concept of "international officials," to recognize that this concept is not identical with the wider concept of "persons invested with functions of international interest," that the concept must be delimited as against international judges, international experts and representatives of members, who can very well be parts of an international organ. We can accept Suzanne Basdevant's definition: "International public officials are persons, who, on the basis of an international treaty constituting a particular international community, are appointed by this international community or by an organ of it" (here lies the difference from the representatives of members) "and under its control" (here lies the difference from international experts) "to exercise, in a continuous way, functions in the interest of this particular international community, and who are subject to a particular personal status."⁹⁹ A uniform and general law of privileges and immunities for international officials is a task; but at the present time it seems that no such general customary international law has yet come into existence.

(b) *Extension*. Shall privileges and immunities be granted to all international organizations and their officials, or only to "important" inter-

⁹⁸ Already the Adatci-de Visscher Report stated that the agreement with the State of the seat and the assimilation of the League officials with diplomatic agents is "theoretically inexact and would practically lead to an inadmissible inequality."

⁹⁹ "International officials" in the sense of Art. VII, par. 4, of the Covenant were the officials of the Secretariat General, of the ILO, of the Saar Governing Commission, of the Registry of the Permanent Court, the High Commissioner at Danzig, the High Commissioner for Refugees, officials of the Paris and Rome Institutes, members of the Mandate Commission, and of the many commissions of the League, insofar as they had not the status of "international experts" or were representatives of the members, the High Commissioners of the League at Vienna and Budapest, Personnel of Nansen office and so on.

national organizations? The present tendency seems to be in the latter sense. International Administrative Unions are still for the most part excluded. It seems also that the standard for "importance" is found in the consideration that the international organization must be charged with more than mere technical functions. But recently the Universal Postal Union and the International Telecommunication Union were brought into relation with the UN.

The functional principle must also protect the states against too high demands and too great an extension of international immunities. Shall they be granted to all officials of the "important" international organizations? Article VII, paragraph 4, of the Covenant made no distinction whatsoever between the "officials" of the League. Rougier wanted the immunities restricted to the Secretary General and the Assistant Secretaries General. But Borsi stated in 1923 that such interpretation is in flagrant contradiction with the text. Yet in practice some discrimination had to be made. The *modus vivendi* of 1926 distinguished between members of the first category and the staff of the second category, who enjoy immunity only with regard to official acts and fiscal immunity from direct taxation, but remained, with regard to acts of their private life subject to the laws and jurisdiction of Switzerland. The same distinction between the higher and the other international officials was made by the Dutch agreement of 1928 and the Italian law of 1930, concerning privileges and immunities of the International Institute of Agriculture. The Adatei-de Visscher Report distinguished between higher and "purely technical or manual personnel"; Politis proposed at the *Institut de Droit International* to distinguish between *agents de fonction* and *agents de gestion*; Jenks speaks of "senior officers."

(c) *Duration*. International officials enjoy the privileges and immunities not only at the occasion of exercising their functions, but during the whole time they are exercising their functions.

(d) *Immunity from jurisdiction for official acts*. This immunity must be granted to all international officials of whatever category. Such immunity is not part of special "international privileges and immunities," just as such immunity of diplomatists does not stem from their diplomatic immunities. Immunity for official acts is, as the Adatei-de Visscher Report has put it, *ratione materiae, par le caractère intrinsèque de ces actes*. Such immunity of all members of an international staff, irrespective of nation or rank, is, in the words of Jenks, "a *sine qua non* of the effectiveness of the immunities of the organizations themselves." Official acts are by the law not imputed to the officials, but to the international organizations.

(e) *Acts of private life*. In order to speak truly of an international immunity from jurisdiction, such immunity must cover the acts of the private life of the international officials. Such immunities, contrary to the im-

munity for official acts, are *ratione personæ*, although their basis and reason lies also in the functional principle. Complete immunity must be granted, at least, for the higher officers of an international organization and such guarantee against national control, as Jenks emphasizes, must be unqualified; for "if the local State can exercise jurisdiction without waiver, then the determination of the official or private character of a particular act passes from international to national control."¹⁰⁰

(f) *Place of immunity.* International officials must be granted the necessary privileges and immunities not only in the State of the Seat of the organization, but in each and all Member States.

(g) *The single privileges and immunities.* Diplomatic privileges granted to international officials include inviolability for his person, effects, papers, and correspondence. Article VII, paragraph 5, of the Covenant granted inviolability also to the residence of officials of the League. The privileges will include immunity from local administrative, police, criminal and civil jurisdiction,¹⁰¹ and immunity from direct taxation. To these privileges belong immunity from immigration restrictions, alien registration requirements, national service obligations, exchange restriction, facilities for travel. As to the problem of an international passport, the Secretary General of the League had already submitted to the International Conference on Passports a memorandum on the granting of a diplomatic passport to the members of the Secretariat General. But serious arguments were made against this proposal. The granting of a passport, it was said, is an act of sovereignty; the League is not a state with sovereign rights; the Secretary General has no subjects. The proposed diplomatic passport should be valid in the territory of all Members without visa. Probably mindful of this precedent,¹⁰² section 24 of the UN General Convention now creates a UN *laissez-passer*, issued by the UN to its officials and which shall be recognized and accepted as a valid travel document by the authorities of Members; but it needs visa. This UN *laissez-passer* extends, under section 17, only to specified categories of UN officials.

(h) *Wives, children, immediate family.* Diplomatic privileges include, in a derivative way, the extension to families living under the same roof. The *modus vivendi* of 1926 granted this extension to officials of the first

¹⁰⁰ Work quoted, p. 40.

¹⁰¹ In *Assurance Générale des Eaux et Accidents v. F. B.* (Cour de Justice Civile, Geneva, May 6, 1928, *Annual Digest*, 1929/30, London, 1935, pp. 315/16) the Swiss Court decided that an official of the first category of the ILO is immune from civil jurisdiction and cannot validly renounce his privilege; proceedings cannot be continued as long as his immunity is not waived by the Director of the ILO.

¹⁰² The Report of the Preparatory Commission (p. 62) proposed the creation of an international passport which "would not, of course, impair the sovereign rights of members in respect of granting visas." The word "passport" has now been lowered to *laissez-passer*.

category.¹⁰³ F. Rey, S. Kaufmann and other writers of the inter-war period opposed this extension and asked only that wives and children be freed from police restrictions of residence and certain conditions of admission.

(i) *Private suite, servants.* As to the extension of the privileges and immunities of international officials to their private suite and servants, with the exclusion of the nationals of the territorial state, opinions of the writers of the inter-war period were divided; Hammarskjöld was in favor, Roger Secrétan and F. Rey opposed. The first test-cases¹⁰⁴ concerning servants of the UN do not allow yet to speak of a settled law in this respect, as the immunity has been either waived or the immunity appeal withdrawn.

(j) *The problem of National Discrimination.* A particular consequence of treating international immunities as diplomatic immunities has been to deny these immunities to international officials who are nationals of the state of the seat of the international organization or to deny them these immunities in their own country. The figure of the *agent diplomatique régnicole* has been duplicated by that of the *agent international régnicole*. Already the treaties of 1899 and 1907 gave international judges diplomatic privileges only "when outside of their country." This principle of "national discrimination" dominated also the inter-war period. The *modus vivendi* of 1926 gave officials of the League of Swiss nationality only immunity from Swiss jurisdiction for official acts, exemptions of League salaries from cantonal and municipal direct taxes, and exemption from or postponement of military service only, if the necessity of training and the interests of the country permit and if their convocation for military service would be likely to interfere with the normal working of the League. A similar

¹⁰³ Parents of officials do not enjoy benefits of immunity. The mother of an official of the ILO of the second category was held not to be entitled to claim any privilege (*W. K. v. Office des Poursuites, Cour de Justice Civile*, Geneva, February 16, 1929, *Annual Digest*, 1929/30, London, 1935, pp. 314/15).

¹⁰⁴ Case of driver *David Sisson*, Queens Traffic Court, New York; UN waived immunity. Case of *Andrew Jackson* before the City Judge at Yonkers; no plea of immunity was made in this case (*The New York Times*, November 5, 1946, p. 5). The most interesting case is that of William Ranallo, chauffeur of Secretary General Trygve Lie, who was before the Court of New Rochelle, N. Y., for speeding (Acting City Judge Rubin). Counsel for the UN stated that "immunity is not the same as the broad, unrestricted immunity of diplomats. It is only when the UN official is carrying out his duties that the immunity is involved." Judge Rubin took exception to the contention that all UN personnel, from highest to lowest, should have immunity, if engaged on UN "functions." He said: "to establish such a principle would in effect create a large preferred class. Under diplomatic immunity the law violator is subject to return to his own country for punishment of violations of U. S. law. Immunity to UN personnel could result in offenses receiving no punishment" (*The New York Times*, November 9, 1946, pp. 1, 7). The immunity appeal was later withdrawn by Trygve Lie. The judge regretted this withdrawal, "as it left the question of right to immunity unsettled for future cases." For a detailed examination of the Ranallo Case see L. Preuss, "Immunity of Officers and Employees of the UN for Official Acts: the Ranallo Case," in this JOURNAL, Vol. 41 (1947), pp. 555-578.

solution was reached in the Dutch agreement of 1928. This principle was confirmed by decisions of courts.¹⁰⁵

The same idea is to be found to-day in municipal legislation¹⁰⁶ as well as in the Constitutions of Specialized Agencies.¹⁰⁷ The Report of the Preparatory Commission¹⁰⁸ states: "It is also a principle that no official can have in the country of which he is a national immunity from being sued in respect of his non-official acts and from criminal prosecution."

But this principle of "national discrimination" has been strongly attacked already by the literature of the inter-war period. The Adatei-de Visscher Report asked that no Member shall deny diplomatic privileges to its own nationals who exercise a mission in the name of the League in their own territory. Schücking and Wehberg termed the national discrimination "not unobjectionable." S. Kaufmann, F. Ray, Jacques Secrétan, Suzanne Basdevant, Hammarskjöld took a stand against national discrimination. The necessity of independence from the control of national authorities, the principle of the equality of states were the principal reasons. Jenks recently demanded immunity for all members of international staffs, irrespective of nation and rank, at least for official acts.

"National discrimination" plays, apart from the problem of exemption from military service, a principal role in two respects: immunity from jurisdiction and immunity from direct taxation. The problem is different as to each of these two aspects.

(k) *The regulation in the UN General Convention.* Article V, sections 17-21, deal with the privileges and immunities of officials. These norms are based on the granting of privileges and immunities in all Member

¹⁰⁵ *C. M. v. A. C., Cour de Justice Civile, Geneva, March 2, 1929 (Annual Digest, 1929/30, London, 1935, pp. 313/14):* Creditors of a League official of Swiss nationality applied for an attachment of salary for debt. The Court held that A. C., a Swiss national, was not entitled to immunity. But as the League premises were inviolable, an attachment of his salary in the hands of the employer could not be made. See *Avenol v. Avenol, France, Juge de Paix, XVI^e arrondissement de Paris, March 8, 1935 (Annual Digest, 1935-37, London, 1941, pp. 395-397).* Sentence in absentia to pay 12,500 francs per month to his wife from whom he was separated as maintenance. Avenol appealed: as Secretary General of the League he was exempt under Art. VII, par. 4, from the jurisdiction of the Courts of any member state, including that of French Courts. The Court dismissed the appeal, holding that (1) his privileges were strictly limited to Geneva and Switzerland; (2) League officials enjoy no exemption in their own country.

¹⁰⁶ British Act 1944, American Act 1945, sec. 7a ("other than Nationals of the U. S.").

¹⁰⁷ Monetary Fund, Art. IX, sec. 8b: "not being nationals," sec. 9b: tax exemption on salaries and emoluments "for those, who are not local citizens, local subjects, or other local nationals." ECITO, Art. VII, sec. 17c: exemption from taxation "except in the case of their own nationals." UNRRA, Rs. 32: "Each Member shall determine to what extent the privileges shall apply to its own nationals and to non-nationals in permanent residence in its territories."

¹⁰⁸ p. 32.

States, without "national discrimination," and on the basis of a differentiation of UN officials into different categories. As to the contents, in some cases full diplomatic privileges are granted, in accordance with general international law, in other cases specified "necessary" privileges and immunities.

There are three classes of officials. The Secretary General and all Assistant Secretaries General have full diplomatic privileges "in respect of themselves, their spouses, and minor children."¹⁰⁹ On the other hand, here and everywhere, privileges and immunities, flowing from general international law, in respect of their private suite and servants, are excluded. This section, therefore, adopts the suggestion, presented in 1921 by Rougier, and presented at that time as a hardly tenable interpretation of Article VII, paragraph 4 of the Covenant.

As to the UN officials below these ranks, section 17 leaves it to the Secretary General to specify the categories of officials to which the provisions of this Article shall apply; these categories shall be submitted to the General Assembly and communicated thereafter to the Governments of all Members as well as the names of the officials included in these categories. Only the categories thus specified will enjoy the privileges of section 18. But in carrying out his function under section 17 of the General Convention, the Secretary General proposed that "the categories of officials to which the provisions of Art. V and VI shall apply should include all members of the staff of the UN, with the exception of those who are recruited locally and are assigned to hourly rates" and this proposal was adopted unanimously by resolution of the General Assembly, 1st session, 2nd part, on December 7, 1946.^{109a}

Section 18a grants immunity from legal process in respects of words spoken or written and all acts performed in their official capacity. It is obvious that this immunity should not be restricted to officials of certain specified categories but granted to all officials irrespective of rank and nationality.

Diplomatic privileges are granted in respect of exchange facilities and repatriation facilities in time of international crisis, further immunity from immigration restrictions and alien restrictions. While all other privileges are strictly personal, the last two privileges mentioned are given to the officials, "together with their spouses and relatives." It is interesting to note that whereas the full diplomatic privileges for the highest officials are granted also to their spouses and "minor children," here the word "relatives" is used which goes much farther than minor children. Here again the private suite and servants of the officials are excluded.

The officials of the specified categories are further granted, in the territories of all Member States and without national discrimination, immunity

¹⁰⁹ Sec. 19.

^{109a} UN *Journal*, No. 54—Suppl. A—A/P.v/50 (December 9, 1946).

from national service obligations and exemption from taxation on the salaries and emoluments paid to them by the UN. It remains to be seen whether the Member States, or all of them, will accept this proviso.

The problem of exemption from taxation, even restricted to international salaries and emoluments, is the problem where the principle of "national discrimination" has established its strongest bastions. While Switzerland and Holland granted to officials of the League and the Court also of Swiss and Dutch nationality exemption from taxation for their salaries, and the Italian law of 1930 took the same attitude as to Italian officials of the International Institute of Agriculture, the French Ministry of Finance refused tax exemption for French officials of the Institute of International Intellectual Cooperation at Paris.

Suzanne Basdevant has strongly defended the tax exemption of nationals exclusively on the principle of the equality of states, according to which the state of the seat should not have a privileged position *vis-à-vis* the international organization. It is not a question of a favor for international officials. Jenks¹¹⁰ has insisted that "fiscal immunity is both an element in the independence of international institutions and a device to prevent the imposition in the fiscal interest of a particular state of inequitable burden on funds held for common international purposes." National discrimination also leads to inequality of payment of international officials for equal work; hence the Paris Institute of International Intellectual Cooperation paid the taxes on salaries for French officials.

The fight against national discrimination in tax exemption of international officials played a large role in the 5th and 6th Committee of the First Part of the General Assembly of the UN, held in London. The principal stand in favor of national discrimination was taken by Senator Vandenberg, who, primarily, invoked the necessity of Congressional action and the "evils of a tax-free class." But in his Report as Chairman of a Sub-Committee he had to recognize that the Sub-Committee "believes that there is no alternative to the proposition that tax exemption for UN salaries is indispensable to equity between Members and equality between personnel."

All kinds of proposals were made: that in order to avoid creating a "tax-free" class, a tax should be imposed by the UN (Holland); but the United Kingdom objected; such tax would have no real purpose, and the UN is not a sovereign state¹¹¹ but an employer; no precedent exists anywhere of an employer taxing an employee. In order to have equal pay for equal work Norway proposed to increase the salaries of officials who have to pay taxes. Finally it was agreed that tax exemption should be granted to nationals but that in the meantime allowances be paid by UN for tax payments, following the precedents of the Paris Institute. But Australia ob-

¹¹⁰ Work quoted pp. 42/43.

¹¹¹ Same argument as against an international passport in the League of Nations.

jected that taxing Members should have to pay increased contributions. In the New York meeting of the UN General Assembly the Soviet Union, while exempting their own nationals from taxation and opposing UN taxation of its own employees, attempted to terminate UN compensation to the employees for income taxes; the attempt was defeated, but the Soviet Union saw in it a "subsidizing" of the United States.¹¹²

(1) *Counterbalancing the privileges and immunities of international officials.* Already the writers of the inter-war period had recognized that immunity from jurisdiction for international officials also in their own state, leads, contrary to the situation with regard to diplomatists, to difficult problems; in such case there would be "no jurisdiction at all" for League officials (Adatei-de Visseher Report), there would be a "gap," which creates the necessity of special regulation (Schücking and Wehberg), a "denial of justice" (Jacques Secrétan), a "juridical vacuum" (Schwelb).¹¹³

The remedy most favored, taken from the law of diplomatic immunities, is the waiver of immunity by the leading international official.¹¹⁴ Section 20 of the UN General Convention makes it the right and duty of the Secretary General of the UN to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN. Waiver of immunity for the Secretary General is the right of the Security Council.

The UN General Convention further provides, to prevent the occurrence of any abuse, that the Secretary General be instructed that the drivers of all official motor cars of the UN and all members of the staff who own or drive motor cars shall be properly insured against third-party risks. Section 29b provides that the UN make provisions for appropriate modes of settlement of disputes involving any official of the UN who by reason of his official position enjoys immunity if immunity has not been waived by the Secretary General. Decision by arbitration, perhaps inserted into a contract, or recognition of a particular tribunal or Court may be such means. The idea of creating special *fora*, perhaps an international tribunal to be utilized exclusively for these purposes, has been advocated by Grunebaum-Ballin, by S. Kaufman, and by Hammarskjöld.

It must also be remembered that the international, like the diplomatic,

¹¹² The UN Budget for 1947 provides \$350,000 for income tax refunds; of this sum \$330,000 are needed for U. S. income tax refunds (*The New York Times*, November 13, 1946, p. 11).

¹¹³ See the reasoning of the French Court in *Avenol v. Avenol* and of Judge Rubin (above, note 105).

¹¹⁴ See *Parlett v. Parlett*, *Tribunal de première instance*, Geneva, July 21, 1927. Divorce proceedings against an official of the first category of the ILO, waiver of immunity from civil jurisdiction by Director of ILO: *Johnstone v. Ruttle*, Superior Court of the Province of Quebec, August 4, 1942; *Annual Digest*, 1941, 1942, London, 1945, pp. 376/77. Suit for annulment of marriage, waiver from civil jurisdiction, signed by Director of ILO.

immunity is only an immunity from local jurisdiction, not from local law. Section 21 of the UN General Convention provides that the UN shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations, and prevent the occurrence of any abuse in connexion with the privileges and immunities. The strict observance of all local laws and ordinances by the officials of the UN can be made their duty by the Regulations for the Members of the Staff of the UN and be put under appropriate sanctions, going up to the dismissal from the UN staff.

On the other hand the drastic restriction of immunity from local jurisdiction seems not to be an adequate means. Under the UN General Convention, apart from the Secretary General and the Assistant Secretaries General, not even the UN officials of the specified categories enjoy immunity from criminal, civil, administrative, and police jurisdiction, in connexion with acts of their private life. But jurisdiction of local Courts without waiver for acts of private life empowers the local Courts to determine whether a certain act is an official act or an act of private life. The determination of the character of an act passes, therefore, as Jenks has warned, from international to national control and endangers the independence of the international organizations themselves.

Special problems will arise with regard to the personnel of international public corporations. Such personnel, as Friedmann states, is not an international civil service, but a service fulfilling public functions in the employment of an enterprise constituted as a commercial Corporation. Friedmann¹¹⁵ stands for immunity from national jurisdiction also in the home state, but demands an international administrative tribunal which shall have not only adequate jurisdiction, but also adequate authority and power of enforcement. The coming into being of large international public corporations, especially an International Atomic Energy Development Authority, which should run mines and take on the administration and performance of actual engineering projects, will make it necessary, as Jessup¹¹⁶ recently remarked, to develop new rules of international law, defining the legal status of such personnel and the rights and duties as well as the international responsibility of such international agencies.

¹¹⁵ Work quoted above, note 88, p. 199.

¹¹⁶ P. C. Jessup, "Responsibility of States for Injuries to Individuals," in *Columbia Law Review*, Vol. XVI (1946), pp. 903-928, at pp. 927, 928).

EDITORIAL COMMENT

THE INTER-AMERICAN DEFENSE TREATY

On August 30 the representatives of nineteen American Republics signed at Rio de Janeiro a Treaty of Reciprocal Assistance continental peace and security. The Rio conference was held in accordance with the recommendation contained in the Act of Chapultepec signed at Mexico City on March 3, 1945, where the American nations gathered in advance of the United Nations Conference at San Francisco of April 25-June 26, 1945, to agree upon their position within the general international organization about to be formed. However, at the San Francisco Conference regional organizations, of which the Inter-American System with more than fifty years of successful operation is the most outstanding, experienced rough sailing. They were not favored because it was feared that they might detract from the authority of the United Nations. The timely promise of President Truman that after the war he proposed to carry out the recommendation of the Act of Chapultepec saved the Inter-American System at San Francisco. The inability of the United Nations to prevent aggression in Europe during the two years which have elapsed since the Charter was signed demonstrates the wisdom of President Truman's safeguard intervention in May, 1945.

Unlike the Charter of the United Nations, the Treaty of Rio de Janeiro does not leave flagrant acts of aggression to be determined *ex post facto* by a political body. Confirming similar provisions of the Act of Chapultepec, Article IX of the Rio Treaty provides that, in addition to other acts which may be characterized as aggression, the following shall be considered as such:

A.—Unprovoked armed attack by a state against the territory, the people, or the land, sea or air forces of another state;

B.—Invasion by the armed forces of a state, of the territory of an American state, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another state.

Article I of the Rio Treaty formally condemns war, and the signatories undertake not to resort to the threat or use of force in any manner not consistent with the provisions of the Charter of the United Nations or of the Rio Treaty. They further agree in Article II to submit every controversy which may arise between them to methods of peaceful settlement by "means of the procedures in force in the inter-American system before referring it to the General Assembly or the Security Council of the United Nations."

Article III specifies that an armed attack by any state against an American State shall be considered as an attack against all the American States, and each one of them undertakes to assist in meeting such an attack "in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations."

In case of a conflict between two American States, the Rio Treaty first recognizes the right of self-defense in conformity with Article 51 of the United Nations Charter. It then provides that the signatories shall meet in consultation and call upon the contending states to suspend hostilities and restore the *status quo ante bellum*. The consultative organ shall, moreover, take all other necessary measures to reestablish inter-American peace and security and for the solution of the conflict by peaceful means. Article VII then provides that "The rejection of the pacifying action will be considered in the determination of the aggressor and in the application of the measures which the consultative meeting may agree upon."

In the case of a direct attack by any state upon an American State, each of the contracting parties upon the request of the state attacked "may determine the immediate measures which it may individually take" in fulfillment of its obligation. It is further provided that "The organ of consultation shall meet without delay for the purpose of examining those measures and agreeing upon the measures of a collective character that should be adopted" (Article III).

Defense against aggression taking place within the Inter-American sphere is slightly differentiated from defense against aggression taking place without. The Treaty accordingly delimits the defensive zone for the Americas by lines specifically laid down in degrees of longitude and latitude. This region may be generally described as running irregularly from the North Pole to the South Pole in the Atlantic and Pacific Oceans, including Greenland within its eastern limits and Hawaii within its western limits. Should the armed attack upon an American State take place outside of this area, the American States are not required to take individual action but it is provided that the organ of consultation shall meet immediately in order to agree on the measures which must be taken to assist the victim of the aggression. The same Article (VI) stipulates also for an immediate meeting of the organ of consultation "if the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extracontinental or intercontinental conflict, or by any other fact or situation that might endanger the peace of America," in order to agree upon measures to be taken for the common defense and for the maintenance of the peace and security of the continent. According to Senator Vandenberg, a delegate of the United States to the Rio Conference,

The delegation of the United States was particularly earnest in urging this idea that crimes against peace and justice cannot be confined within latitudes and longitudes. We were anxious that the creation of our "region" should imply no lack of interest in world peace outside that "region" nor condone war crimes against humanity wherever they occur.¹

The organ of consultation is to be the meeting of the Ministers of Foreign Affairs of the signatory states until otherwise provided. Until the Ministers can meet, the Governing Board of the Pan American Union may act provisionally as an organ of consultation. The consultation may be initiated on a request addressed to the Governing Board of the Pan American Union by any of the signatories of the treaty. Decisions of the organ of consultation are to be taken by a vote of two-thirds of the signatories. Decisions of the Governing Board of the Pan American Union concerning the initiation of consultation and as an organ of liaison among the signatory states are to be taken by an absolute majority of the members entitled to vote. In the case of a situation or dispute between American States, the parties directly interested are excluded from voting in the consultative organ whether it be meetings of the Ministers of Foreign Affairs or the Governing Board of the Pan American Union. The veto power which has prevented effective action by the Security Council of the United Nations has thus been outlawed in the Inter-American System.

The sanctions which may be imposed by the organ of consultation to assure the fulfilment of the obligations of the treaty are those specified in the Act of Chapultepec, which include the recall of diplomatic officers, the breaking of diplomatic and consular relations, the discontinuance of communications in every form, and the interruption of economic, commercial and financial relations. The use of armed force is also authorized, but no state may be required to use armed force without its consent. Mr. Warren R. Austin, Chief Delegate of the United States to the United Nations and one of the United States delegates to the Rio Conference, explained that

This reservation conforms to constitutional requirements of various countries concerning the mobilization of their armed forces. No doubt such countries, including our own, will find a way of giving such consent in time to be effective.

The authority of the United Nations is upheld throughout the Rio Treaty whenever the general organization is ready and able to maintain international peace and security in accordance with the Charter; and the American States are required to make prompt report of their actions under

¹ Radio address of Sept. 4, 1947. Printed in *The New York Herald-Tribune* for Sept. 5.

² Statement to the press Sept. 3, 1947. *The New York Herald-Tribune*, Sept. 4, 1947.

the Rio Treaty to the United Nations. Article X of the Rio Treaty specifically provides that

None of the provisions of this treaty shall be construed as impairing the rights and obligations of the high contracting parties under the the Charter of the United Nations.

The conclusion of the Rio Treaty of Reciprocal Assistance is an occasion for certain inescapable reflections and comparisons. It is above all, as stated by Senator Vandenberg, in accordance with traditional American ideals. It recalls the names of James Monroe, Simón Bolívar, James G. Blaine, Elihu Root and Cordell Hull. To them it adds the names of Harry S. Truman and George C. Marshall. When the latter affixed the signature of the United States to this treaty at Rio de Janeiro on August 30, 1947, the spirit of Elihu Root must have been hovering nearby for in the same city forty-one years ago, that is, on July 31, 1906, Mr. Root, then Secretary of State of the United States, at the opening of the Third Pan American Conference, declared on behalf of this country:

We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire; and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong.

Upon his return from Rio de Janeiro, Secretary Marshall reported to the American people over the radio. He declared that the conference was "The most encouraging, the most stimulating international action since the close of hostilities." The results of the conference demonstrate, he stated, "that where nations are sincerely desirous of promoting the peace and well-being of the world it can be done," and, he added, "It can be done without frustrating delays and without much of the confusing and disturbing propaganda that has attended our efforts of the last two years."³ Senator Vandenberg in the same broadcast declared the Treaty to be a milestone of incalculable importance, and "a tremendously significant and progressive pattern for others to follow." Verily, the Rio Treaty is, as he said, "sunlight in a dark world."

GEORGE A. FINCH

Editor-in-Chief

SWITZERLAND AND THE INTERNATIONAL COURT OF JUSTICE*

The San Francisco Conference took a significant step when it decided that the World Court should be an organ of the United Nations. It

³ Radio address of Sept. 4. Printed in *The New York Herald-Tribune*, Sept. 5.

* On October 1, 1947, after this Comment was in type, it was reported that the Federal Council of Switzerland was favorably disposed to accession to the Statute on the terms proposed.

effected but slight changes in the text of the Statute of the Court as drawn up in 1920 and modified in 1936. Yet whereas force had been given to that Statute by a protocol separate and distinct from the Covenant of the League of Nations, the San Francisco Conference proposed that it should be annexed to the Charter of the United Nations as an integral part thereof.

What this meant, in effect, was that the existing World Court was taken away from one group of states and taken over by another group of states as a part of the United Nations Organization. This was possible because, for the most part, the membership of the two groups was the same.

If the new orientation of the Court has some distinct advantages, it also has some disadvantages.

One of the disadvantages lies in the fact that certain states which had theretofore faithfully supported the Court for more than twenty years, which had paid their part of its expenses and had conferred jurisdiction upon it, were not included among the Members of the United Nations. Hence they ceased to be parties to the Court's Statute. They were, so to speak, squeezed out. Among them were the neutral states of Ireland, Portugal, Spain, Sweden, and Switzerland.

To be sure, the door was not closed to these states' becoming Members of the United Nations. To do so, however, they must pass the "peace-loving" test as it may be applied by the Security Council and the General Assembly. Up to this time Sweden is the only one of the named states which has met the test.

Other doors were also left open to these states with respect to the Court. Without becoming Members of the United Nations, they could become parties to the Court's Statute on conditions to be determined in each case by the General Assembly on the recommendation of the Security Council. In each case, for the United Nations were not willing to take the chance that some renegade might crawl under the umbrella of general principles of law and justice! Still another door was held open also. Upon complying with the conditions laid down by the Security Council non-Member states may appear as litigants before the Court.

The most striking case is that of Switzerland. As she had stayed out of all but humanitarian action through two World Wars, she was not to be regarded in 1945 as a "peace-loving" state. Of course the scenes on the stage of 1945 have now shifted to some extent, and possibly Switzerland could today qualify for United Nations membership. She has made no application for such membership, however, and her centuries-old tradition of neutrality may keep her from shouldering the obligations of the Charter for many years to come.

However one may appraise that course, he cannot but admire the striking example of democracy which this small multi-racial and multi-lingual

nation has set for the world. Nor can he fail to give her credit for the loyalty with which she has coöperated with other nations in the past. Not only have various international bureaus been located at Bern, but Switzerland continued to give hospitality to the League of Nations when potentially hostile armies were massed on all her frontiers.

The whole world expects Switzerland to hew the line of legal propriety, to chart her course with meticulous regard for her obligations under international law. Long among the leaders in promoting the judicial settlement of international disputes, her record in respect to the World Court was exemplary. She was among the first states to sign and ratify its Statute. From the very beginning she recognized its compulsory jurisdiction—and this without any crippling reservations of matters essentially within her domestic jurisdiction as determined by herself. When she became involved in a dispute with France about the Free Zones around Geneva, she promptly repaired to the Court—and she won her case.

Was it not, then, a bit tough for Switzerland to be forced to sit by and see herself relegated to the side-lines when the World Court was taken over by the Members of the United Nations in 1945? Thus relegated by states some of which, like the United States, had never raised a finger in support of the Court, had never become parties to its Statute, had never conferred on it compulsory jurisdiction, had never resorted to it as litigants, had never contributed a penny for its financial needs? One could hardly quarrel with them if the Swiss had shown some slight resentment at this turn of events.

The Swiss are not a sulking people, however. Hence they lost no time in seeking to repair their position. The Swiss Federal Council promptly made inquiry as to the conditions on which Switzerland might once more be a party to the Court's Statute. These conditions were set by a resolution adopted by the Security Council on November 15, 1946, and determined by the General Assembly on December 11, 1946.¹ As a considerable period of time has elapsed and the Swiss accession to the Statute has not yet been effected, one may surmise that these conditions may have given rise to some difficulties for Swiss public opinion. It may not be inappropriate, therefore, to review them from the Swiss point of view.

The conditions set for Switzerland's accession were three: (1) acceptance of the provisions of the Statute; (2) acceptance of all the obligations of a Member of the United Nations under Article 94 of the Charter; and (3) an undertaking to contribute to the Court's expenses such equitable amount as the General Assembly may assess from time to time after consultation with the Swiss Government. It is hardly to be imagined that the first and third of these conditions could have given rise to any difficulty.

¹ United Nations document A/64/Add. 1, p. 182.

The second condition may not be so easily acceptable, however, to a people who are naturally sensitive about a tradition which in their eyes has so recently saved them from the ravages of war. If hesitance exists, therefore, it doubtless has to do with Switzerland's accepting "all the obligations of a Member of the United Nations under Article 94 of the Charter."

Article 94 creates for each Member State an obligation to comply with the decision of the International Court of Justice in any case to which it is a party. This obligation would have existed even if it had not been specifically formulated. Of course a judgment of the Court is binding on a state which is a party before the Court in the case in which the judgment was given. This is set out in Article 59 of the Statute, in its provision that "the decision of the Court has no binding force except between the parties and in respect of that particular case." It seems inconceivable that the formulation of this obligation in Article 94 could create a difficulty for the Swiss.

Article 94 of the Charter proceeds to create a sanction for the Court's judgments which hardly goes beyond that contained in the Covenant of the League of Nations. It provides that "if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Thus if Switzerland failed to carry out a judgment of the Court given in a case to which she was a party, she would have to admit the other party's right of recourse to the Security Council, and she would be bound by any decision of the latter for giving effect to the judgment. Yet the matter is reciprocal, and if the other party to the case failed to perform its obligations under a judgment, Switzerland could go to the Security Council for relief. It seems hardly probable that this part of Article 94 would give pause to Swiss opinion.

Standing by itself, then, Article 94 would seem to create for Members of the United Nations no obligations which Switzerland is likely to balk at assuming. Yet the Article does not stand by itself. It is a part of the Charter, and its purport may be affected, for Members of the United Nations at least, by others of the 111 Articles thereof. Perhaps this is the feature of the situation which leads to Swiss hesitance, if it exists.

When the matter of the Swiss accession was being considered by the Security Council, it had before it a report by its Committee of Experts,² in which the latter said that "the obligations of a Member of the United Nations under Article 94 include the complementary obligations arising under Articles 25 and 103 of the Charter insofar as the provisions of those articles may relate to the provisions of Article 94." By Article 25 the Members "agree to accept and carry out the decisions of the Security

² United Nations document S/191, 11 November 1946.

Council in accordance with the present Charter"; by Article 103, in the event of a conflict between the obligations of Members under the Charter and their obligations under any other international agreement, their obligations under the Charter are made to prevail.

It must be admitted that, for Members of the United Nations, the obligations under Articles 25 and 103 are complementary to those under Article 94. Yet it seems too much to say that the latter "include" the former. Though this conclusion by the Committee of Experts met with no demur either in the Security Council or in the General Assembly, it can hardly be taken to have become an established proposition, and the International Court of Justice itself would not be bound by the interpretation.

The Committee of Experts went even further in its report. It stated that "non-Members of the United Nations which become parties to the Statute . . . become bound by these complementary obligations under Articles 25 and 103 in relation to the provisions of Article 94 (but not otherwise), when they accept 'all the obligations of a Member of the United Nations under Article 94.'" Though the phrase in parentheses sharply limits its effects, this statement seems to go beyond anything which could have been intended in the drafting of the provisions in Article 93 looking toward non-Members becoming parties to the Statute.

For Switzerland the report of the Committee of Experts raises the following question. If Switzerland should become a party to the Statute, would she be bound, under Article 25 of the Charter, to carry out a decision of the Security Council upon measures to be taken to give effect to a judgment rendered by the Court in a case to which Switzerland was not a party?

Let us suppose that Switzerland could assume all of the obligations of a Member under Article 94 standing by itself—the obligation to comply with a decision of the Court in any case in which Switzerland was a party, and the obligation to carry out a decision of the Security Council upon measures to be taken to give effect to a judgment given in a case to which Switzerland was a party. It would be going much further to say that Switzerland, as a party to the Statute, would have an obligation under Article 25 of the Charter to carry out a decision of the Security Council for giving effect to a judgment rendered by the Court in a case to which Switzerland was not a party.

Switzerland may well say: "Yes, in any case to which I am a party, I will comply with the Court's decision; and if I fail to do so, I will be bound to take the measures which the Security Council may decide upon to give effect to the judgment. In a case between my neighbors, France and Germany, or France and Italy, however, I am not willing to be bound to carry out a decision of the Security Council upon measures to give ef-

fect to a judgment of the Court." The writer finds it impossible to believe that, as a party to the Statute on the conditions set, and so having all the obligations of a Member of the United Nations under Article 94 of the Charter, Switzerland would not be justified in saying this.

Fortunately, an attentive examination of the report of the Committee of Experts bears out this conclusion. For it assimilates the obligations of a non-Member which is a party to the Statute to those of a non-Member not a party to the Statute and possessing merely a right of access to the Court.

In a resolution adopted on October 15, 1946, the Security Council gave effect to a provision in Article 35 (2) of the Statute by fixing the conditions on which a state not a party to the Statute may have access to the Court. These conditions required that, by a previous declaration, such a state should have undertaken "to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter." The Committee of Experts' report indicates that, with regard to Article 94, non-Members which are parties to the Statute and "non-parties which have access to the Court" have the same "complementary obligations under Articles 25 and 103 in relation to the provisions of Article 94 (but not otherwise)."

Now it seems inconceivable that a state which is not a Member of the United Nations and not a party to the Statute, would be required, as a condition of its access to the Court, to make a declaration binding itself to carry out decisions taken by the Security Council under Article 94 in cases to which it was not a party, in circumstances in which it has not had actual access to the Court. Such a construction of the Security Council's resolution would so effectively discourage declarations that it would be inconsistent with any desire to open the Court for the widest possible usefulness, and every leaning must be against it.

Since, in the view of the Committee of Experts, such a state is on the same footing with regard to Article 94 as a non-Member which is a party to the Statute, one must interpret the Committee's phrase "in relation to the provisions of Article 94 (but not otherwise)" to mean that neither the state having mere access nor the non-Member party to the Statute is bound by the "complementary obligations" under Articles 25 and 103 with regard to decisions of the Security Council designed to give effect to judgments rendered by the Court in cases to which they were not parties before the Court.

If the Swiss feel some hesitation, and if the grounds for it are properly appreciated here, it would seem that their fears can be set at rest, and that even with their tradition of neutrality there can be no danger for Switzerland in acceding to the Statute on the conditions set by the Security Council and the General Assembly.

MANLEY O. HUDSON

INDIVIDUAL AND COLLECTIVE SELF-DEFENSE IN ARTICLE 51 OF THE CHARTER OF THE UNITED NATIONS

Article 51 of the Charter of the United Nations¹ poses the problem of the meaning of the concept of "individual and collective self-defense," of its connection with other parts of the Charter, and of the range of its application.²

This article, not contained in the Dumbarton Oaks Proposals, was added at San Francisco. It was the notion of "collective self-defense" which was needed, and it was needed as a diplomatic step to solve the so-called "Latin-American crisis" at San Francisco. It was the means to save the relative independence of the Inter-American System and the continued validity of the Act of Chapultepec and of the proposed permanent Inter-American Defense Treaty, without endangering the universality of the jurisdiction of the Security Council. It was for purposes of fitting regional arrangements, and particularly the Inter-American System, into the general international organization. That this was so is clearly shown by the history of the San Francisco Conference, where what is now Article 51 was worked out by Committee III/4, dealing with regional arrangements. Latin Americans had originally feared that the Security Council might override the Act of Chapultepec, but soon became anxious rather for fear that action under this Act might be blocked through the inactivity of the Security Council, paralyzed by the exercise of the "veto." A great number of Latin American proposals were introduced between May 4 and 23, 1945, in Committee III/4, the Chairman of which was Alberto Lleras Camargo, then Foreign Minister of Colombia, now Director General of the Pan American Union. But only the United States proposal of what is now Article 51 solved the dilemma. Lleras Camargo, speaking for Colombia, declared³ in the fourth meeting of Committee III/4 on May 23, 1945:

¹ Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

² For a preliminary discussion of Art. 51 see: Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents*, Boston, 1946, pp. 174-181. For a more thorough discussion, but one written when the San Francisco documents were not yet available, see E. Albanell MacCall, *La legítima defensa en el artículo 51 de la Carta de las Naciones Unidas*, Montevideo, 1945. A synthesis of this Uruguayan study is given by A. Schreest Ferrer in *Revista de Derecho Internacional*, Vol. 51, number 101 (March 31, 1945), pp. 14-23. The Uruguayan study is primarily based on the excellent Hague lectures of Emile Giraud, *La théorie de la légitime défense* (*Recueil des Cours*, 1934, Vol. I, pp. 691-865).

³ *United Nations Conference on International Organization Documents*, 1945. Vol. XII, pp. 630-31.

The Latin American countries understood, as Senator Vandenberg has said, that the origin of the term 'self-defense' is identified with the necessity of preserving regional systems like the Inter-American one. . . . It may be deduced that the approval of this article implies that Chapultepec is not in contravention of the Charter.

and again: ⁴

In the case of the American states, an aggression against one American state constitutes an aggression against all the other American states and all of them exercise their right of legitimate defense by giving support to the state attacked, in order to repel such aggression.

This is what is meant by the right of collective self-defense.

All the Latin American representatives associated themselves with these declarations. When the Report of Committee III/4 was adopted ⁵ on June 13, 1945, at the second meeting of Commission III, the Mexican Castillo Nájera spoke in the same sense.⁶

The proposals of the Latin American governments for the Inter-American Defense Treaty to be considered at the Rio de Janeiro conference and the report and draft treaty of the Committee of the Governing Board, presented ⁷ at the session of May 22, 1946, distinguish between acts and threats of aggression having the form of "armed attack," where full advantage is taken of Article 51, and other acts and threats of aggression.

Historically, therefore, the connection of Article 51 with the Inter-American System is clear. But this historical background is not necessarily decisive for the juridical interpretation of Article 51 as it stands. The Permanent Court of International Justice held that, where a text is clear and unambiguous, no resort should be had to *travaux préparatoires* for its interpretation. There are to be noted further the fact that Article 51 is not included in the chapter on regional arrangements, the fact that the Inter-American System—this question was debated at San Francisco and decided negatively—is not specifically mentioned, and the negotiations themselves. The representative of Egypt stated that Article 51 also extended to the Pan-Arab League, but he declared himself against the inclusion of alliances and mutual assistance pacts. But Paul-Boncour (France) emphatically stated that the formula of Article 51 "extends in general to cases of mutual assistance against aggression." Thus the "collective self-

⁴ The same, p. 687.

⁵ The same, Vol. XI, pp. 54-55.

⁶ In the same sense also: *Report on the Action of the San Francisco Conference on Regional Arrangements, Submitted to the Governing Board by the Director General*, Washington, Pan-American Union, 1945. Congress and Conference Series 48 (mimeographed).

⁷ *Inter-American Conference for the Maintenance of Continental Peace and Security, Rio de Janeiro*, Washington, 1946, pp. 14f (mimeographed).

defense" of Article 51 may play the same role for a new system of alliances as the *ententes régionales* of Article XXI of the Covenant.

This development, apart from the original wish of saving the relative autonomy of Pan-America, reflects the lack of complete faith in the ability of the United Nations to maintain international peace and security, a lack of faith brought about by the fact that Article 43, calling for the placing of armed forces at the disposal of the Security Council had not yet been implemented and by the possible paralysis of the Council through the exercise of the veto. Yet the developments discussed give the right of "collective defense" only to members bound by regional, or, at least, by particular treaty ties. But may Article 51 not be invoked by any and all members, even those which have no special treaties with the state attacked? Such use was intimated by the British Representative on the occasion of the discussion of the Report of the Military Staff Committee,⁸ as a substitute for non-existing "collective security." For the Report had, realistically, proposed to build up only a relatively small armed force to be used against small and medium-sized states, not against Great Powers.

The obligation of Article 2, paragraph 4, that the members "refrain in their international relations from the use of force," is subject, therefore, apart from Articles 106 and 107, to the following exceptions: (1) the right of individual self-defense, (2) the right of collective self-defense: (a) by the Inter-American System, (b) by the Pan-Arab League, (c) by possible new continental or regional organizations, (d) by states having alliances or mutual assistance pacts against aggression and (f) eventually by any and all states members.

Whether such development will, in fact, substitute the independent use of force for the enforcement action by the United Nations is, first of all, a political problem; but it is also a juridical problem, depending on the legal meaning of the concept "individual and collective self-defense."

Let us analyze, first, the legal meaning of the concept of "collective self-defense." The term is new, but the thing was known previously. Military assistance to another state is the heart of any treaty of alliance. Prior to the League of Nations this problem was primarily political, as a state could at all times go to war, and as states could also conclude alliances for offensive purposes. Yet the idea of helping another state only to defend itself had often also a legal significance; the *casus foederis* was often restricted to an *attaque non-provoquée*.⁹ The alliances and mutual assistance pacts of the inter-war period, concluded "within the framework of the League of Nations," all take this attitude. The idea of Pan-American solidarity, often proclaimed, was raised to the idea of Pan-American continental defense. It culminates in Declaration XV

⁸ Security Council 3/335, April 30, 1947.

⁹ See W. Steinler, *Der Begriff des nicht herausgefordert-en Angriffs in Bündnisverträgen*, Leipzig, 1927.

signed at Havana in 1940, and the Act of Chapultepec, of 1945, which, for the first time, envisaged "the use of armed force to repel aggression."

A special problem is raised by the wording of Article 51, which gives the right of collective self-defense only "if an armed attack occurs against a member of the United Nations." In the hypothetical case of an illegal armed attack by a member of the United Nations against Portugal, with which Great Britain has a centuries-old alliance, has Great Britain a right of collective self-defense under Article 51?

The term "collective self-defense" is not a happy one. It is not self-defense, but defense of another state;¹⁰ it corresponds, in municipal law, not to self-defense, but to the defense of others.¹¹ Neither is "collective self-defense" an action in the name and by authority of the United Nations. It is not a means to realize collective security. It does not correspond to the military action commune under Art. XVI of the Covenant. It is an autonomous exercise of force, legalized by the Charter only under the conditions and within the limits of Art. 51.

Is the exercise of collective defense merely a right, or also a legal duty?¹² If a state or states are bound by regional or mutual assistance treaties they are under a duty to act, imposed by particular international law. But for any state or states not having such particular obligations the exercise of collective defense is for it under Art. 51 merely a right and not a legal duty.

The right to defend others in municipal law is often restricted to persons having a special family relation with the person defended and always made dependent on whether the person defended has himself a legal right of self-defense.¹³ Here, too, the legality of the exercise of the right of collective self-defense depends on whether the state in whose favor it is being exercised has a right of individual self-defense. In consequence all further legal problems concerning collective self-defense depend on the problem of individual self-defense.

Self-defense must be distinguished from self-help. Self-help is a procedure of realizing and enforcing the law in a primitive legal order. In an advanced legal order self-help is excluded. As international law is, or at least was, a primitive legal order, it had to admit self-help (reprisals, war). In consequence the notion of self-defense had a political rather than a legal character. Self-defense as a truly juridical institution pre-

¹⁰ Descamps (Hague, *Recueil des Cours*, 1930, Vol. I, pp. 469-485) speaks of the *concours à la légitime défense d'autrui*.

¹¹ In German *Nothilfe* as distinguished from *Nothwehr*.

¹² In Roman Law a slave had not only the right, but also the legal duty, to defend his master if the master found himself in a situation of self-defense.

¹³ Such person "has only the same right to defend another as he would have to defend himself under the same circumstances," although "even a stranger may take life, if necessary, in order to prevent the commission of a felony by violence or surprise" (Clark and Marshall, *A Treatise on the Law of Crimes*, Chicago, 1940 (4th ed.), p. 359).

supposes an advanced legal order and international self-defense is, therefore, closely bound up with a more advanced international organization. Only where self-help is forbidden does self-defense become legally meaningful. Only the attempts to restrict or eliminate the right of resort to war make international self-defense legally meaningful. The notion of international self-defense depends on the illegality of war, or, as the Charter puts it more sharply, on the illegality of the use of force by individual states.

Self-defense is further, in municipal and international law, clearly to be distinguished from the so-called "state of necessity."¹⁴ Self-defense is a full justification; it is a right, not only an excuse. But it is a right, established by positive law, a right in the lawyer's sense, not merely a political or ethical principle. That is why it is unfortunate that Art. 51 puts it as a "right" of natural law,¹⁵ although this phrase is also found in municipal law.¹⁶ While the right of self-defense is granted by practically all legal orders, it may be denied, or it may constitute only an excuse, or it may be made dependent on particular conditions.¹⁷ The phrase "inherent right" can only serve to obscure the legal meaning. As a legal right, granted by positive international law, it has to be defined by this positive law. Only thus can its legal meaning be discovered; only thus can we see whether Art. 51 constitutes a progressive development and measure it against the institution of "self-defense" in advanced municipal legal orders.

As in municipal law, self-defense under Art. 51 is not a procedure to enforce the law, is not designed to punish the aggressor or to obtain indemnities, is not an enforcement action by the United Nations, but serves primarily to repel an illegal armed attack. But, contrary to municipal law, it may not stop here: it seems to give the state or states exercising the right of individual or collective self-defense the right to resort to a justified war, to carry this war to victory, to impose a peace treaty upon

¹⁴ It was, therefore, not correct, when Secretary of State Webster spoke, with regard to the Caroline Case of 1837, of the "great law of self-defense" (J. B. Moore, *Digest of International Law*, Vol. II, p. 412). Necessity may be an excuse, but never a justification; in the common law of crimes necessity even as an excuse for homicide is doubtful. See *Reg. v. Dudley and Stephens*, L. R. 14, Q. B. Div. 273 (1834). See also Jerome Hall, *General Principles of Criminal Law*, Indianapolis, 1946.

¹⁵ "Inherent right"; in the French text: *droit naturel*; in the Spanish text *derecho inmanente*.

¹⁶ Already in Roman law: *vim vi repellere licere Cassius scribit idque ius natura comparatur* (Dig. 43, 16, 1, 27).

¹⁷ See the development in the common law of crimes: originally no excuse at all; then, under the Statute of Gloucester (6 Edw. I, c. 9, 1278), the life of one who had killed *se defendendo* was released but his chattels forfeited; later a full justification under the Statute of 24 Henry VIII, c. 5, 1532. Yet the exercise of the right of self-defense presupposes the "retreat to the wall," a condition wholly unknown to the countries of the Roman law.

the vanquished aggressor, always presupposing that the Security Council has failed and continues to fail of taking the measures necessary to maintain international peace and security. The right of self-defense is, in such cases, a right to resort to war. But as the action is war, even if illegal on the side of the aggressor, the state or states acting in self-defense are bound by the laws of war.

It seems also that the conditions of necessity, reasonableness, and a certain proportionality, which the municipal law prescribes for the exercise of the right of self-defense, are lacking in Art. 51.

Self-defense in municipal law presupposes an illegal attack; this is certainly true also in international law.¹⁸ In consequence the right of Art. 51 cannot be exercised legally against the legal use of force, as against an enforcement action by the United Nations, or against a state or states legally exercising the right of self-defense under Art. 51.

As self-defense is legal only against an illegal attack, the problem of when self-defense is legitimate is of the utmost importance; the problem of the limits of self-defense is coördinate with the problem of the "definition of aggression." The recognition of a vague "right of self-defense," to be determined by the state which claims to act in self-defense, is apt to make the prohibition of "wars of aggression" illusory. That is why it could logically be asked whether the Pact of Paris could be violated at all. It is a commonplace that all states, determined to go to war, plead self-defense. The term "self-defense" has been diplomatically used in a very extended fashion, including the Monroe Doctrine,¹⁹ the so-called British Monroe Doctrine, and, in general, the doctrine of the so-called "vital interests,"²⁰ the justification of the lend-lease bill²¹ and so on. "Self-defense" has been recognized as an exception in the abortive Geneva Protocol of 1924, in Art. 2 of the Locarno Treaty of 1925, and under the Kellogg Pact.²² In addition it was often insisted, as Hughes said 1923 with regard to the Monroe Doctrine, "that the U. S. in the exercise of this right of self-defense must have an unhampered discretion," or, as the Kellogg Note puts it, that "each nation is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same."

In this respect Art. 51 constitutes an important progress by limiting the right of individual and collective self-defense to the one case of armed attack against a member of the U.N. Various problems arise with regard to the interpretation of the term "armed attack." The word "at-

¹⁸ C. C. Hyde, *International Law*, Boston, 1922, Vol. I, p. 106.

¹⁹ C. H. Hughes, 1923 (Hackworth, *Digest of International Law*, Vol. IV, p. 451).

²⁰ J. L. Brierly, *The Outlook for International Law*, Oxford, 1944, pp. 33-45.

²¹ H. Rep. 18, 77th Cong., 1st sess., p. 5 (Hackworth, work quoted, Vol. VII, pp. 692-93).

²² Circular Note of Secretary of State Kellogg of June 23, 1928.

tack" is a strategic, not a legal word. It is clear that "armed attack" can only mean an illegal armed attack,²³ an "aggression." But the problem of the definition of aggression has not only not yet been solved: the very desirability of the definition of aggression has been rejected by Pan-America²⁴ and at San Francisco.²⁵ Under Art. 39 of the Charter it is for the Security Council to determine the existence of any act of aggression at its discretion.

If "armed attack" means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident; necessity or proportionality are no conditions for the exercise of self-defense under Art. 51. It is clear that there is no self-defense against a legal enforcement action by the United Nations or against a legal exercise of self-defense. An armed attack may also be unlawful, and thus give the right of self-defense if it constitutes an unlawful intervention, individual or collective; Art. 51 must be interpreted with regard to the doctrine of non-intervention and Art. 2, par. 7, of the Charter.²⁶ "Armed attack" gives the right of self-defense if directed against a member of the U.N.; how it is done, on land, by sea, in the air, by invasion of territory by armed forces, or by long-range guided missiles, and so on, is legally irrelevant. It is also irrelevant whether such armed attack is made ultimately against the sovereignty, territorial integrity, and independence of the U.N. member or whether any such purpose is expressly denied. Such interpretation will make illegal an armed intervention under the Monroe Doctrine or for the purpose of protecting citizens abroad; is, in the latter case, an "armed intervention," the dispatching of men-of-war, without attack, legal or does it already give rise to self-defense under Art. 51? But the "armed attack" must not only be directed against a state, it must also be made by a state or with the approval of a state. One may think of the Pancho Villa affair, or now of the situation of Greece and Yugoslavia.

"Armed attack" as the only condition of the right of self-defense under Art. 51 may, in conceivable circumstances, mean too little. For this right does not exist against any form of aggression which does not constitute "armed attack." Secondly this term means something that has taken place. Art. 51 prohibits "preventive war." The "threat of aggression" does not justify self-defense under Art. 51. Now in municipal law self-defense is justified only against an actual danger, but it is sufficient that the danger is *imminent*. { The "imminent" armed attack does not suffice under Art. 51 }

²³ Whereas the English and the Spanish texts use "armed attack" and *ataque armado*, the French text has the clearer term *agression militaire*.

²⁴ Res. XXIV, Lima Conference, 1938.

²⁵ Documents, work quoted, Vol. XII, pp. 341-349.

²⁶ Luis E. Nieto Arteta, *Intervención y dominio reservado del Estado* (in the first [1947] number of the *Revista Colombiana de Derecho Internacional*).

Apart from the problem of the definition of aggression, there is the problem of determining the aggressor. The aggressor, or he who has "provoked" an aggression, has no right of self-defense under municipal law; also in municipal law there are situations where neither of two fighting persons can invoke the right of self-defense. To determine the aggressor must, in cases of self-defense, be left, in the first instance, to the person in question. But self-defense becomes a truly juridical institution in municipal law only through the control of self-defense by independent courts with compulsory jurisdiction. No such judicial control is provided in Art. 51. But here, too, some progress has been achieved, through giving a certain control over the exercise of the right of self-defense to the Security Council. The latter not only retains, notwithstanding Art. 51, all authority and responsibility to take at any time the necessary measures, and thus to determine an act of aggression and, consequently, the legality of self-defense. The state or states acting in the exercise of self-defense, are, moreover, legally bound to report immediately to the Security Council the measures taken in the exercise of the right of self-defense, and they can take such measures only until the Security Council has taken the measures necessary to maintain international peace and security.

The concept of self-defense in Art. 51, to sum up, reveals a progressive development, although it is, of course, still far away from the juridical precision which the legal institution of self-defense has in advanced municipal law.

JOSEF L. KUNZ

PROPOSED ITO CHARTER

Eighteen United Nations have recently participated, through their representatives on the Preparatory Committee, in the preparation of a draft charter for an International Trade Organization.¹ Earlier phases of the effort looking to a United Nations Conference on Trade and Employment, which is to be held at Havana beginning on November 21, 1947, were the subject of earlier comment by the present writer.²

The provisions of the Charter as they have now evolved are the results of intensive work by the Preparatory Committee at its first session (held in London, October 15 to November 26, 1946),³ revisory effort by the Drafting Committee (which met in New York from January 20 to February 25, 1947),⁴ and further discussion and formulation at the second session of the Preparatory Committee which convened at Geneva on April 10, 1947, and

¹ Doc. E/PC/T/180.

² "Toward a World Conference on Trade and Employment," this JOURNAL, Vol. 41 (1947), pp. 127-131.

³ Report in Doc. E/PC/T/33.

⁴ Report in Doc. E/PC/T/34.

continued its labors for more than four months.⁵ While minutes of the meeting that produced the most recent version of the Charter are not yet available for public use, the discussions have deservedly received wide attention in the world press. In view of the magnitude of the undertaking which the Charter represents, and the potential importance of the ITO as an instrumentality designed to make the basic plan work, the substantive provisions of the draft Charter seem to merit the attention of those who are concerned for the development of law and order in the field of international economic relations as well as for observers of institutional development within the framework of the United Nations system. The limits of a brief comment preclude detailed consideration of the one hundred articles and permit only summary and, in some cases, illustrative, statements.

The purposes and objectives of the proposed ITO, as set out in Chapter I, refer to higher standards of living, full employment, and the conditions of economic and social development envisaged in Article 55(a) of the United Nations Charter. The ITO Charter envisages both national and international action to assure a large and steadily growing volume of real income and effective demand, and, by increasing the production, consumption, and exchange of goods, to contribute to a balanced and expanding world economy. Further purposes are to foster and assist industrial and general economic development (particularly of countries in early stages of industrial development), to encourage the international flow of capital for productive investment, to further the enjoyment, on equal terms, of access to markets and of products and productive facilities needed for economic prosperity and development. The plan is further designed to reduce tariffs and other barriers to trade, to eliminate discriminatory treatment in international commerce, to enable countries ("by increasing opportunities for their trade and economic development on a mutually advantageous basis") to abstain from measures which would disrupt world commerce, reduce productive employment, or retard economic progress. Finally, the Charter looks to the facilitation of consultation and cooperation in the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices, and commodity policy.

In Chapter II, on "Employment and Economic Activity," there are references, *inter alia*, to the maintenance of domestic employment through measures to be taken by each member state, "appropriate to its political, economic, and social institutions." In connection with fair labor stand-

⁵ Members of the Preparatory Committee represented at the second session were: Australia, Belgium, Luxembourg, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, The Netherlands, New Zealand, Norway, the Union of South Africa, the United States and the United Kingdom. The Soviet Union, a member of the Preparatory Committee as created by the United Nations Economic and Social Council, was not represented.

ards, one goal specified is the elimination of substandard conditions of labor in production for export, "and generally." A separate article relates to the removal of maladjustments within the balance of payments, and another to safeguards for members subject to deflationary pressure.

Chapter III, on "Economic Development," sets forth that "... all countries have a common interest in the productive use of the world's human and material resources. . . ." ⁶ There is a provision that "No member shall impose unreasonable or unjustifiable impediments that would prevent other members from obtaining on equitable terms . . . facilities for their economic development, . . ." and that no member shall take unreasonable action within its territories injurious to the rights or interests of other members' nationals in the enterprise, skills, capital, arts, or technology which they have supplied. ⁷ Elements of an investment code are incorporated in the Charter. In connection with this are also found provisions on non-discriminatory protective measures permissible for the purpose of economic development. Although elimination of preferences is a major objective and Chapter IV contains provisions directed to this end, under special circumstances referred to in Chapter III (Art. 15) "new preferential measures" that are proposed by a member may be approved by the ITO.

Of central importance are the provisions which relate to general most-favored-nation treatment as to customs, the methods of levying duties, and rules and formalities in this connection, also provisions concerning the elimination of preferences and national treatment as to internal taxation and regulation. A section on "Quantitative Restrictions and Exchange Controls" states a general rule to the effect that there shall be no prohibitions or restrictions other than duties, taxes, or other charges, but allows certain exceptions, as in the case of countries in balance of payments difficulties, provided that any restrictions permitted under such exceptions are administered in a non-discriminatory manner. To the rule of non-discriminatory administration of such restrictions, exceptions are to be permitted, with prior approval of the ITO required after March 1, 1952, when there is "widespread disequilibrium." ⁸ In the matter of exchange control it is provided that members shall not, "by exchange action, frustrate the intent of the provisions" of this section, nor, "by trade action, the intent of the International Monetary Fund." ⁹ Coöperation of the ITO with the Fund is envisaged. Separate sections deal with subsidies and with state trading. In connection with the latter a rule of non-discrimination and the application of commercial considerations are prescribed, ¹⁰ and negotiations (when

⁶ Art. 8.

⁷ Art. 11.

⁸ Art. 23.

⁹ Art. 24.

¹⁰ Art. 30.

requested by an interested member) looking to the limitation or reduction of protection afforded (through operation of a monopoly) to domestic producers of the monopolized product, are contemplated.¹¹ In a section on "General Commercial Provisions" are to be found articles on freedom of transit, anti-dumping and countervailing duties, valuation for customs purposes, formalities connected with importation and exportation, marks of origin, publication and administration of trade regulations, information, statistics and trade terminology, boycotts, emergency action on imports of particular products, consultation and territorial application.

Chapter V, on "Restrictive Business Practices," provides that each member shall take appropriate measures, individually or through the ITO, or in both ways, to prevent business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic practices (or which interfere with the achievement of other objectives of the Charter).¹² Detailed provisions cover the method of investigating, consulting, and reporting, in cases where such business practices are alleged. Action or omission to act by the ITO is not to prevent a member's enforcing its own statutes or decrees against monopoly or restraint of trade. Even as to types of agreements excepted (by Art. 51) from the provisions of the chapter, the ITO may make recommendations.

Seventeen articles, comprising Chapter VI, relate to "Intergovernmental Commodity Agreements." Among the introductory considerations is recognition of the fact that the tendency toward disequilibrium between production and consumption of primary products, accumulation of burdensome stocks, and pronounced fluctuations in prices may necessitate special treatment of the international trade in such commodities.¹³ Commodity studies are to be arranged by the ITO, which, upon recommendation of a study group or at the request of a member whose interests represent a substantial part of world production or consumption or trade in particular commodity, is to convene a conference on the subject. General principles are set forth covering intergovernmental commodity agreements, and further rules for commodity control agreements and their administration through commodity councils. There are also provisions on settlement of disputes, and provisions whereby any international organization, such as the FAO, may attend a study group or commodity conference, ask that study of a particular primary commodity be made, submit to the ITO any relevant study,

¹¹ Art. 31.

¹² Art. 45. Art. 47 specifies the obligation of members to take measures, by legislation or otherwise, to ensure that public and private enterprises do not engage in practices having specified effects.

¹³ Art. 52. See "The International Trade Organization—How Will It Work?" United States Department of State Publication 2597 (Commercial Policy Series 92), p. 6.

and recommend further study.¹⁴ Members accept certain obligations as to existing, as well as future, commodity arrangements.¹⁵

For the student of international government Chapter VII, relating to the ITO itself, will perhaps hold greatest interest, although, as Under Secretary Clayton has pointed out, the "... form of the original machinery established in the ITO is less important than the commitments member governments are willing to undertake on the substantive matters. . . ." ¹⁶ Eligible to membership in the ITO will be the states invited to the Havana Conference on Trade and Employment which accept the Charter and other states approved for membership by the Conference.¹⁷ Article 69 spells out functions of the ITO largely in terms of collecting information, encouraging and facilitating consultation, undertaking studies and making recommendations, promoting international agreements, consulting with members, and coöperating with intergovernmental organizations for achieving social and economic objectives and the restoration and maintenance of international peace and security. Structurally the ITO will include a Conference, meeting in annual sessions (aside from special ones), an Executive Board (for the composition of which three alternative plans are presented in the Charter, but which seems likely to include a group of states of chief economic importance and other states elected by the Conference), a Tariff Committee, such Commissions as may be established by the Conference, a Director-General and staff, and possibly other organs. Powers and duties of these proposed agencies are set out in some detail. Article 84 provides for consultation and coöperation with other international organizations referred to in Article 57 of the United Nations Charter. By Article 86 the ITO "shall have legal personality and shall enjoy such legal capacity as may be necessary for the exercise of its functions." In the territory of any member the Organization is to have, for itself and its representatives, such legal capacity, privileges, and immunities as are necessary for the exercise of its functions.¹⁸

Chapter VIII seems likely to hold special interest for international lawyers, since it relates to the settlement of disputes and to interpretation. If representations made by one member to another do not result in adjust-

¹⁴ Art. 64.

¹⁵ Art. 65.

¹⁶ *International Trade Organization. Hearings before the Committee on Finance, United States Senate, Eightieth Cong., First Session on Trade Agreements System and Proposed International Trade Organization Charter*, Pt. 1, p. 20 (hereinafter cited as *Hearings*).

¹⁷ Art. 68 of the Charter also envisages membership for separate customs territories not responsible for the formal conduct of their diplomatic relations. The Havana Conference is to determine conditions of application of Charter provisions to trust territories. The effect upon membership in the ITO of a member's exclusion from the United Nations Organization also remains to be determined.

¹⁸ Art. 87.

ment within a reasonable time there may be reference to the Executive Board or, with the latter's approval, to the ITO Conference. The Board may refer a matter involving two or more members to arbitration, with consent of the members concerned and on terms agreed upon between such members and the Board. Rulings of the Executive Board may, at the request of an interested member, be reviewed by the Conference, which has power to suspend obligations or concessions under or pursuant to the Charter; if such action is taken the member with respect to which the suspending action is taken may, upon giving the required notice, withdraw from the ITO. Article 91 relates to references to the International Court of Justice. The latter may be asked, by the Conference or the Executive Board, for an advisory opinion on legal questions "arising within the scope of activities" of the ITO. Any resolution of the Conference or Conference decision shall be subject to review by the Court through request from the ITO for an advisory opinion, pursuant to the Court's Statute. Furthermore, at the instance of any "substantially interested" member of the ITO, the latter shall request such an opinion, transmitting a statement of facts and other information which the Court may require; pending delivery of an opinion by the Court any Conference resolution or decision on the matter involved is to have full force and effect, although the Conference may suspend effectiveness of such resolution or decision if damage which would result from enforcement would be difficult to repair. The advisory opinion of the Court in such cases is, it should be noted, to be binding upon the ITO and the resolution or decision which has given rise to the request is to be modified if it is not in accordance with the opinion. Nothing is said in the Charter as to binding effect upon individual members.¹⁹

Chapter IX, on "General Provisions," provides alternate versions to cover relations of a member with a non-member. One of these provides that nothing in the Charter is to preclude members from consulting or making commercial treaties or maintaining relations with non-members, provided that no member shall seek preferential export or import duties or taxes or exclusive advantages in its trade with a non-member.²⁰ The Charter is not to be construed to require a member to make disclosures that it considers contrary to its security interests, or to prevent a member's taking action under the United Nations Charter for the maintenance of international peace and security. The provisions concerning amendments

¹⁹ On the intended meaning of the part of the Charter relative to this subject matter (as provisions were formulated prior to the Geneva discussions) see the testimony of Leroy Stinebower in *Hearings*, Vol. I, p. 553. By Art. 92 of the Charter, nothing in Chapter VIII thereof is to exclude procedures provided for in the Charter for consultation and settlement of differences arising out of its operation.

²⁰ Art. 93. There is in the same version a provision which envisages suspension (after full consultation) of application of Charter provisions for any member if a substantial part of the latter's foreign trade is with a non-member; withdrawal of the member, in case there is no satisfactory adjustment, may follow.

distinguish between those involving changes in obligations assumed by members under the Charter and those not involving such changes. The Conference may declare that an amendment of the former type is of such nature that all members not accepting it within a period of time specified by the Conference shall withdraw from the ITO. The Conference is to call a special session, before the end of the tenth year from the date of the Charter's entering into force, for review of its provisions. Without prejudice to other parts of the Charter which refer to possible withdrawal, a member may, upon giving the required notice of intention to terminate, withdraw for itself or its separate customs territories at any time after three years.²¹ The effectiveness of the Charter itself (for all states bound by it) may be terminated at any time by agreement of three-fourths of the members.

Perhaps the most striking thing about the proposed Charter is the comprehensiveness of its design. The head of the American delegation at Geneva has appraised the work of the Preparatory Committee as a "miracle" of international coöperation.²² That much remains to be decided when the Conference on Trade and Employment convenes in Havana is emphasized by the alternative provisions formulated on certain matters and by the fact that some of the eighteen states represented at Geneva reserved their positions on various parts of the instrument. In any case, there is in prospect a multilateral agreement which is not without some flexibility, and an organization which is not a "superstate" but essentially a "medium for consultation,"²³ the operation of which may in the future present many international questions of legal as well as economic significance.

ROBERT R. WILSON

INTERVENTION—THE TRUMAN DOCTRINE AND THE MARSHALL PLAN

While the Marshall proposal for aid by the United States toward European recovery is often called a corollary of the Truman Doctrine, they differ essentially in their aims. While both are directed against the expansion of Soviet Russia the Truman Doctrine looks to military aid to Greece and Turkey, and the outcome is unknown. The Marshall proposal, on the other hand, looks purely to economic aid for the countries of Western Europe and professes to disregard political considerations.

The so-called Truman Doctrine is often called an extension of the Monroe Doctrine. But this is surely an error. The Monroe Doctrine was limited geographically to this continent. It announced that American arms would protect the Continent against any effort of Europe to extend its system across the Atlantic. Several efforts at European intervention

²¹ Art. 97.

²² Address of Under Secretary Clayton broadcast from Paris, reported in *The Washington Post*, Sept. 11, 1947, p. 1.

²³ *Hearings*, Vol. I, p. 3 (testimony of Mr. Clayton).

were made during the nineteenth century, efforts which always failed. The Truman Doctrine has no geographical limits and promises American intervention in places where the United States has little or no interest. One of the major premises of the Monroe Doctrine was the traditional American policy of not intervening in European feuds. The bottom has, therefore, been taken out of the Monroe Doctrine by American intervention abroad, so that the United States has now little moral claim to ask Europe to refrain from extending its political philosophy to this continent. Moreover the Truman Doctrine is not a self-denyng ordinance but a promise to use American dollars, if not more, to stop Communism. Apart from the fact that Soviet Russia exemplifies not Communism but National Socialism—the Communist Utopia not having yet arrived—it remains to be proved that dollars can stem the advance of a doctrine which finds its major source and soil in poverty and misery. President Truman recently announced, in describing the Potsdam Declaration, that chaos had been brought to Germany by the Nazi Party.¹ Regardless of the accuracy of his ascription, the fact is that chaos prevails in most of Europe and that American money, which European peoples naturally are delighted to spend, can hardly shore up countries that surrender to the inevitable. It shows how fantastic was the half-truth of the idea of "One World." As Senator Root said to Senator Bacon of Georgia in a famous debate on Mexico, many ideas, like world government, are logical, but not practical.

One of the primary interests of the founders of this country, who are entitled to be heard in such a dilemma as now confronts the United States, is that European ideology must not be imported into this heterogeneous population. The founders' warning was prophetic. The major opposition to the Italian Treaty comes from Italian-American societies who resent the fate meted out to Italy. In that opposition they have a good ground for protest, but it seems pitiful to transfer European problems to this soil in the alleged interests of an unachievable Utopia.

The Marshall Proposal. The so-called Marshall Plan is no plan at all but merely undertakes to finance some plan satisfactory to Secretary Marshall and the United States Congress if the European countries can come to agreement. Russia and her satellites have already declined American aid and profess to see in it danger to the aided. They promise to defeat the proposal.

If we should advance any money to Europe in addition to the twenty billions already devoted to relief and other purposes it will show that the United States is the only country really paying reparations in addition to what Russia has looted out of Germany and Austria and her satellites, mostly private property. It may be questioned why the United States should pay reparations, but it is a result of failing to think about what will

¹ *Department of State Bulletin*, August 5 and 12, 1945, pp. 153, 208.

happen after a war. The psychology of merely defeating the enemy is manifestly inadequate. Yet the mores of war forbid thought beyond this point. First we spend billions, not, it is true, with a view to destroying Europe but having that effect. Now we are to spend new billions to restore Europe with the promise that it will be interpreted as American imperialism. It may also have that result, since Secretary Marshall promises to supervise the expenditure of any funds which Congress may advance. But that is not the initial intention. The Russians are wrong in charging that it positively will have that result. We can accept Secretary Marshall's statement that he, at least, has no such intention. He may, however, find himself in the position of the British in Egypt after 1882; then the United States, already a Balkan power, will become an imperialist power. It is simply too early to forecast all future developments. The chances are not weak that the reparations of Italy and other countries payable to Russia and her satellites may be siphoned off from American loans to Italy and other reparation paying countries.

The Marshall Plan seems particularly to lack consideration because no one can tell what it may cost the United States. We have seen figures mentioned of three billions for three years, five billions for four years, and seven billions for ten years. The President states that we have already contributed twenty billions to Europe since the end of hostilities in 1945. Europe is now based on the unsound political plan of Potsdam, and no amount of American money can change that fact. So long as that basis stands any American money raised, as it must be on credit, will be the sheerest palliative and can serve no purpose of recovery.

There are other dilemmas that must be faced. Europe's condition is not only due to the unfortunate features of the Potsdam agreement, of which Russia seems to have taken full advantage, but Eastern Europe has also been separated from the West to a considerable extent by the so-called Iron Curtain. Eastern Europe normally exports foodstuffs and raw materials, as does Russia, but they are not getting in exchange industrial goods from the West, goods which they badly need. Although Russia hurries to make agreements with her satellites, they can hardly make good the deficiency. Eastern Europe, therefore, seems likely to suffer an industrial famine, although the Marshall proposal does not contemplate a termination of the bilateral treaties made between Eastern countries and the West.

The Marshall proposal seems more likely to finance state socialism, although the word "recovery" is frequently employed. At this writing (September, 1947), it is unsafe to predict developments, but since Russia and her satellites have declared war on the plan, the financing of Western Europe might turn into a military measure, leaving recovery an unachieved aim.

We now learn that France objects to increasing the German output,

though the joint chiefs-of-staff have already issued a directive to that effect. Great Britain is also said to protest against part of the program. Perhaps this is the most significant event of recent years, since it throws light on the origins of the war in 1914, however justified the protest. If Europe is not to be allowed full production, it seems idle to throw American money into the breach. The plan is stymied at the source.

The countries which possess the fifteen billion dollars of gold and foreign exchange that the National City Bank reports are not the countries with which the bulk of American trade is done, but some exchange is possessed by those countries. Should Secretary Marshall insist first on their spending their assets on American goods before receiving American bounty? Or will they say, as a British cabinet minister threatened the other day, that default in certain loans will follow or that the United States in its own interest must finance exports up to eight billions a year—the difference between exports and imports—since otherwise unemployment will result in the United States?

There are thus many obstacles which the Marshall proposal must overcome. Will the proposal founder on one or more of these obstacles? Only the future can give an answer.

EDWIN BORCHARD

INTERNATIONAL LAW IN THE CONSTITUTIONS OF THE LÄNDER IN THE AMERICAN ZONE IN GERMANY

The inclusion in the Weimar Constitution of August 11, 1919, of the provision that "The generally recognized rules of international law are valid as binding and integral parts of German Federal law"¹ was the result of a conscious adoption of what was deemed to be the Anglo-American practice with regard to the enforcement of international law through municipal law. Dr. Hugo Preuss, Minister of the Interior and "father" of the Constitution, placed at the head of his original draft three fundamental and related principles: that all political authority belongs to the people; that the state should be organized on a federal basis; and that the Reich should form a democratic *Rechtsstaat* within the international community.² "As once the United States of North America entered the circle of the old world of states with an acknowledgment of the binding force of international law, so," Preuss stated, "the new German Republic recognizes . . . the validity of the law of nations." In Section 2 of Article VI of the United States Constitution Preuss perceived the recognition of a new democratic principle which marked the beginning of a fundamental change in the structure of international

¹ Artikel 4. Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts.

² Hugo Preuss, *Reich und Länder: Bruckstücke eines Kommentars zur Verfassung des Deutschen Reiches*, Berlin, 1928, p. 81 ff.

society. The individual, whose relations with the world community had hitherto been mediatized by absolute princes and cabinets, was now to come into immediate contact with international law, which would henceforth be binding as an integral part of the internal law directly upon all organs of the state and upon individuals.³

It is clear from the proceedings of the Weimar Assembly that not all of its members were activated by like motives in accepting the provisions of Article 4. Dr. von Simson considered that the article "desires to express the maxim dominant in Anglo-American jurisprudence and state practice that generally recognized rules of international law are binding not only on the state, but on individuals as well." The real motive for his support of the principle appears, however, in his further statement that "The inclusion of this provision in the Constitution is desirable because it represents an acknowledgment of the value and validity of international law and because it renders it difficult for our enemies to make the incorrect statement that international law is less respected in Germany than in England and America."⁴ One member, indeed, opposed the article on the ground that it would "produce the impression that the German *Volk* indicts itself on account of its former attitude toward international law and makes an obeisance before non-German international law. It is worthy of notice that England during the War violated international law more widely than did Germany."⁵ A later commentator expressed a widely-held view when he characterized Article 4 as "a concession to Americanism."⁶

It is probable that similar mixed motives influenced the constituent assemblies and electorates of the German *Länder* in the United States Zone which in the latter part of 1946 adopted constitutions containing provisions modeled upon Article 4 of the Constitution of the former Reich.⁷

³ On the drafting of Article 4 see *Verhandlungen der verfassunggebenden Deutschen Nationalversammlung*, Bde. 326, 327, 336 (cited hereafter as "*Verhandlungen*"); and Preuss, work cited, pp. 80-84; Gustav A. Walz, *Völkerrecht und staatliches Recht: Untersuchungen über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht*, Stuttgart, 1933, p. 300 ff.; Rudolf A. Métall, *Das allgemeine Völkerrecht und das innerstaatliche Verfassungsrecht*, in *Zeitschrift für Völkerrecht*, Vol. XIV (1928), p. 161 ff.; Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, Tübingen, 1923, p. 111 ff.

⁴ *Verhandlungen*, Bd. 336, p. 406.

⁵ Dr. Kahl, same, p. 31.

⁶ Max Fleischmann, *Die Einwirkung auswärtiger Gewalten auf die deutsche Reichsverfassung*, Halle, 1925, p. 25.

⁷ Constitution of the Republic of Bavaria, passed by the Constitutional Assembly, Oct. 26, 1946, and ratified by the voters of Bavaria, Dec. 1, 1946; Constitution of the State of Hesse, passed by the Constitutional Assembly, Oct. 26, 1946, and ratified by the voters of Hesse, Dec. 1, 1946; Constitution of Württemberg-Baden, passed by the Constituent Assembly, Oct. 24, 1946, and ratified by the voters of Württemberg-Baden, Nov. 24, 1946. For the German texts, see *Constitutions of Bavaria, Hesse, and Württemberg-Baden*, Office of Military Government (U. S.), 15 February 1947. The parallel English trans-

The United States Military Government has asserted that the constitutions of the *Länder* are "German in origin, spirit, and preparation."⁸ It is natural, therefore, that they should reflect earlier German experience in the enforcement of international law through municipal law, and that they should attempt to obviate certain interpretations of Article 4 of the Weimar Constitution which distorted, and, in some important cases, practically nullified, its provisions. Under the further influence of American practice, reinforced by the necessity of obtaining the approval of the occupation authority, the *Länder* of the United States Zone have adopted the following constitutional provisions relating to the position of international law in the internal legal system:

Bavaria:

Article 84. The generally recognized principles of international law are valid as part of domestic law.

(*Die allgemein anerkannten Grundsätze des Völkerrechts gelten als Bestandteil des einheimischen Rechts.*)⁹

Hesse:

Article 67. The rules of international law are valid as part of the law of the State without requiring express incorporation in the law of the State. No law is valid which conflicts with such rules or with a State treaty.

(*Die Regeln des Völkerrechts sind bindende Bestandteile des Landesrechts, ohne dass es ihrer ausdrücklichen Umformung in Landesrecht bedarf. Kein Gesetz ist gültig, das mit solchen Regeln oder mit einem Staatsvertrag in Widerspruch steht.*)

Article 68. No one may be called to account for pointing out facts that constitute an infringement of obligations under international law.

(*Niemand darf zur Rechenschaft gezogen werden, wenn er auf Tatsachen hinweist, die sich als eine Verletzung völkerrechtlicher Pflichten darstellen.*)¹⁰

lations, prepared by the Civil Administration Division, and quoted in the following paragraph, are not altogether accurate.

⁸ Same, "Introduction," p. 1.

⁹ The Constitution of Bavaria also provides that:

Article 181. The right of the Bavarian State, within the limits of its competence, to conclude State treaties remains unaffected.

(*Das Recht des Bayerischen Staates, im Rahmen seiner Zuständigkeit Staatsverträge abzuschließen, bleibt unberührt.*)

Article 182. The State treaties formerly concluded, especially the treaties with the Christian Churches of 24 January 1925, remain in force.

(*Die früher geschlossenen Staatsverträge, insbesondere die Verträge mit den christlichen Kirchen vom 24 Januar 1925, bleiben in Kraft.*)

¹⁰ The Constitution of Hesse also provides that:

Article 69. Hesse declares its attachment to peace, freedom and the comity of nations. War is outlawed.

Every act undertaken with the intention of preparing for war is unconstitutional. (*Hessen bekennt sich zu Frieden, Freiheit, und Völkerverständigung. Der Krieg ist geächtet.*)

Jede Handlung, die mit der Absicht vorgenommen wird, einen Krieg vorzubereiten, ist verfassungswidrig.)

Wuerttemberg-Baden:

Article 46. The generally recognized rules of international law are binding integral parts of the law of the State. They are binding for the State and for the individual citizen.

The rights granted to foreigners by international law may be claimed by them, even though they are not set forth in State legislation.

(Die allgemein anerkannten Regeln des Völkerrechts sind bindende Bestandteile des Landesrechts. Sie sind für den Staat und für den einzelnen Staatsbürger verbindlich.)

*Die durch das Völkerrecht Ausländern verbrieften Rechte können von diesen geltend gemacht werden, auch wenn sie nicht durch Landesgesetz ausgesprochen sind.)*¹¹

A mere reading of the above constitutional texts may produce the impression that they ensure the legal supremacy of international law over municipal law. Such was the general conclusion drawn in non-German legal circles from Article 4 of the Weimar Constitution, which, at first sight, appeared to represent a complete repudiation of German positivist doctrine and of monistic and pluralistic theories based upon the primacy of state law. Since the new texts, and especially those of Bavaria and Wuerttemberg-Baden, are obviously modeled upon Article 4, it seems clearly proper to interpret their possible meaning in the light of German juristic doctrine and the constitutional experience of the Republic.

A tendency to restrict the apparent meaning of Article 4 emerged in the discussions of the Weimar Assembly. Dr. Preuss' original draft had provided that the Reich should recognize *das geltende Völkerrecht*. The substitution in the final text of the phrase *allgemein anerkannten Regeln* was made, the drafter explained, at the instance of the Ministry of Justice, which considered that omission of the qualifying term *allgemein* might be interpreted to mean that rules deemed by the English and Americans to be part of international law would be binding also upon Germany.¹²

¹¹ The Constitution of Wuerttemberg-Baden provides also that:

Article 47. Any action undertaken with the intention of disturbing peaceful international coöperation, especially of preparing for war, is unconstitutional.

(Jede Handlung, die mit der Absicht vorgenommen wird, eine friedliche Zusammenarbeit der Völker zu stören, insbesondere die Führung eines Krieges vorzubereiten, ist verfassungswidrig.)

¹² *Verhandlungen*, Bd. 326, p. 32. Dr. Zweigert, Minister of Justice, considered that Article 4 would be objectionable only if it were construed to mean that express provisions of German law could be abrogated by international law (*Völkerrecht bricht Landesrecht*). "This result," he said, "is, however, avoided, since the article is restricted to generally recognized principles of international law. It is obvious that a principle of international law which is contrary to an express provision of German law is not generally recognized." Same, p. 406.

Preuss's own view was not free from ambiguity: "It is not perhaps always possible," he stated, "to determine with mathematical precision what is 'generally' recognized; but there is no doubt that rules of international law which are not recognized by all the Great Powers are not rules of international law. But here also one must not juggle concepts on the point of a needle." Same, p. 32.

Dr. Kahl, reporter for the Constitutional Committee, stated that Article 4 was approved with the understanding that a rule of international law would be valid as being "generally recognized" only if it had been recognized by Germany, and that the element of general recognition would be lacking if the alleged rule should contradict an express provision of German law.¹³ The content and meaning of "generally recognized principles," Dr. Kahl asserted, remains uncertain and controversial. Such principles are, "in fact, only what the Anglo-American legal conception sets up as a rule."¹⁴ To go beyond the interpretation placed upon the article by the Committee would be to "surrender Germany to the arbitrariness of those states which claim universal validity for their own international legal conscience."¹⁵

The view that purported rules of international law are not binding upon Germany unless recognized by it has been generally accepted by German doctrinal writers.¹⁶ Not all, however, have been willing to admit the logical conclusion to which such a premise necessarily leads, namely, the primacy of internal over international law, and, consequently, the negation of the legal character and binding force of international law. Such a doctrine, if tenable, would clearly obviate the possibility of a conflict between international law and German law, since the enactment of the latter would in itself be conclusive evidence of the legal invalidity of the alleged rule of international law which it would apparently contradict. International law, according to this conception, would not form a universal and valid legal system, but would constitute merely a series of internal laws relating to matters of external concern—an *äußeres Staatsrecht*¹⁷ or *Untergesetzesrecht*.¹⁸

¹³ Same, p. 120f. Dr. Heintze had suggested that the article be amended to include the phrase *das vom Deutsche Reiche anerkannte Recht*. Same, Bd. 326, p. 33.

¹⁴ Same, p. 406.

¹⁵ Same, p. 31. Gustav Stresemann considered that adoption of Article 4 would create "a serious danger that we will be placing a noose about our own necks."

¹⁶ See the authorities collected by Métal, work cited, pp. 168, 169, and Walz, work cited, pp. 308, 309. Walz considers that it would be *grotesk* to hold that Article 4 gave internal force to principles to which Germany had not agreed. Another writer maintains that "The correctness of this opinion results with absolute necessity from the fact that Germany, not only because of its greatness, but above all because of its political position and cultural significance, belongs to those states which must decisively influence international intercourse. It further results from the peculiar social structure of the international legal community. No state is bound by a principle of international law in the formation of which it has not participated, or which in so far as it has been established by other states, it has not acknowledged as binding upon itself." Elisabeth Mohr, *Die Transformation des Völkerrechts in deutsches Reichsrecht*, in *Internationalrechtliche Abhandlungen*, Bd. 22, Abh., Berlin-Grunewald, 1934, p. 43.

¹⁷ See, for example, Albert Zorn, *Grundzüge des Völkerrechts*, Leipzig, 1903 (2d ed.), p. 7 ff.

German courts have, on several occasions, appeared to express their agreement with the above view. The *Reichsfinanzhof*, in a decision of October 19, 1921, rejected the contention that a new tariff law was, according to generally recognized principles of international law, invalid within the occupied zone, in stating: "This court cannot . . . agree with the plaintiff's citation of Article 4 of the Constitution because, within its meaning, a generally recognized rule of international law must be one which has been recognized by Germany."¹⁹ The *Oberlandesgericht* of Darmstadt held, on December 20, 1926, that "Principles of international law are applicable only in so far as they have been recognized to be a part of municipal law, either through express enactment, through customary law, or by conclusive acts."²⁰

Judicial practice, however, has generally been more liberal than judicial pronouncement or juristic theory, and the judges of the Republic did not in their actual application of customary international law demand evidence of the acceptance by Germany of any particular rule. Rather, they assumed, as did Lord Alverstone in the *West Rand* case,²¹ that whatever had received the common consent of civilized countries must have received the consent of their own, and that it could hardly be supposed that a *Kulturstaat* would repudiate a rule widely and generally accepted by others. Thus the obligatory character of international law was reconciled with the logical exigencies of positivist theory.²²

There is always the danger, however, that the German courts of the future, under the influence of a recrudescent nationalism and a desire to evade the consequences of the peace settlements, may resort to theories of a "higher law" destructive of international obligations. It is hardly to be anticipated that the dominant German legal and political tradition will

¹⁹ See, for example, Leo Wittmayer on the *Primat eigenstaatlicher Rechtsordnung*, in *Zeitschrift für Völkerrecht*, Vol. XIII (1924-1926), p. 12; and Max Wenzel, *Juristische Grundprobleme*, Berlin, 1920, Vol. I, p. 387, who states: "The norms of international law have as many bases of validity as there are states, and, therefore, legal systems which have participated in their formation."

²⁰ *Entscheidungen des Reichsfinanzhofs*, Vol. VII (1921), p. 102.

²¹ *Zeitschrift für Völkerrecht*, Vol. XIV (1927-1928), p. 594.

²² Compare *West Rand Gold Mining Co., Ltd., v. The King* (1905), 2 K. B. 391, 406, 407.

²² Compare with the decisions cited in the preceding paragraph those of the Prussian *Kompetenzgerichtshof* in the case of *Von Hellfeld v. the Russian State*, Jan. 25, 1910, in which the court rejected the conception of international law as "external public law" in holding that "the contention of the creditor that international law is applicable only in so far as it has been adopted by German customary law, lacks foundation in law. Such a legal maxim would, moreover, if generally applied, lead to the untenable result that in the intercourse of states with one another, there would not obtain a uniform system—international law—but a series of more or less diverse municipal laws of the individual states." This *JOURNAL*, Vol. V (1911), p. 490, 514; *Zeitschrift für internationales Recht*, Vol. XX (1910), p. 416.

be completely exercised by the enactment of constitutional texts. In 1922 the *Reichsgericht*, without referring to the provisions of Article 4 of the Constitution, held:

that the right of a belligerent state to self-preservation is superior to all rules created by treaties is a subsisting and recognized principle of international law, effective also under the Hague Regulations on Land Warfare; and a state may in case of necessity depart from the latter code.²³

In a series of cases the *Reichsgericht* developed the doctrine that judicial protection of the political interests of the state is justifiable in a higher sense, although it may be contrary to treaties and laws concluded or adopted under duress. The functions of the state are not exhausted in the enforcement of its legal order; the natural right to defend the political interests of the state is paramount and inalienable.²⁴ The underlying *rationale* of these decisions has been expressed by a leading commentator in the following terms:

Article 4 obviously does not relate to the provisions of the so-called Peace Treaty of Versailles. The "recognition" of this instrument of coercion was expressly refused by two Great Powers, the United States of North America, and Russia, in addition to China. "Generally recognized" the "Treaty" is not but only its²⁵

During the life of the Republic a number of jurists advanced an interpretation of Article 4 according to which the generally recognized principles of international law were elevated to the rank of constitutional law. The Constitution, therefore, incorporated the principle *pacta sunt servanda*, and, since a state might not unilaterally modify or abrogate a rule of international law, a statute contrary to a treaty or to a rule of customary international law would be unconstitutional.²⁶ This interpretation was not

²³ Decision of Nov. 1, 1922, *Entscheidungen des Reichsgerichts in Zivilsachen* (cited hereafter as *RGZ*), Vol. 105, p. 326; *Fontes Juris Gentium*, Berlin, 1931, Ser. A, Sec. II, T. 1 (cited hereafter as *Fontes*), pp. 180, 671.

²⁴ See, *Reichsgericht* decision of March 27, 1924, 54 *Juristische Wochenschrift*, 1924, p. 1531; *Fontes*, pp. 1, 721. Also, decision of March 14, 1928, *Entscheidungen des Reichsgerichts in Strafsachen*, Vol. 62, p. 65 (cited as *RGSt.*); *Fontes*, p. 834. This line of cases, some of which are not officially reported, are discussed by Lawrence Preuss, "International Law and German Legislation on Political Crime," in *Transactions of the Grotius Society*, Vol. XX (1934), pp. 93-95.

²⁵ Walz, *Völkerrecht und staatliches Recht*, p. 391. On National Socialist attitudes, see, for example, L. Preuss, "National Socialist Conceptions of International Law," in *American Political Science Review*, Vol. XXIV (1935), p. 596 ff.

²⁶ See Josef L. Kunz, *Völkerrechtliche Bemerkungen zur österreichischen Bundesverfassung*, in *Annalen des Deutschen Reichs*, 1921/1922 p. 320 ff., and authorities collected by Walz in work cited, pp. 327-330.

Compare, however, the decision of March 2, 1933, 67 *RGSt.* 130, in which the *Reichsgericht* stated: "The view occasionally advanced by writers that even in internal matters

adopted in judicial practice, but its influence may perhaps be perceived in the Constitution of Hesse which provides (Article 67) that "No law is valid which conflicts with such rules (of international law) or with a State treaty," and, furthermore, establishes a *Staatsgerichtshof* with the power of judicial review (Articles 130-133).²⁷ It appears to be the clear purpose of Article 69 of the Constitution of Hesse and Article 46 of the Constitution of Wuerttemberg-Baden,²⁸ which declare every act in preparation for war to be unconstitutional, to avoid a repetition of those decisions in which the *Reichsgericht* has held to be treasonable the betrayal of information concerning secret rearmament and other military measures undertaken in violation of treaty engagements and national law.²⁹

the abrogation of provisions contained in international treaties requires an amendment of the Constitution, finds no support in Articles 4 and 45, or elsewhere in the Constitution."

^{25a} The courts of the Second Reich and the Republic applied the same principles as to conflicts between international law, whether conventional or customary, and statutes as have those of the United States. See, for example, the decisions of the *Reichsfinanzhof*, Aug. 8, 1928, *Entscheidungen des Reichsfinanzhofs*, Vol. 24, p. 73; and of the *Reichsgericht*, 67 *RGSt.* 130, in which the court, in making a clear distinction between the internal and external validity of international law, stated: "... There is no doubt that treaties with foreign states which relate to matters of German legislation ... have the force of law not merely as between the states but also directly as regards the internal organs of the state, in particular the courts and administrative authorities. However, this is the case only—just as with any other municipal statute—so long as the legislature has not repealed or limited the validity of the treaty by a new statutory provision, which must be decisive as regards the organs of the state and individuals. As Germany alone, in virtue of her internal sovereignty, can decide what belongs to the generally recognized rules of international law within the meaning of Article 4 of the Constitution, so it lies within her discretion to promulgate legislation conflicting with the provisions of a treaty."

²⁷ To a limited extent the same object may be attained by Article 61 (1, 2) of the Constitution of Bavaria, which provides: "The Constitutional Court (*Staatsgerichtshof*) renders decision on charges brought against a member of the Cabinet. ... The charge against a member of the Cabinet is that he has intentionally violated the Constitution or a law (including a generally recognized principle of international law declared by Art. 84 to be a valid part of domestic law)."

²⁸ See note 10, above. Articles 91 and 92 of the Constitution of Wuerttemberg-Baden also establish a *Staatsgerichtshof* with a power of judicial review over statutes, ordinances, administrative decrees, and administrative acts.

²⁹ See especially the *Zeigner* and *von Ossietzky* cases, discussed by L. Preuss, as cited in note 24, above.

Article 68 of the Constitution of Hesse, which provides that "No one may be called to account for pointing out facts that constitute an infringement of obligations under international law," appears to have been enacted for the purpose of preventing such decisions as those cited in the preceding note. See the decision of March 14, 1928, 62 *RGSt.* 65, *Fontes*, p. 834, in which the *Reichsgericht* affirmed the conviction of an editor charged with revealing information concerning secret rearming. The court rejected the contention of the appellant that the exposure of illegal acts could not be deemed prejudicial to the welfare of the Reich, since the interests of the state are confined to the realization of its legal will. Such a doctrine, the court said, could not be accepted without qualifica-

The new constitutions of Hesse and Wuerttemberg-Baden contain provisions which are obviously designed to terminate the controversy over the issues raised by Triepel's *Transformationstheorie*, and since continued with rising fury by adherents of the dualist and monist views of the relation between international law and municipal law. Article 67 of the former instrument, which provides that the rules of international law are valid "without requiring express incorporation in the law of the State," and Article 46 of the latter, which contains a provision to the same effect, seek to produce the legal consequence intended by the drafters of the Weimar Constitution by the inclusion in the language of Article 4 of the phrase *bindende Bestandteile*.³⁰ Dr. Kahl had, during the discussions in the Weimar Assembly, objected to the Preuss draft on the ground that it contradicted the fundamental principle that international law is "a law of states. It confers (he said) rights and duties only upon states; for individuals it is *res inter alios acta*. Corresponding legislation is required, therefore, if it is to have an immediate legal effectiveness for individuals."³¹ Dr. Preuss stated in reply that it was the purpose of the provision to ensure that the rules of international law should, without the necessity of transformation by statute, possess legal validity in the internal sphere. Although it was true, as contended by Dr. Kahl, that the predominant doctrinal view was that international law binds only states as such, and not their organs and citizens directly, it was precisely the purpose of the new provision to advance beyond that position. "I am of the opinion," Preuss stated, "that the dogma that international law can bind the members of a state only through the intermediary of legislation is not unqualifiedly tenable."³²

In his later commentary Preuss again referred to the *Wortstreit* regarding the juristic construction of Article 4. Its legal significance, he maintained, is not dependent upon the interpretation placed upon it either by dualists or monists, for

. . . The positive principle of law contained in Article 4 is not in itself opposed to a construction which bases the internal legal validity of international law upon internal legislation, and especially upon the

tion, especially in cases involving foreign relations and state security. In any event, the appellant could not derive any right directly from a treaty.

³⁰ See the statement by Dr. von Simson, *Verhandlungen*, Bd. 326, p. 407. Dr. Haussmann had introduced before the Constitutional Committee a counter-proposal which provided that "State treaties and generally recognized principles of international law shall be operative in the relations of the German Reich to foreign states. . . ." He withdrew his amendment when it was pointed out in an article by Alfred Verdross (*Reichsrecht und internationales Recht: eine Lanze für Artikel 3 des Regierungserwurfes der deutschen Verfassung*, in *Deutsche Juristen-Zeitung*, Vol. XXIV (1919), cols. 291, 292) that the phrasing of the proposal would defeat the purpose of making international law directly binding upon individuals. Same, p. 406.

³¹ Same, p. 31.

³² Same, p. 32.

constitution. . . . Article 4, indeed, can serve as a basis for this construction, which views it as forming a "general, perpetual transformer of common international law" into rules which possess legal validity internally. Within the sphere of its application the positive provision of Article 4 removes the internal validity of international law from the strife of doctrine. Within the sphere of the Constitution and in appropriate cases, every one must from now on observe and apply the generally recognized rules of international law as a law binding upon them directly, whether he is in other respects an adherent of the monist or the dualist theory, of the supremacy of international law or of the law of the state. In any event, the adherents of one theoretical view will see in Article 4 a declaratory, and those of the other view a constitutive, significance. For those who see in international law a higher, because an all-embracing, legal order, Article 4 will merely declare in express terms what would be valid without it on general legal principles. On the other hand, those who trace all valid law to the command of the state are given this unequivocal command in Article 4. In either case the legal principle contained in Article 4 must undoubtedly be followed; therein lies its practical significance under all circumstances. Whether it is observed as a declaratory or a constitutive legal principle is a matter of indifference.³³

Despite the divergent constructions placed by jurists upon Article 4, the courts of the Republic were able, save in a few cases involving strong political factors,³⁴ to steer clear of the factional strife of the opposing schools. Recognizing that the obligatory character of international law is not dependent upon the adequacy of the municipal legislation enacted for its enforcement, the courts, in general, held that the question whether transformation is required in any given case can be answered only on the basis of the concrete content of the rule of international law concerned.³⁵ The duty of the state to fulfill an international obligation is, therefore, a duty of the legislature to make the obligation effective whenever legislation, according to its constitutional system, is essential to accomplish the object in view. The problem presented to the German courts was not peculiar to the constitutional system of the Weimar Republic. It exists in the United States, notwithstanding general acceptance of the maxim "international law as a part of the law of the land." That the courts possessed a clearer insight than did the more doctrinaire jurists may be judged from the following statement of the *Reichsgericht* in a decision of March 29, 1928:

³³ *Reich und Länder*, pp. 94, 95.

³⁴ See, for example, the decision of the *Reichsfinanzhof*, June 28, 1926, in which the court entered into a lengthy discussion of *Monismus* versus *Dualismus* in holding invalid an ordinance of the Interallied Rhineland High Commission. *Zeitschrift für Völkerrecht*, Vol. XIV (1928), p. 440.

³⁵ "It follows exclusively from the substantive content of the norm of international law whether an intermediate state act is required in order to bind state organs and individuals legally—to confer on them rights and duties, or whether this legal obligation is imposed directly by the norm of international law itself." Hugo Preuss, work cited, p. 92.

The Treaty of Versailles is an international treaty and therefore creates rights and obligations only between the contracting states. It has, indeed, received internal force in the German Reich through the Law of July 16, 1919, but an individual is entitled to advance claims on the basis of its provisions only in so far as this can be determined with complete clarity from the treaty itself, i.e., when the content, purpose and tenor of the specific provision are so adapted as to exercise an effect in private law without the necessity of further international or municipal action.⁵⁶

The enforcement of international law through municipal law will not present any serious legal problem in the constitutional life of the new German *Länder* of the United States Zone. The practical legal issues which developed during the life of the Republic appear to have been resolved, in so far as this can be done through the adoption of constitutional texts. Article 4 of the Weimar Constitution, upon which the new provisions are based, could, in fact, have been derived from the practice of the Second Reich, which had already arrived at results similar to those reached in Great Britain and the United States.⁵⁷ Since Article 4 was less of an innovation than its framers supposed, it is perhaps unfortunate that the Anglo-American example should have been adduced, thus identifying its basic principle with an alien doctrine. The storms of juristic controversy which raged about Article 4 during the life of the Weimar Republic could not wholly obscure the political motives which produced them. The insistence by nationalist groups upon the dualist conception was merely the juristic formulation of resistance to the terms of the Peace Settlement, and the accession of the Nazi regime to power only served to accentuate and to give political force to the extremist view. The dualist conception is not, despite its theoretical shortcomings, necessarily hostile to the notion of the supremacy of international law. In maintaining that international law is directly binding solely upon the state it does not deny that the state is under the inescapable obligation to give to that law internal legal effect. One may suspect that monists have opposed the dualist view primarily because of its tendency to

⁵⁶ 122 RGZ 7; *Fontes*, pp. 147, 836. Also decision of May 2, 1929, 124 RGZ p. 204; *Fontes*, pp. 23, 859. Compare the Advisory Opinion of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig* case, Publications of the Court, Series B, No. 15; Hudson, *World Court Reports*, Vol. II, p. 237.

Writing in terms with which a dualist might agree, Hans Kelsen has stated: "Certainly there are norms of international law which are not intended for direct application by the judicial and administrative organs of the State. An international treaty to the effect that a State has to treat a minority in a particular manner can, for instance, have the meaning only that the State has to enact through its legislative organ, an adequate statute which is to be applied by its courts and administrative organs. But the treaty may be formulated in such a way that it can be applied directly by the courts and administrative organs. Then transformation of international law into national law—by a legislative act of the State—is superfluous. . . ." *General Theory of Law and the State*, Cambridge, Mass., 1945, p. 379.

⁵⁷ Walz, in *Zeitschrift für Völkerrecht*, Vol. XIII (1924-1926), p. 172.

merge with the conception of *Staatsrechtsprimat*. Because of its association with traditional German theories of state supremacy the dualist conception may present a real danger, for juristic theories, when inspired by nationalist sentiment, tend to harden into legal facts. The new constitutions of the three *Länder* in the United States Zone seek to obviate this danger. Since they are probably intended to be the prototypes of the constitution of the future German state (whether composed of the *Länder* of two or three of the zones of occupation, their provisions relating to international law may represent some advance over the situation which prevailed under the Republic. Whether this advance proves to be real rather than apparent will depend upon the sincerity of the German people and the effectiveness of the international control by which they are held to their own professions.

LAWRENCE PREUSS

EFFORTS TO CURB DANGEROUS PROPAGANDA

Propaganda, particularly through the medium of the radio, becomes a grave menace to peace when used by an aggressive state to stir up hatred, revolution, and war.¹ In the preparation and commission of his crimes against the peace of the world Hitler made propaganda into a lethal weapon and, as we all know, the development of radio toward this end was one of the most pernicious accomplishments of the Nazi machine.

This being the case, one might have expected to see post-war planners devote considerable attention to the task of curbing subversive and aggressive propaganda. Surprisingly enough, however, nothing definite along this line was accomplished at San Francisco. Although the Security Council, under Article 39 of the Charter, surely has the right to deal with a case of propaganda which it considers to be a "threat to the peace, breach of the peace, or act of aggression," no direct mention of pernicious propaganda appears in the Charter.

Despite this absence of any reference to propaganda in the Charter, the United Nations has not been blind to its dangers. A number of current UN activities offer an opportunity to approach the matter from various angles. At the suggestion of Yugoslavia, the following item has been added as part of the provisional agenda of the second regular session of the General Assembly:

Recommendations to be made with a view to preventing the dissemination with regard to foreign states of slanderous reports which are harmful to good relations between states and contrary to the purposes and principles of the United Nations.²

¹ Whitton and Herz, "The Radio in International Politics," in Childs and Whitton, *Propaganda by Short-Wave*, Princeton, 1942, Chapter I.

² *UN Weekly Bulletin*, September 16, 1947, p. 369.

Furthermore, any future disarmament treaty might well include provisions designed to curb the psychological along with the material weapons of warfare.³ The International Law Commission (ILC), envisaged by the UN Commission on the Progressive Development of International Law and its Codification in its recent report, could consider aggressive propaganda as one of the "offences against the peace and security of mankind" whose codification it is proposed to undertake.⁴ The ILC might also include this category of offences in its proposed "code of international penal law."⁵ This movement is of further interest to the jurist because some types of propaganda are already recognized as constituting acts in violation of established rules of international law.⁶ Also the campaign against a certain kind of propaganda is part and parcel of the movement for the repression of terrorism, to which international lawyers gave considerable attention during the years just prior to the war.⁷ It is claimed that states

³ Text proposed by the Legal Committee (Moral Disarmament), Conference for the Reduction and Limitation of Armaments, Conference Documents, Vol. II (IX. Disarmament. 1935. IX. 4), p. 702:

The H. C. P. undertake to adopt legislative measures empowering them to penalize: . . . Inciting public opinion by direct public propaganda with a view to forcing the State to embark upon a war of aggression. 3. Participation in or support of armed bands organized in the territory of the State, which have invaded the territory of another State; 4. The dissemination of false news, reports or of documents forged, falsified or inaccurately attributed to third parties, whenever such dissemination has a disturbing effect upon international relations and is carried out in bad faith. 5. Causing prejudice to a foreign State by maliciously attributing to it acts which are manifestly untrue and thus exposing it to public resentment or contempt.

⁴ U. N. Committee on the Progressive Development of International Law and its Codification. Report of the U. S. Representative (Philip C. Jessup), *Department of State Bulletin*, Vol. XVII, No. 420 (July 20, 1947), pp. 121-127. UN doc. US/A/AC.10/4, June 18, 1947.

⁵ Pella, *La Répression des Crimes contre la personnalité de l'Etat*, in *Académie de Droit International, Recueil des Cours*, Vol. 33 (1930), pp. 677, 805.

⁶ While the international law of this subject is still uncertain and incomplete (another reason why it is worth the study of experts on codification), there seems to be agreement that subversive activities against foreign states, if emanating directly from the Government or organizations receiving from it financial support, engage the international responsibility of the state: L. Preuss, "International Responsibility for Hostile Propaganda against Foreign States," in this JOURNAL, Vol. 28 (1934), p. 649 ff. See P. B. Potter, *L'Intervention en droit international moderne*, in *Académie de Droit International, Recueil des Cours*, Vol. 32 (1930), p. 622. Also see Oppenheim (Lauterpacht), *International Law*, Vol. I, Peace, pp. 238-240, and authorities therein cited; C. C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 1945 (2d ed.), Vol. I, p. 605 ff.

⁷ After Yugoslavia appealed in 1934 to the League of Nations with regard to alleged activities of Yugoslav terrorists in Hungary, the Council set up a committee of experts to study the matter (*O. J.*, 1934, p. 176). This committee prepared a draft convention considered later by the Assembly (*Off. J.*, 1936 Assembly, *Special Suppl.* No. 155, p. 135). The Council, in 1937, decided to convene an international conference to consider the matter: *Monthly Summary*, May, 1937, p. 102. See also Kuhn, "The Complaint of Yugoslavia against Hungary with Reference to the Assassination of King Alexander," this JOURNAL, Vol. 29 (1935), p. 87.

whose security is menaced by propaganda campaigns originating abroad may evoke, as measures of legitimate self-defence, the right to retaliate which, in the case of radio, takes the form of "jamming" offensive messages.⁸

UNESCO, too, has the problem on its agenda. As part of its program in the field of mass communication this organization plans to cooperate with the United Nations in the preparation of a report on the obstacles to the free flow of information and ideas, concerning itself with "all restrictions on the flow of information and ideas across international boundaries, and with the suppression and distortion of information and ideas by any influence."⁹

But the most direct attack on propaganda as a threat to peace is likely to come through still another United Nations channel—the Conference on Freedom of Information and of the Press, scheduled to be held in Geneva next Spring, in accordance with a resolution adopted by the General Assembly on December 14, 1946.¹⁰ In this resolution it is recognized that freedom of information cannot be absolute, but "requires as an indispensable element the willingness and capacity to employ its privileges without abuse." Further, "it requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent." The Sub-Commission appointed by the Economic and Social Council has suggested, as part of the agenda for the proposed conference, "the study of measures for counteracting the persistent spreading of demonstrably false or tendentious reports which confuse the peoples of the world, aggravate relations between nations, or otherwise interfere with the growth of international understanding, peace, and security against a recurrence of Nazi, Fascist, or Japanese aggression."¹¹

It seems certain, therefore, that the grave question of pernicious propaganda will come up for consideration next year at the conference on Freedom of Information and of the Press. It is unfortunate, however, that this exceedingly complex and difficult problem, above all the matter of radio propaganda, is to be dealt with as only a minor part of the vast subject of freedom of communications. In our view, much more could be accomplished if a special conference, similar to the Inter-Governmental Conference for the Adoption of a Convention Concerning the Use of

⁸ Hyde, p. 606; A. Raestad, *Le projet de convention sur la radiodiffusion et la paix*, in *R. D. I. et L. C., 3e série*, tome XVI (1935), p. 239 ff.; C. G. Fenwick, "The Use of the Radio as an Instrument of Foreign Propaganda," in this JOURNAL, Vol. 32 (1938), p. 339 ff.

⁹ Report of Program Commission, adopted by the General Conference, Paris, November 19–December 10, 1946. UNESCO/C/23/46 (rev), pp. 15–16.

¹⁰ *General Assembly Journal*, No. 75. Supplement A-64, Add. 1, pp. 856–857.

¹¹ E/441, 5 June 1947.

Broadcasting in the Cause of Peace, held at Geneva in 1936, were devoted to this single matter.¹² This we believe for two reasons, as indicated below.

First, propaganda is a problem *sui generis*. Radio differs from other means of communication because broadcasts can readily be sent across frontiers and even beamed to the other end of the world, and all defences against it have proved to be inadequate. Propaganda by short-wave is a unique weapon of power politics; it is admirably adapted to arouse minorities against a government, incite peoples to revolution, or drive them to hatred, aggression or war. Finally, as demonstrated by the years of study and the enormous documentation which preceeded the 1936 conference on broadcasting and peace, the subject is one requiring the most intensive preparation.

In the second place, such a limited conference would seem to have a greater chance to succeed than the much broader one on freedom of communications. To judge by the bitter clashes in committee between the representatives of Soviet Russia and the United States, there is little possibility of a meeting of minds between these two countries with regard to the freedom of the press. The Soviets believe that freedom of the press can only be maintained by governmental ownership; they insist on the right of censorship and refuse to allow foreign correspondents freedom of movement.¹³ The position of the United States Government is diametrically opposed to such views, as shown by the draft treaty on an international agreement on freedom of information, released by the Department of State on September 7, 1947.¹⁴

On the other hand, when it comes to the fight against propaganda, Soviet Russia and the United States are apparently following similar lines. Thus, in the Sub-Commission already referred to, the Soviet delegate proposed that one object of the proposed convention should be "the unmasking of war-mongers and the organization of an effective struggle against organs of the press and information which incite to war and aggres-

¹² The signatories undertook to prohibit the transmission within their territories of anything detrimental to good international understanding, or which might incite the population of any of their territories to acts incompatible with internal order or security; they promised to see that transmissions from their stations should not constitute an incitement to war; and to prevent the making of incorrect statements. Text in this JOURNAL, Supplement, Vol. 32 (1938), p. 113. Signed at Geneva, September 23, 1936, and ratified by 19 states, including Soviet Russia (but not by Germany or Italy, the states whose broadcasts were the most objectionable). Van Dyke, "The Responsibility of States for International Propaganda," in this JOURNAL, Vol. 34 (1940), pp. 58, 59.

¹³ E/Ac.7/50, 1 August 1947.

¹⁴ For instance, see Article II, "Correspondents from each signatory (together with their equipment) shall have free ingress to and egress from the territories of each other, . . ." and Article IV, "All copy of correspondents or information agencies of each signatory shall be permitted free egress from the territories of the other without censorship, deletion or editing." *The New York Times*, September 8, 1947.

sion."¹⁵ Rather than to embark upon an apparently fruitless attempt to reach an agreement on the broader question of freedom of the press, our government, we submit, should rather take the Russians at their word, and call a conference for the more restricted but no less important matter of curbing the use of propaganda for aggression and war.¹⁶ For here is a real opportunity, unfortunately very rare these days, for the two "super-powers," whose coöperation is the *sine qua non* of peace, to labor together in the same cause.

JOHN B. WHITTON

¹⁵ E/Ac.7/38, 7 August 1947.

¹⁶ The need for an international convention to curb pernicious propaganda is only too evident today. See Charles A. Siepmann, "Propaganda and Information in International Affairs," in *Yale Law Journal*, Vol. 55 (1946), p. 1261: "To reestablish good manners in communication, some form of international convention may be necessary by means of which the evil and aggressive aspects of the use of propaganda are eliminated." For an enlightening discussion of the problem, and a proposal for a draft treaty on freedom of information which includes provisions to "outlaw" certain acts defined as "psychological aggression," see James P. Warburg, *Unwritten Treaty*, New York, 1946, p. 151 ff.

Soviet Russia might find it difficult to respect her obligations under such a convention and still carry on the kind of pernicious propaganda in which, both at home and abroad, she is indulging today. On the other hand would the United States, under such a treaty, be obliged to curb newspapers and individuals who speak loosely today of a "preventive war"?

CURRENT NOTES

MEETING OF EXECUTIVE COUNCIL AND BOARD OF EDITORS; NOTICE OF CONSTITUTIONAL AMENDMENT

A joint meeting of the Executive Council of the Society and the Board of Editors of the JOURNAL was held in Washington on 4 October, some twenty persons attending. President Hyde proposed a call to arms to the members of the Society which was adopted by the Council and will be circulated to the members and released to the press:

"Society is experiencing a profound shock today in observing the tendency of states to put policy before law and to shape their conduct in ways which are contemptuous of standards established by international law. The welfare of civilization depends upon the determination of the people of every land to oppose such tendencies at whatever cost, and to do so by utilizing the agencies appropriate to that end. Coöperative efforts with the United Nations and pursuant to its Charter are worth the making.

"The American Society of International Law is about to hold autumnal regional meetings in New York, Chicago, and San Francisco, and possibly elsewhere. You are encouraged to make use of these meetings with a particular view to considering methods by which the United Nations may be most potently utilized to uphold the cause of international law. Through these meetings you may be able to exert a fresh and useful influence calculated to hearten and sustain this Society in its struggle to maintain the cause for which it stands. Accordingly it is urgently hoped that you will avail yourself of the opportunity to attend and participate in the next regional meeting of the Society to be held in your own area."

Plans were made for regional meetings in New York, Chicago, and San Francisco in November and December, and a Committee was created in Washington to coördinate these meetings with the Annual Meeting where reports are to be presented from the regional meetings.

An amended text of Article VIII of the Constitution was proposed by the Committee authorized at the last Annual Meeting as follows:

ARTICLE VIII

Resolutions

Resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and in case of such reference no vote shall be taken until a report shall have been made thereon.

Resolutions relating to such subjects may be submitted by any member of the Society to the Secretary at least thirty days in advance of

any Meeting and shall be referred to the appropriate committee or the Council for consideration and report at said Meeting.

This amendment is hereby communicated to members of the Society, in accordance with Article IX of the Constitution, for action at the Annual Meeting of 1948, which will be held in Washington on April 22-24.

The Committee authorized by the Council on 28 September 1946 reported receipt of final payment, less deductions for expenses accepted by the Committee, of the legacy to the Society of Dr. James Brown Scott. On motion this report was accepted.

The Secretary reported that the Society had been denied the status of Consultant to the Economic and Social Council of the United Nations but was coöperating actively with the Legal Department of the Secretariat in connection with the program for development and codification of international law.

The members lunched together and were addressed briefly by Mr. Justice Robert H. Jackson, after which they returned to a discussion of the JOURNAL. A new program for extended reporting of Judicial Decisions was adopted, in charge of Editor William Bishop, and a new department on United Nations activities of a legal character, to be put in charge of a suitable Editor, was similarly authorized. It was voted to increase the size of the JOURNAL for 1948 to 1200 pages and also to obtain if possible leading articles on salient aspects of international relations by distinguished public figures whether strictly inside or outside of the legal field.

P. B. P.

Secretary

REGIONAL GROUP CONFERENCES OF THE AMERICAN AND CANADIAN BAR ASSOCIATIONS ON INTERNATIONAL LAW

The rapidly growing interest and concern of American lawyers generally in the development of international law is reflected by the greatly increased scope of the American Bar Association's activities in this field.

In addition to its important Section of International and Comparative Law, the Association created a special committee on the subject before the end of World War II because the House of Delegates desired a committee, directly responsible to itself, to advise it as to its responsibilities and opportunities in planning for the post-war era. As the work of the Section is already widely known, this article will deal only with the work of the special committee.

Originally instructed "to report as to proposals for the organization of the nations for peace and law" this became the Committee's name until 1946 when events permitted it to be shortened to Committee for Peace and Law Through United Nations. From the outset Judge William L. Ransom has been chairman of the Committee.

Its first tasks related to the World Court and the San Francisco Charter. Beginning in 1945 it utilized a technique that has been so successful that it may interest readers of this JOURNAL. It is called the system of Regional Group Conferences.

The American Bar Association realized that it faced a dilemma. Fate had cast on our nation a leading responsibility for the reorganization of the world; our faith was implicit that peace could be obtained and maintained only through law—international law—and yet our Bar as a whole was profoundly ignorant of even the rudiments of international law. Dean Arthur T. Vanderbilt has estimated that less than one-tenth of one percent of our practicing lawyers had ever taken a single course on the subject during their law school education. This continuing dilemma has been given a classic expression in the Editorial Comment by Professor Clyde Eagleton in the April, 1947 issue of this JOURNAL (page 435).

The Special Committee decided that what was imperative was to influence American opinion at the "grass roots" level. This could be done by bringing together leading lawyers in different cities, men who had won the respect of their communities, men who confessedly knew little about international law but were eager to learn so that they, in turn, could give sound advice.

Obviously the important topic for lawyers in 1945 was the World Court, its Statute, and adherence by the United States.

The Special Committee selected 25 key cities in the United States (shortness of time made it impossible to include more) and asked two prominent lawyers in each city to act as "conveners." The conveners themselves selected those to be invited. The test was a man's willingness to give up an entire working day to group discussion. Those who signified their willingness were called "participants."

Discussion, if it is to be free, open, and instructive, must be participated in by everyone present and that necessarily limited the size of the groups. This was regrettable, but inescapable. Twenty-five was found to be the optimum number; thirty to be the maximum.

Discussion, if it is to be fruitful, must be led, stimulated, informed, and controlled. For this heavy assignment the Committee turned to Judge Manley O. Hudson and his assistant, Dr. Louis B. Sohn, who traversed the country and attended all meetings.

The typical Regional Group Conference convened at 10 A.M. with the senior convener presiding. Judge Hudson then opened the subject and pointed up the issues to be faced and the questions to be considered. After a full morning's discussion, the group adjourned for luncheon in the same building, and then reconvened for a full afternoon's discussion ending at 5 or 5:30 P.M.

Towards the end the "weight of the meeting" was taken. Participants were not asked to cast a formal vote. As to the cardinal issues that had been discussed each person around the table was asked to tell how he then felt after what he had heard. The "weight of the meeting" reflected the preponderance of the group's opinion.

Not only did each Regional Group have a definite opinion or "weight" but the different Regional Groups independently arrived at very much the same opinions. Thus it was possible to publish a consensus of the opinions of all the Regional Group Conferences which later had a strong influence at San Francisco and in the United States Senate.

As secretary to the Special Committee, and being in general charge of the administration of the plan, I confess that my one real worry was whether busy practicing lawyers would give up a whole day for this purpose. My fear proved to be totally unfounded. In this way we reached approximately 600 "participants." I believe it no exaggeration to say that we gained nearly 600 converts to an abiding interest in international law.

The Canadian Bar Association liked this plan, set up five Regional Group Conferences stretching across the continent from Halifax to Vancouver, and invited Judge Hudson and Dr. Sohn to conduct the meetings, which they did. In Canada "weights of the meetings" were also taken.

These actions paved the way for the famous Joint Statement by the Canadian and American Bar Associations which was published in five languages and was available to the delegates of the United Nations at San Francisco.

The Charter of United Nations calls for "the progressive development of international law and its codification." To assist in that effort became the second major objective of the Special Committee. It invited a group to meet in New York on October 9, 1946, to see how non-governmental agencies, such as bar associations, could be of assistance to the United Nations Organization. This meeting—in contradistinction to the Regional Group Conferences—consisted of recognized experts in international law, and invitations to attend were also accepted by Dr. Kerno, Mr. Feller, Dr. Liang, and Mr. Koo, Jr. of the Legal Secretariat of United Nations. This meeting made it plain that the assistance of responsible bar associations would be welcomed.

Accordingly, the Special Committee decided to resume the Regional Group Conference plan in coöperation with the Canadian Bar Association. The subject selected was "Rights and Duties of Nation-States." Judge Hudson was made Reporter to the Committee and Dr. Sohn Assistant Reporter.

A three year program has been laid out. As this called for expenditures beyond the limited means of the American Bar Association the coöperation of the Carnegie Endowment for International Peace in financing and in

carrying out the work was sought, and the Endowment made a grant on a share and share basis.

Complete plans for 30 Regional Group Conferences in the United States and 6 in Canada were made. Conveners for every city had been selected and had agreed to act. Dates for all meetings had been set. Seven Conferences had successfully been held when Judge Hudson's illness caused a halt. The eighth Regional Group Conference had been timed to coincide with the Regional Meeting of the American Bar Association at Jacksonville. Mr. George A. Finch, Director of the Division of International Law of the Carnegie Endowment and a member of the Special Committee, cheerfully served as a pinch-hitter and successfully conducted that meeting with Dr. Sohn as his assistant.

All remaining Regional Group Conferences have been postponed until the fall and winter, when it is confidently believed they can be held.

Realizing the complexity of the problem now under discussion, and having learned from experience that the participants were willing to devote time to preliminary study, the Special Committee, with the assistance of the Carnegie Endowment, has had prepared documents summarizing the declarations heretofore made as to the Rights and Duties of States, the Proscription of Aggression, and the Nuremberg Trials. These are sent to participants in advance of the Regional Group Conference which they are to attend.

The thorny questions presented by any honest effort to put into clear and unequivocal language what the rights and duties of states are to be in law easily give rise to divergencies of opinion. It will take time, patience, and understanding to hammer out the principles that men are willing to have their own nation bound by. Hence at the present series of Regional Group Conferences no "weights of the meetings" are being taken.

But, starting with wide divergencies, certain common principles have begun to emerge. After the first series of meetings is concluded the special Committee of the two Associations will, on the basis of drafts prepared by the Reporter and the Assistant Reporter, draft a preliminary Declaration of Rights and Duties of States which will be discussed at a second series of thirty conferences. It is hoped that from this series of conferences an improved draft will emerge acceptable to a large group of American and Canadian lawyers. If difficulties are encountered in obtaining agreement on the draft, another series of conferences may be necessary.

The competent authorities of the United Nations will be kept informed of the progress in drafting the Declaration, and the final draft will be submitted to them for consideration.

REGINALD HEBER SMITH

Boston

A SWEDISH CASE ON THE JURISDICTION OF STATES OVER FOREIGNERS:
CROWN v. VON HERDER

The question of the limits of the jurisdiction of states over foreigners in criminal cases is a frequently debated and highly controversial problem of international law. In Sweden these limits are defined in a Penal Code whose provisions in this respect are primarily based on the principle of nationality, supplemented to some extent by that of territoriality. According to current doctrine offences against the state may be punished by Swedish courts even if committed abroad by foreign nationals. The exercise of Swedish jurisdiction in these cases is, however, as has been acknowledged by several leading authorities, limited by the rules of international law. //

Recently the question of the limits imposed by international law on Swedish jurisdiction in this respect was raised in an interesting way. After the German army in Norway had capitulated a German soldier who was known to have engaged in espionage against Sweden during his term of service in Norway was arrested as a refugee on Swedish territory. He was committed for trial on a charge of espionage against Sweden.

His guilt was not denied, nor could there be any doubt that an offence against Sweden was punishable, even if committed by a foreigner outside Swedish territory and irrespective of whether the motive was morally justifiable or not. But in this case the activities in which the defendant had engaged had been pursued during his military service under the jurisdiction of his own Government. Could he be tried for them by a Swedish court? Swedish law contains no provisions affording unequivocal guidance in a case like this. The rules defining the territory within which the Penal Code is applicable did not formally preclude the institution of criminal proceedings. The fundamental problem involved was rather whether international law, as recognized by Sweden, imposed any limitations on the jurisdiction of the Swedish state.

It is true that, according to some publicists, espionage against a certain power carried out by a foreign national on the territory of his own state may be punished by the aggrieved state in case the spy subsequently enters the territory of the latter. This doctrine seems at least to be presupposed in the French case of *Urias* in 1919.¹ But even if this rule is accepted, it does not follow that it is applicable in the case under review. In the first place, the doctrine of the equality of sovereign states implies that the power of jurisdiction of one state does not extend to acts committed by the officials of another in the legitimate execution of their duties inside the territory of that state, including territory occupied by it.² Moreover, the

¹ Travers, *Compétence criminelle*, in Lapradelle-Niboyet, *Répertoire*, T. 4, p. 369, holds this view though its validity is contested by Garçon, *Code pénal annoté*, Art. 76, no. 3, and Becket, *British Yearbook of International Law*, 1925, p. 441 f.

² Pitt-Cobbett, *Leading Cases on international Law*, p. 87.

leading case of *MacLeod* shows that a foreign subject could not be tried before an American court for acts committed by him under the orders of his state, even on American territory. This principle is also illustrated by the *Arce* case in 1918, which concerned the acts of Mexican soldiers inside United States territory, and the case of *Hatch v. Bazz* in 1876 in which it was held that the President of the Dominican Republic could not be tried before a United States tribunal for offences committed by him in his capacity as President.³

Secondly it should be noted that the present case concerned an act that formed part of the lawful activities of a foreign state. Espionage is recognized in international law as a legitimate means of warfare.⁴ The arrest of a foreign spy should therefore not be regarded as an act of criminal jurisdiction but as a precautionary administrative measure.

From the two principles referred to above it would then seem to follow that the courts of one state are not allowed to try the officials of another for acts of espionage committed by them in the execution of their duty inside the territory of the state whose nationals they are. However, on this point the doctrine and practice of international law has remained very meagre and ambiguous.

Previous practice is illustrated by the sensational *Schnaebelé* case of 1887 in which the German Government laid claim to jurisdictional competence in respect to espionage against Germany carried out by a French official in the execution of his duty and on French territory. A French police inspector by the name of Schnaebelé was arrested on German territory and committed for trial on a charge of espionage. After a diplomatic conflict, however, the German Government abandoned their claim to jurisdiction in this case. A similar situation arose in the *Lux* affair. Here the Germans refused to give up their claim to jurisdiction over a French officer who had been arrested in Germany and was subsequently sentenced to internment for high treason. It should be noted, however, that in this case the officer might be assumed to have committed his offence also on German territory and that he was not sentenced to imprisonment but to a term of internment. Thus the German Government did not consistently uphold their claim to jurisdiction in cases of this nature. Moreover, their claims have been severely criticised by most authorities on international law, including Chrétien and Donnedieu de Vabres.⁵ In fact the draft of international legislation concerning jurisdiction in criminal cases which was prepared under the auspices of the Harvard Law School

³ Compare *Underhill v. Hernandez* (1897).

⁴ See comments of the court in the *Waberski* case: Hackworth, *Digest of International Law*, Vol. VI, p. 307; see also Oppenheim, *International Law*, Vol. II, p. 329, Fauchille, *Traité de droit international public*, T. 2, p. 149.

⁵ Chrétien in *Journai de Droit International Privé*, 1912, p. 148; Donnedieu de Vabres, *Les Principes Modernes du Droit International*, 1928.

and published in 1935 in this JOURNAL contains a rule specifically directed against such exaggerated claims to jurisdiction as those advanced by Germany. Travers, on the other hand, has expressed the opinion that a state might well be considered justified in instituting criminal proceedings against an official of another who has engaged in espionage directed against the former state inside the territory of his own country.⁶ These briefly are the general problems of international law that the Swedish courts had to consider in the case of *von Herder*.

The court of first instance, basing its verdict on an advisory opinion submitted by Mr. R. Bergendal, Professor of Criminal Law in the University of Lund, ruled that the fact that von Herder, as a member of the armed forces of Germany, had acted under the orders of his military superiors could not relieve him of responsibility for his offence. The Svea Court of Appeal likewise held that he could be punished for his offence in Sweden. The Supreme Court, on the other hand, found that, according to international law, which has to be observed in Swedish procedure, von Herder could not be convicted by a Swedish court. The ruling of the Court, which agreed with an opinion prepared by a group of jurists including the present writer, is in perfect harmony with current rules of international law.

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SETTLEMENT-OF-DISPUTES PROVISIONS IN AXIS SATELLITE PEACE TREATIES

The ratification of the Treaties of Peace of February 10, 1947, with Italy, Bulgaria, Hungary, Rumania, and Finland has recently been completed. President Truman signed an instrument of ratification on June 14, 1947, after advice and consent was given by the United States Senate on June 5, 1947;¹ the treaties were ratified by the Soviet Union, last of the Great Powers, on August 29, 1947. The treaties, effective since September 15, 1947, upon deposit of ratification,² contain provisions for the settlement of disputes which may arise out of their operation; the provisions are almost identical in terms.

Part XI of the Treaty with Italy (Final Clauses) provides in Article 87 for a mechanism to deal with controversies concerning the interpretation and execution of the Treaty which are not settled by diplomatic negotiations. Such controversies are to be submitted to the Ambassadors in

⁶ *Le Droit International Pénal*, 1921.

¹ *Congressional Record*, June 5, 1947, pp. 6567, 6573, 6578, 6584. The United States is not a signatory to the Finnish Treaty.

² *Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland (English Versions)*, Department of State Publication 2743, European Series 21: Article 90 (Italy); Article 38 (Bulgaria); Article 42 (Hungary); Article 40 (Roumania); Article 36 (Finland).

Rome, of Great Britain, the United States, the Soviet Union and of France.³ If the dispute has not been resolved by them within a period of two months,

it shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

It is further provided that the decision of the majority of the members of the Commission "shall be accepted by the parties as definite and binding." Identical provisions appear in Article 40 of the Treaty with Hungary, Article 36 with Bulgaria, Article 38 with Rumania, and in Article 35 of the Treaty with Finland (to which latter treaty the United States is not a signatory). This provision, however, applies "except where another procedure is specifically provided under any Article of the present Treaty," Article 87 (1) of the Treaty with Italy. Such specific procedure is primarily contained in Part IX of the Treaty headlined "Settlement of Disputes," Article 83, referring to the economic articles or, as officially summarized,⁴ to "disputes in connection with restitution and restoration of United Nations property."

Article 83 applies to any disputes "which may arise in giving effect to Articles 75 and 73 and Annexes XIV, XV, XVI, and XVIII, Part B, of the Treaty," namely Part VI: Claims Arising out of the War, Section II—Restitution by Italy (of property removed from the territory of any of the United Nations), Article 75; Part VII: Property, Rights and Interests, Section I—United Nations Property in Italy, Article 78; Annex XIV: Economic and Financial Provisions relating to Ceded Territories; Annex XV: Special Provisions relating to Certain Kinds of Property (A. Industrial, Literary and Artistic Property; B. Insurance); Annex XVI: Contracts, Prescriptions and Negotiable Instruments; Annex XVII B: Judgments (review of any judgment given by an Italian court between June 10, 1940, and the coming into force of the Treaty in any proceeding in which a national of any of the United Nations "was unable to make adequate presentation of his case either as plaintiff or defendant"). All such disputes shall be referred to a "Conciliation Commission consisting of one representative

³ In this case the Four Ambassadors will not be restricted by the time limit provided in Article 86, namely the period not to exceed eighteen months from the coming into force of the Treaty where they "will represent the Allied Powers in dealing with the Italian Government in all measures concerning the execution and interpretation of the Treaty." See *Making the Peace Treaties, 1941-1947*, Department of State Publication 2774, European Series 24, p. 44.

⁴ *Department of State Bulletin*, Vol. 16 (1947), p. 1079; Senate Executive Report No. 4, 80th Congress, 1st Session, May 15, 1947, p. 20.

of the Government of the United Nations concerned and one representative of the Government of Italy, having equal status." If within three months no agreement has been reached within the Conciliation Commission, a third member may be selected by mutual agreement of the two Governments from nationals of a third country. In case no agreement has been reached within two months on the selection of a third member of the Commission, the Four Ambassadors in Rome shall appoint the third member of the Commission. "If the Ambassadors are unable to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment," Article 83 (1). Each Conciliation Commission shall determine its own procedure "adopting rules conforming to justice and equity," Article 83 (3). The decision of the majority of the members of the Commission "shall be accepted by the parties as definite and binding," Article 83 (6). As to expenses connected with the proceedings of any Conciliation Commission, which shall have jurisdiction over all these disputes, Article 83 (4) provides that each Government shall pay the salary of the member of the Commission whom it appoints "and of any agent whom it may designate to represent it before the Commission," whereas "the salary of the third member shall be fixed by special agreement between the Governments concerned and this salary, together with the common expenses of each Commission shall be paid in equal shares by the two Governments."⁵ Similar provisions (with the exception of those relating to ceded territories in Annex XIV of the Treaty with Italy⁶) are embodied in Article 35 of the Treaty with Hungary, Article 32 with Rumania, Article 31 with Bulgaria and Article 31 with Finland.

Recent action of the United States as to the return of Italian property in the United States will have a bearing on the execution of the Peace Treaty and thus on the implementation of the settlement-of-disputes provisions.

Under Article 79 of the Treaty (to which Article no reference is made in Article 83), the United States is to have the right, with certain stated exceptions, to retain all Italian assets within its territory, and to apply such property to meet the claims of American nationals for property losses in Italy during the war.⁷ Article 79 provides further that all Italian prop-

⁵ Article 83(5) further provides that "the parties undertake that their authorities shall furnish directly to the Conciliation Commission all assistance which may be within their power."

⁶ These provisions shall not apply to the former Italian Colonies. "The economic and financial provisions to be applied therein will form part of the arrangements for the final dispositions of these territories pursuant to Article 23 of the present Treaty," Annex XIV (19), namely to be "determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France within one year from the coming into force of the present Treaty."

⁷ See *Treaties of Peace with Italy, Roumania, Bulgaria and Hungary*. Hearings before the Committee on Foreign Affairs, U. S. Senate, 80th Congress, First Session, on

erty in excess of such claims shall be returned. During the negotiations of the Treaty, United States representatives "made clear that it was our intention to return the great bulk of Italian assets."⁸ Thus Public Law No. 370, approved August 5, 1947, provides for the authorization of the return of approximately 15 million dollars worth of Italian assets which have been vested by the Office of Alien Property⁹ and for the transfer of certain ships to Italy. In addition, 45 million dollars worth of property was blocked under the freezing regulations of the United States Treasury Department, but did not require legislation for its return. Machinery was established for the release of Italian assets under Public Law 370, will also have to be used for the settlement of debt claims. In this regard Article 78 of the Italian Treaty should be taken into consideration to which the settlement-of-disputes provisions of Article 83 apply. It provides for the restoration of all legal rights and interests in Italy of the United Nations and their nationals "in good order." In cases where the property cannot be restored or is damaged as a result of the war, the owner shall receive from the Italian Government compensation in lire to the extent of two-thirds of its value. Here the question arises and may well be a topic for the application of the arbitration provisions of Article 83, as to whether or not payment in domestic currency of the value of the property constitutes full satisfaction of the claim.¹⁰

It should be recalled, in this connection, that the Senate Report which accompanied Public Law 370¹¹ stated:

Arrangements are being worked out with the Italian Government so that the terms of the treaty of peace with respect to the return of property of American nationals in Italy may be fully implemented. Further arrangements are being made for the payment of a lump sum by Italy to the United States for the purpose of satisfying special claims of American nationals against Italy not otherwise covered by the treaty. It will be possible for the Congress at a later date to deter-

Executives F, G, E, and I, pp. 142, 145; *Commentary on the Treaties of Peace with Italy, Roumania, Bulgaria, Hungary and Finland*, Misc. No. 2 (1947), (Cmd. 7026), London, p. 12; Winifred N. Hadsel, "The Five Axis Satellite Peace Treaties," in *Foreign Policy Reports*, Vol. 23 (1947), pp. 22, 24.

⁸ Senate Report No. 390, 80th Congress, 1st Session, June 26, 1947, p. 2.

⁹ Return of Italian property will be made in the same manner as those returns which have already been authorized by Congress, under an amendment of Sec. 32 (a) (2) and Section 33 of The Trading with the Enemy Act, as amended. See Martin Domke, *The Control of Alien Property* (1947), pp. 4, 226.

¹⁰ For references of recent foreign nationalization legislation, see Martin Domke, work cited, p. 314. The memorandum regarding settlement of certain wartime claims, of August 14, 1947, *Department of State Bulletin*, Vol. XVII (1947), p. 372, provides in its Article III (d) that compensation "shall be subject to the foreign exchange control regulations which may be in force in Italy from time to time."

¹¹ Senate Report No. 390, 80th Congress, 1st Session, p. 3; see also House Report No. 1009 and Congressional Record of July 25, 1947, p. 10325.

mine which claims should be paid out of this fund and on what prorated basis they should be paid.

It may well be that the types of "special claims" which will be covered by the proposed arrangements will also have to be determined in case of disagreement of the two Governments in the procedure provided for in Article 83 of the Treaty.¹² The Memorandum of Understanding between the two Governments regarding Italian assets in the United States and Certain Claims of United States Nationals, of August 14, 1947,¹³ provides that the ultimate disposition of property for which "the United States does not intend to assume any obligation to make returns" (enumerated in Section a (1-7) of its Annex I is "reserved for future decision by the Government of the United States, after consultation between the Governments of Italy and the United States" (Section b). Thus, the mechanism for settling disputes under Articles 83 and 87 of the Peace Treaty will not apply to the return of property to Italy which is placed by Congressional authorization (Public Law 370) at the disposal of the Government, whereas the settlement of claims against Italy will be governed by both the aforementioned provisions of the Treaty.

American legislation carried into effect further parts of the four Peace Treaties, namely the provisions relating to patents. Law 380, approved August 6, 1947 (H. R. 4070; S. 1701), provides that the International Convention for the Protection of Industrial Property of 1883, as amended, is considered as reestablished between the United States and the Axis Satellite countries, and that the privileges of the Boykin Act¹⁴ are available to nationals of the four countries until February 29, 1948, so that similar privileges will be made available for United States nationals in these countries.¹⁵ It will be noted that disputes regarding industrial property rights are to be settled by a Conciliation Commission pursuant to Article 83 of the Italian Peace Treaty (and the corresponding provisions in the other Treaties mentioned supra).

One of the principal sources of controversy between the United States, Great Britain, and France on the one hand and the Soviet Union on the other is the question of External German Assets and their disposition

¹² It should be mentioned that H. R. 4044, by Report 976 of July 17, 1947, reported out, proposed the classification of all war claims and the submission by a War Claims Commission of recommendations regarding compensation by the U. S. Government. This bill, however, refers only to property interests of German and Japanese nationals and not of any other (Axis Satellite) country. See House Report No. 976, 80th Congress, 1st Session, July 17, 1947, p. 2.

¹³ *Department of State Bulletin*, Vol. XVII (1947), p. 375.

¹⁴ Public Law 690, 79th Congress.

¹⁵ See *Congressional Record*, July 23, 1947, p. 993, and Memorandum from the Commissioner of Patents to the Secretary of Commerce, of July 8, 1947, same, p. 9994.

under the Potsdam Declaration of August 2, 1945.¹⁶ The determination and disposal of German external assets has been, as is widely known, one of the principal obstacles to the agreement on a Peace Treaty for Austria, and it may be recalled that the Council of Foreign Ministers established an Austrian Treaty Commission, and within it a special Committee of Experts for the purpose of further examination and discussion of unagreed positions of the Austrian Treaty draft.¹⁷ For the determination of the controversy regarding German external assets in Austria Secretary of State George C. Marshall recommended arbitration at the Moscow meeting of March 27, 1947.¹⁸ This question (which can be considered here only in relationship to the settlement-of-disputes provisions of the Axis Satellite Peace Treaties) has been dealt with by the Control Council for Germany in Military Law No. 5, regarding the Marshalling and Vesting of German External Assets, of October 30, 1945.¹⁹ The disposal of German external assets in European neutral countries was further the subject of Understandings of the Allied Governments with Switzerland, of May 26, 1946,²⁰ and with Sweden, of July 18, 1946.²¹ Both agreements provide for arbitration of disputes which may arise in the operation of the agreements, namely as to the determination and liquidation of German external assets located in these neutral countries.²²

¹⁶ For references, see Martin Domke, work cited, pp. 10, 279, 284. *Adde*: Eli E. Nobleman, *Quadruplicate Military Governmental Organizations and Operations in Germany*, this JOURNAL, Vol. 41 (1947), pp. 650, 653, and Office of Military Government for Germany (U. S.), *Finance (Cumulative Review)*, Report No. 24 (1 July 1946-30 June 1947), p. 53 (External Assets).

¹⁷ *Military Government Austria, Report of the United States High Commissioner*, May 1947, No. 19, p. 1.

¹⁸ *Department of State Bulletin*, Vol. 16 (1947), p. 65.

¹⁹ Official Gazette of the Control Council for Germany, No. 2, November 30, 1945, p. 27; *Department of State Bulletin*, Vol. XIV (1946), p. 283; *United States Economic Policy toward Germany*, Department of State Publication 2650, European Series 15, p. 88. Said the Monthly Report of Military Governor, U. S. Zone, No. 4, of November 20, 1945, p. 26: "This law is an innovation in International Law, which, until this time, has regarded such assets as lying within the exclusive jurisdiction of the sovereign state within which they are located."

²⁰ *Department of State Bulletin*, Vol. 14 (1946), p. 1101; *United States Economic Policy toward Germany*, work cited, p. 140.

²¹ *Department of State Bulletin*, Vol. 17 (1947), p. 162; see Seymour J. Rubin, *Allied-Swedish Accord on German External Assets, Locked Gold, and Related Matters*, same, p. 155.

²² Questions relating to German external assets are also dealt with by the Inter-Allied Reparation Agency in Brussels, where the Assembly referred them to a special Committee on German External Assets, composed of the member countries of Belgium, Canada, United States, France, and Great Britain. See *First Report of the Secretary General for the Year 1946*, p. 59, and for the arbitration provision of Part II, Articles 7 and 8 of the Reparation Agreement of January 14, 1946, this JOURNAL, Vol. 40 (1946), Supp. p. 126.

Here where the (already controversial) question of disposal of German external assets under the Peace Treaties with Axis Satellite countries is concerned, there should first be mentioned the Memorandum of Understanding of the Governments of France, Great Britain, and the United States with the Government of Italy on a program for the liquidation of German assets in Italy of August 14, 1947.²³ It provides for liquidation by the Italian Government of German external assets in Italy whereby proceeds from the sales will be held in a special account and distributed under the terms of the Peace Treaty. Such Treaty provides in Article 77 (5) that "Italy agrees to take all necessary measures to facilitate such transfer of German assets in Italy as may be determined by those of the Powers occupying Germany which are empowered to dispose of the said assets." The Understanding provides in Annex 2 that disputes concerning the interpretation or execution of the Understanding shall be settled by a committee of representatives of the four Governments, whose procedure in case of disagreement follows the lines of Article 87 of the Peace Treaty.²⁴

The competence of the Four Ambassadors (and not only of representatives of the four Governments) for the determination of disputes appears again in Article 74 (A2b) of the Italian Peace Treaty, whereby reparation for the Soviet Union shall partly be made from "Italian assets in Rumania, Bulgaria, and Hungary." Article 77 (5) further provides that "the Four Ambassadors shall determine the value of the Italian assets to be transferred to the Soviet Union."²⁵ These are Italian, not German, external assets since the Soviet Union does not share in proceeds out of the disposal of German external assets in Italy. The Soviet Union, however, will receive German external assets in all other Axis Satellite countries (Bulgaria, Hungary, Rumania, and Finland) as expressly provided for,

²³ *Department of State Bulletin*, Vol. XVII (1947), p. 388.

²⁴ The provision of Annex 2 reads as follows:

Any dispute concerning the interpretation or execution of this understanding, which is not settled by direct diplomatic negotiations, shall be referred to a body composed of one representative each of the Governments of France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.

²⁵ Article 74 (B7b) further provides, with regard to reparations for Albania, Ethiopia, Greece, and Yugoslavia, that the Four Ambassadors "shall be competent to decide any point submitted to them by either Government or by any other Government entitled to reparations under part B of this Article."

as a principle, in Section IV (Reparations from Germany) of the Potsdam Declaration of August 2, 1945.²⁶ In this regard the Peace Treaties with the four countries provide that the respective country "recognizes that the Soviet Union is entitled to all German assets, in the respective country, transferred to the Soviet Union by the Control Council for Germany and undertakes to take all necessary measures to facilitate such transfer." Such determination of German assets in the four Axis Satellite countries by the Control Council for Germany is in conformity with the competence of that organ which "is the repository of supreme authority in Germany and acts in lieu of a central German Government."²⁷

It is with regard to certain dealings of the Soviet authorities in Hungary, Bulgaria, and Rumania involving German and Italian assets, that both the British and the American Governments recently delivered a note to the Soviet Government protesting against a unilateral determination by Soviet authorities which would not be in accordance with the aforementioned provisions of the Peace Treaties (which, however, had not then been in force) and would, in any event, interfere with the functions of the Control Council for Germany.²⁸ The United States Government sought information of any provisional transfer to the Soviet Union of assets in ex-enemy countries and desired "to be consulted in connection with any discussion which may grow out of the application of treaty provisions governing the transfer of German assets."

In order to understand the legal implications of the controversy, the following may be recalled, since it may have a certain bearing for a later application of Article 33 of the Rumanian Peace Treaty. This Treaty provides in Article 33—and no other Treaty has a similar provision—that any disputes which "may arise in connection with the prices paid by the Rumanian Government for goods delivered by this Government on account of reparation and acquired from nationals of an Allied or Associated Power or company owned by them," shall be settled by diplomatic negotiations "without prejudice to the execution of the obligations of Rumania with regard to reparation." Should these direct negotiations not result in a solution within two months, the dispute is to be referred to the Heads of the Diplomatic Missions in Bucharest of the Soviet Union, Great Britain, and the United States of America for settlement. "In case the Heads of Mission fail to reach agreement within two months either party may re-

²⁶ Reprinted in *Occupation of Germany, Policy and Progress 1945-1946*; Department of State Publication 2783, European Series 23, p. 159. In the Peace Treaties of February 10, 1947, again no definition as to the meaning of the term "German assets" has been given. For an arrangement e.g. with Finland providing for the transfer of German property to the Soviet Union, see Law of June 1, 1946, *For'attrinssamling* No. 410, referred to in *Foreign Commerce Weekly*, Vol. 24 (1946), No. 3, p. 24, and further, *The New York Times*, February 4, 1947, p. 3, col. 1.

²⁷ *Occupation of Germany*, as cited, p. 8.

²⁸ *Department of State Bulletin*, Vol. 17 (1947), p. 298.

quest the Secretary-General of the United Nations to appoint an arbitrator whose decision shall be binding on the parties in the dispute." One of the disputes, as appears from a detailed press release of the Department of State of July 21, 1947,²⁹ arose because of removal by Soviet military forces, in the early days of their occupation of Rumania, of oil equipment from Romano-Americana, a Rumanian subsidiary of an American oil corporation. It does not directly concern "the prices paid by the Rumanian Government," as provided in Article 33, but rather the principle that beneficiary interests of nationals of the United Nations in property located in Rumania cannot be considered available for reparations.³⁰

The Armistice Agreement with Rumania of September 12, 1944, to which the United States is a party,³¹ provides in its Article 11(2) that "compensation will be paid by Rumania for losses caused to the property of other (that means: other than Soviet Union) Allied States and their nationals in Rumania during the war, the amount of compensation to be fixed at a later date." Article 18 of the Agreement further provides for the establishment of an Allied Control Commission, under "the general direction and order of the Allied (Soviet High) Command, acting on behalf of the Allied Powers."³² As to the question of removal of Allied property in Rumania by Soviet military forces during their early days of occupation of that country, an agreement was reached by the Governments of the United States and the Soviet Union at the Potsdam Conference that a joint United States-Soviet Oil Commission should be established in Rumania to investigate the facts as a basis for the settlement of claims arising from the removal in the latter months of 1944, of oil equipment in Rumania. The work of this Commission, which began on August 20, 1945, did not proceed in view of the attitude of the Soviet members and, after many frustrated efforts, the American members considered the Commission terminated as of June 12, 1947, for the reasons enumerated in the aforementioned release. The controversy may have far-reaching consequences in the interpretation of the Axis Satellite Peace Treaties (now in force) and the later settlement of the disputes arising thereunder. This is all the more true as the farther notes of the British and American Governments of July 30, 1947, as mentioned above, stress the fact that certain dealings of the Soviet authorities would prejudice the application of the Peace Treaties signed by the Soviet Union.

²⁹ Same, p. 225.

³⁰ As to the application of the control test in such occurrences, see Martin Domke, work cited, p. 294.

³¹ This JOURNAL, Vol. 39 (1945), Supplement, p. 90; see Graham, *Armistices—1944 Style*, this JOURNAL, Vol. 39 (1945), pp. 286, 292.

³² See Report of Tripartite Conference of Berlin, Article XII, providing for a Revised Allied Control Commission Procedure in Rumania, Bulgaria, and Hungary in this JOURNAL, Vol. 39 (1945), Supplement, pp. 245, 256; *International Organization*, Vol. 1 (1947), p. 166.

It is obvious, and became manifest during the long negotiations of the Axis Satellite Peace Treaties,³³ that the conditions after the end of the hostilities of World War II developed very differently from those after the First World War. Nevertheless some provisions of the Paris Peace Treaties of 1920 were followed almost literally in the Annexes regarding contract rights and other matters, the interpretation of which is subject to the settlement provision of Article 83 of the Italian Peace Treaty (and the corresponding articles of the other treaties considered above). No more, however, is reference made to the establishment of Mixed Arbitral Tribunals and various other arbitral agencies which were set up under the Paris Peace Treaties and subsequent agreements.³⁴ Much is left to the decisions of the Four Ambassadors and in case of their disagreement to arbitral tribunals to be established *ad hoc*. Implementation of the Peace Treaties through other settlement-of-dispute provisions may later become necessary, by agreement on a multilateral basis or through bilateral arrangements, as they have been used recently in other instances of Commissions for the settlement of claims between Allied countries.³⁵ Early settlement of the many disputes which will arise out of the application of the Axis Satellite Peace Treaties will contribute to the reestablishment of normal relations with these countries and, generally, to the furtherance of peaceful developments.

MARTIN DOMKE *

ANALYTICAL NOTE ON CERTAIN INTERNATIONAL AGENCIES IN WHICH
THE UNITED STATES PARTICIPATES

Public international administration is the result of constitutions, treaties, conventions, charters, agreements, arrangements, statutes, and legal codes drafted to solve concrete problems of international coöperation in technical as well as political fields.

Such international administrative bodies are variously known as agencies, associations, authorities, boards, bureaus, commissions, committees, congresses, councils, courts, groups, institutes, missions, offices, organizations, services, societies, unions, and working parties.

³³ *Making the Peace Treaties, 1941-1947*, as cited, p. 50.

³⁴ See, for many arbitral instances, *The Treaty of Versailles and After. Annotation of the Text of the Treaty*, Department of State Publication 2724, Conference Series 92 (1947), pp. 445, 608, 624, 627; *Report of the Committee on Adjudication of War Claims*, in *Proceedings of the Section of International and Comparative Law, American Bar Association* (December, 1945), p. 53.

³⁵ E.g., the Polish-American Mixed Commission to be established for the determination of compensation for American owners of enterprises taken over pursuant to the Polish Industries Nationalization Act of January 3, 1946; Agreement of December 27, 1946, *Department of State Bulletin*, Vol. 16 (1947) p. 28.

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An international administrative body is usually limited to a particular subject or function. It is usually an organ, technical in purpose, created to apply uniform regulations or to obtain mutual benefits for its members. The members are usually states, though some bodies admit individuals, corporations, and other international bodies. The existence of a state of war among the members suspends rather than destroys its existence.

Administrative bodies may vary in structure from rudimentary agencies of limited function and activity to organs with complex powers: legislative, executive, and, possibly, judicial. An agency usually has a policy-making organ, meeting at regular intervals to establish, by resolution or treaty, rules or regulations to effect the purpose of the body. Each member applies these in its own territory. Some bodies have an administrative or informational agent called a bureau, office, or secretariat. They may have executive officers to supervise the work of the bureau.

Even in 1937 the United States was a member of almost forty such formal bodies by treaty, but it had also perfected more than eighty general agreements on humanitarian, economic, and cultural topics by legislative action or, in appropriate cases, by executive agreement. Executive agreements have been made in such cases as the activation of a previous treaty, the furtherance of declared Congressional policy, the facilitation of faithful execution of the law and conduct of foreign relations, or in anticipation of a formal agreement.

The immediate prewar period and the war period produced a remarkable growth in international collaboration because of the expansion of industry and trade, the development of communications and transport, the increase of research, the exploitation of natural resources, and a heightened social consciousness.

In the past the United States furnished leadership in the formation of international bodies dealing with postal matters, opium, fur seals, fisheries, and other special topics, especially in the inter-American region. It has collaborated in founding bodies dealing with weights and measures, industrial property, exchange of documents, sanitation, white slavery, the African slave trade, publication of tariff information, pharmacopoeial formulas, radio, and agriculture.

The bodies have been motivated by such purposes as to obviate obstructive intergovernmental conduct and policies; to solve internal difficulties; to ward off undesired influences from the United States; to protect the interests of Americans abroad and of foreigners in the United States; to conserve natural resources; to increase human knowledge and coöperation in scientific research; to unify rules on matters affecting private interests; or to prevent exploitation of primitive peoples. In every case the United States has taken action as a result of enlightened self-interest.

Of the 51 international agencies hereafter analyzed as reported in a recent Department of State publication, *International Agencies in which the*

United States Participates (Publication 2699), it may be interesting to note the common structural characteristics. These may be analyzed as to legal origin, nature of membership, complexity of structure, officers, types of decisions, languages used for business or publication, methods of apportionment of financial obligations, relations with other organizations, and United States relations to them, including legislative basis for participation, payments made to, and governmental agencies interested in or concerned with, each agency.

Of the 51, 24 were constituted merely on the basis of a resolution of a conference,¹ 26 were established following the conclusion and formal acceptance of a treaty, convention, or agreement or the formal acceptance of a charter or constitution.² One was established as the result of an executive statement.³

Of these 51 organizations, 50 are intergovernmental, that is, the members

¹ These were the Pan American Union (PAU), the International Seed-Testing Association (ISTA), the Inter-American Economic and Social Council (IESC), the Inter-American Statistical Institute (ISI), the International Institute of Statistics (IIS), International Union for the Protection of Industrial Property (UIPIP), International Cotton Advisory Committee (ICAC), Rubber Study Group (RSG), Central Bureau of the International Map of the World on the Millionth Scale (CBIMWMS), International Council of Scientific Unions (ICSU), International Hydrographic Bureau (IHB), International Meteorological Organization (IMO), Pan American Institute of Geography and History (PAIGH), Emergency Advisory Committee for Political Defense (EACPD), Inter-American Juridical Committee (IJC), Interparliamentary Union for the Promotion of International Arbitration (IUPIA), United Nations War Crimes Commission (UNWCC), American International Institute for the Protection of Childhood (AIIPC), Inter-American Commission of Women (ICW), Intergovernmental Committee on Refugees (IGC), International Criminal Police Commission (ICPG), International Technical Committee of Aerial Legal Experts (CITEJA), Permanent International Association of Navigation Congress (PIANC), and Permanent International Association of Road Congresses (PIARC). For convenience hereafter the agencies will be referred to only by their symbols.

² These were the United Nations (UN), the Food and Agriculture Organization of the United Nations (FAO), the Inter-American Institute of Agricultural Sciences (IIAS), International Bank for Reconstruction and Development (IBRD), International Bureau for the Publication of Customs Tariffs (IBPCT), International Monetary Fund (IMF), the Inter-American Coffee Board (ICB), the International Sugar Council (ISC), the International Tin Committee (ITC), the International Wheat Council (IWC), the International Bureau of Weights and Measures (IBWM), United Nations Educational, Scientific and Cultural Organization (UNESCO), International Court of Justice (ICJ), Permanent Court of Arbitration (PCA), Inter-American Indian Institute (III), International Bodies for Narcotics Control (NC), International Labor Organization (ILO), International Office of Public Health (PH), Pan American Sanitary Bureau (PASB), United Nations Relief and Rehabilitation Administration (UNRRA), European Central Inland Transport Organization (ECITO), International Telecommunication Union (ITU), Office of Inter-American Telecommunications (OIT), Postal Union of the Americas and Spain (PUAS), Provisional International Civil Aviation Organization (PICAO), and the Universal Postal Union (UPU).

³ The Allied Commission on Reparations (ACR) was forecast in the Crimea Statement.

are direct representatives of states or governments. Three of these 50 agencies have both individual and institutional membership as well as state membership.⁴ Some admit colonies, provinces, and states to membership as well.⁵ One at present is limited to individuals.⁶ Several consist of individuals appointed as individuals to represent interests of states.⁷ One has among its affiliated members not only semi-official institutions but other international organizations.⁸

In comparison of structure only 25 have a structure elaborate enough to include legislative conferences variously known as assemblies, congresses, or conferences.⁹ Twenty-eight had bureaus or secretariats and in certain of these the secretariat overshadows the other branches of the organization in activity, production, and importance.¹⁰ Thirty-eight had small executive bodies which supervised the affairs of the agencies. These were known also as bureaus, administrative committees, general councils, governing boards, governing bodies, boards of directors, etc. Eighteen had standing committees or commissions; 18 had councils; 3 had technical advisory councils; and one had a subordinate study group. Not all that had presidents among the officers provided for vice-presidents as well. Some of those which had directors, directors-general, or secretaries-general to run their secretariats had in addition as officers secretaries, treasurers, chairmen, and vice-chairmen. One provided for a technical consultant.¹¹

In 28 agencies most decisions were determined by majority vote. In some of these such voting was confined to procedural matters. Nine agencies provided for weighted voting.¹² Ten required unanimity for some or all of their decisions.¹³ The ISI requires a three-fourths majority of half the entire membership to adopt an amendment but elects constituent members by a two-thirds vote. Other agencies requiring a two-thirds vote for important questions are UN, FAO, ICSU, UNESCO, IGC, ILO, UNRRA, PUAS, and UPU. No decisions are taken in the RSG. There was no mention of how decisions are taken in eleven organizations.¹⁴ Little more than

⁴ ISI, PIANC, and PIARC.

⁵ IBPCT, ICAC, ITC, IMO, IBWM, NC, PH, PIANC, PIARC, ITU, and UPU.

⁶ IIS. Individuals qualify for membership by reason of their official positions in government bodies without directly representing their governments in their membership activities.

⁷ EACPD, IJC, ICJ, PCA, and NC.

⁸ ICSU.

⁹ There is no provision for periodic meeting of the IBPCT.

¹⁰ PAU, IBPCT, IUPIP, CBIMWMS, IBWM, IHB, ILO, PASB, UNRRA, ITU, PUAS, and UPU.

¹¹ EACPD.

¹² IBRD, IMF, ICB, ISC, ITC, IHB, IUPIA, PH, PIANC, and PIARC.

¹³ PAU, IAS, ICB, IWC, ACR, PH, ITU, PIANC, PUAS, and UPU.

¹⁴ IESC, IBPCT, IIS, IUPIP, ICAC, CBIMWMS, IMO, IUPIA, UNWCC, III, or ICPC.

half—23—took most of their decisions by simple majority vote.¹⁵ Six permit voting by mail between conferences.¹⁶

Four organizations have adopted the five United Nations languages: Chinese, English, French, Russian, and Spanish.¹⁷ Eleven inter-American agencies use the languages of the American republics: English, French, Portuguese, and Spanish;¹⁸ but three do not.¹⁹ No mention was made of the official languages used in two cases.²⁰ The remaining 31 agencies use a variety of nine different combinations of languages in their conduct of official business and their official publications. Eight use only French²¹ and seven English and French.²² Five of the newer agencies rely solely on English.²³ Five old line agencies use English, French, and German.²⁴ Two publish in English, French, German, Italian, and Spanish.²⁵ Other language instruments used in only one organization were German and English;²⁶ English, German, French, and Russian;²⁷ English, French, and Russian;²⁸ and English, French, and Spanish.²⁹ PIARC publishes a dictionary in English, French, German, Italian, Spanish, and Danish.

As to financial matters 39 set quotas for their members.³⁰ Eight quotas

¹⁵ UN, PAU, ISTA, IBRD, IMF, ISC, ITC, IBWM, ICSU, IHB, PAIGH, UNESCO, EACPD, IJC, IGJ, PCA, AIIPC, ICW, IGC, NC, PASB, UNRRA, ECITO, CITEJA, ITO, OIT, PIARC, PICAQ, and UPU.

¹⁶ UN, ISTA, ISI, IBWM, PUAS, and UPU.

¹⁷ UN, FAO, ICAC, and UNESCO.

¹⁸ PAU, IIAS, IESC, ISI, ICB, PAIGH, AIIPC, ICW, IIL, PASB, and OIT.

¹⁹ EACPD (Spanish and English), IJC (English, Spanish, and Portuguese), and PUAS, which declares Spanish the official language on postal matters.

²⁰ ACR and PCA.

²¹ IIS, IUPIP, CBIMWMS, IBWM, PH, CITEJA, ITU, and UPU.

²² RSG, ICSU, IHB, ICJ, UNWCC, IGC, and NC.

²³ IBED, IMF, ITC, IWC, and UNRRA.

²⁴ ISTA, IMO, IUPIA, PIANC, and PIARC.

²⁵ ILO and IBPCT.

²⁶ ICFC.

²⁷ ISC.

²⁸ ECITO.

²⁹ PICAQ.

³⁰ UN, PAU, FAO, IIAS, IESC, ISI, IBRD, IBPCT, IMF, IUPIP, ICB, ISC, ITC, IWC, IBWM, IHB, IMO, PAIGH, UNESCO, EACPD, IUPIA, PCA, UNWCC, ICW, IIL, IGC, NC, ICPC, ILO, PH, PASB, UNRRA, ECITO, CITEJA, ITU, OIT, PAUS, PICAQ, and UPJ. The quotas in the IBPCT are based on the amount of commerce of the various states. The quotas of the ITC are intended to be based on the standard tonnages in the agreement. The quotas in the IWC are supposed to be proportioned according to the number of votes held. The contributions of the IHB are a flat fee plus a supplement based on the maritime importance or tonnage of the member states. The UNWCC has a flat fee for operating costs and quotas for additional expenses are based on ability to pay. Until recently the ICW was financed from private sources, the PAU furnishing office space and materials. The population quotas in the IIL are supplemented for states with larger Indian population by additional units equivalent to 50 per cent of those otherwise assigned to them. Dues in ISTA vary according to the number of votes determined by the importance of the station.

were set by agreement in which states selected their own classes.³¹ In 11 cases these quotas were based on population figures ranging from 15 cents to \$1.80 per thousand inhabitants.³² Nine agencies assess flat fees.³³ In four cases members paid only their own expenses.³⁴ Three had no fixed budget or dues.³⁵ Three were financed also by gift;³⁶ one, through the United Nations;³⁷ one, through the PAU,³⁸ and one through the League of Nations.³⁹

All but five had formal or unofficial relations with other international organizations.⁴⁰

As to the relations of the United States to these 51 agencies, they were based on treaty in 17 cases⁴¹ and on joint resolution in seven.⁴² United States participation was authorized by Act of Congress in 16 cases⁴³ and by executive agreement in one.⁴⁴ Legislation was pending in one case,⁴⁵ and in nine there was no legislative basis for participation.⁴⁶

Payments were made by the United States in 38 cases.⁴⁷ Departmental funds financed participation in ten agencies.⁴⁸ Participation in one is financed through the United Nations;⁴⁹ one was never paid.⁵⁰ The OIT has not yet been set up but payments were made to its predecessor, the Inter-American Radio Office.

³¹ IUPIP, IUPIA, PCA, FH, UNRRA, ITU, OIT, and UPU.

³² PAU, IIAS, IESC, ISI, PAIGH, IBWM, EACPD, ICW, IIL, ICPC, and PASB.

³³ ITC, IWC, CBIMWMS, ICSU, IHB, UNWCC, AIIPC, PAINC, and PIARC. The AIIPC is converting to population-quota assessment.

³⁴ RSG and ACR. In ICAC the Department of Agriculture paid the expenses of the secretariat until recently; and Brazil did likewise for the IJC.

³⁵ ISTA, IIS, and IWC. In the first, dues varied with the number of votes determined by the executive committee according to the importance of the station.

³⁶ ISI, ICW, and IIL.

³⁷ ICJ.

³⁸ IESC.

³⁹ NC.

⁴⁰ IBPCT, ICB, ISC, ITC, RSG.

⁴¹ UN, IIAS, IBPCT, IUPIP, ICB, ISC, IBWM, ICJ, PCA, IIL, NC, PH, PASB, ITU, PUAS, PICAQ, and UPU.

⁴² FAO, ISI, ICB, CBIMWMS, UNESCO, EACPD, AIIPC, and ILO. Note that the ICB Agreement was supplemented by a Joint Resolution.

⁴³ PAU, ISTA, IESC, IBED, IMF, IIS, ICSU, IHB, IMO, PAIGH, IUPIA, ICPC, UNRRA, CITEJA, PIANC, and PIARC.

⁴⁴ ECITO.

⁴⁵ IWC.

⁴⁶ ICAC, ITC, RSG, ACR, IJC, UNWCC, ICW, IGC, and OIT.

⁴⁷ UN, PAU, FAO, IIAS, ISTA, IESC, ISI, IBRD, IBPCT, IIS, IMF, IUPIP, ICB, ISC, IWC, CBIMWMS, IBWM, ICSU, IHB, IMO, PAIGH, EACPD, IUPIA, PCA, UNWCC, AIIPC, IIL, IGC, NC, ILO, PH, PASB, UNRRA, ECITO, CITEJA, ITU, PIANC, and PIARC.

⁴⁸ ICAC, ITC, RSG, UNESCO, ACR, IJC, ICW, PUAS, PICAQ, and UPU.

⁴⁹ ICJ.

⁵⁰ ICPC.

A great variety of government agencies have participated more or less directly and indirectly in the work and policy-making sessions of these international bodies. The major responsibility for participation was that of the Department of State in 32 instances. Second and third in international activity are the Department of Agriculture in 8 and the Department of Commerce in 7. Other government departments and agencies in order of international activity are the Departments of Labor (4) Interior (4), Treasury (4), War (4), Navy (4), the Bureau of Budget (3), the United States Public Health Service (3), the Post Office Department (2), the Tariff Commission (2), and the Air Coordinating Committee, the Federal Communications Commission, the Weather Bureau, the Civil Aeronautics Authority, the Federal Security Agency, the Reconstruction Finance Corporation, the Rubber Development Corporation, the War Production Board, the Combined Raw Materials Board, the National Academy of Sciences, the National Research Council, the Congress, the Department of Justice, the United States Shipping Board, and the American Merchant Marine.

Undoubtedly there is more than one instance of agencies having subsidiary or indirect interest in these organizations mention of which was not included in the publication. It is interesting to note that in 15 cases the United States took the initiative in the formation of the body⁵¹ and was an active participant in the founding of others.⁵²

From this brief survey it may be concluded that for more than three quarters of a century the United States has been active in international co-operation for mutual welfare, but that such co-operation developed without any particular pattern. There was little or no concerted effort to standardize such collaboration as to legal basis, powers and functions, membership, structural organization, officers, language instruments, methods of taking decisions, methods of apportionment of financial obligations, or the relationship with other organizations. Whenever a need for common consultation and common action was felt, a body was set up without much consideration of the existences of similar or previous bodies, the experience of such bodies, or the place of the proposed organ in the world-wide or regional frame. The result has been a spate of agencies with similar or related interests and functions, each with its own pattern and demands on state treasuries.

Under Articles 57, 58, and 59 of the Charter of the United Nations, the Economic and Social Council has power to review the existence of such organizations, bring them into relationship with the United Nations, and advise as to the co-ordination of their policies and activities. With the benefit of such periodic review, and the resulting recommendations for

⁵¹ UN, PAU, FAO, IIAS, IESC, IBRD, IMF, ICAC, IWC, ESG, EACPD, PASB, UNRRA, and PICAO.

⁵² CBIMWMS, ICJ, ISC, ICB, ACR, UNWCC, ILO, etc.

structural revision and fiscal operations, there should result an amalgamation, consolidation, and reduction in number so that each remaining agency and each body newly created to replace a number of existing agencies can standardize procedures and coördinate functions to render a wider and greater service. At the same time the possible common fiscal arrangements may effect a saving not only to the financial management of the agencies themselves but also to the states who hold membership in the several international bodies. Hence in a few years there may emerge a better integrated fabric of international administrative activity.

MARIE STUART KLOOZ

Washington

CHARLES G. FENWICK APPOINTED TO DEPARTMENT OF PAN-AMERICAN UNION

Members of the Society and readers of the JOURNAL will be interested to learn of the appointment of Charles G. Fenwick to be Chief of the new Department of International Law and Organization in the Pan-American Union. Mr. Fenwick was for years Professor of Political Science in Bryn Mawr College. In recent years he has served as United States Delegate to various Pan-American conferences and has acted as a member of the Inter-American Neutrality Committee and finally of the Inter-American Juridical Committee, sitting in Rio de Janeiro. Dr. Fenwick will take up his duties at the Pan-American Union at the end of this year and may be expected to continue his frequent contributions as an Editor of the JOURNAL. The appointment seems to combine admirably Dr. Fenwick's talents and interests and the growing importance of international juridical and political organization in the Americas.

P. B. P.

DEATH OF ABD-AL-MUNIM RIAD BEY

Abd-al-Munim RIAD Bey, a jurist well known in international circles, died in Cairo, Egypt, on March 23, 1947. At the time of his death, he was in his fifties.

Riad Bey was a graduate of the National University in Cairo. He was also a professor at the University for several years and one of the founders of the Egyptian Society of International Law.

He served on the United Nations Committee of Jurists which met in Washington in 1945. His fame as an able jurist transcended the boundaries of Egypt. Saudi Arabia honored him by making him a member of its delegation to the United Nations General Assembly in the fall of 1946. He became a well-known figure at the meetings and took a major part in the discussions.

An idealist, he did not confine his interest to international law. He was held in high esteem by many Egyptians for his interest in social progress. He was connected with several charitable and social organizations, including the Princess Ferial Organization. For a time he served in the Egyptian Ministry in Social Affairs.

JOHN MAKROS

Washington, D. C.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 1-JULY 31, 1947

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *E. S. C. O. R.*, United Nations Economic and Social Council Official Records; *G. A. O. R.*, United Nations General Assembly Official Records; *G. B. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *N. Y. T.*, New York Times; *P. A. U.*, Pan American Union Bulletin; *S. C. O. R.*, United Nations Security Council Official Records; *T. I. A. S.*, U. S. Treaties and other International Acts Series; *U. N. W. B.*, United Nations Weekly Bulletin.

February, 1946

16-July 29, 1947 UNITED NATIONS. Security Council—Vetoes. List of vetoes: *N. Y. T.*, July 30, 1947, p. 4.

June, 1946

6/January 7, 1947 FINLAND—UNITED STATES. Effected agreement by exchange of notes concerning double taxation. Text: *T. I. A. S.* 1596.

September, 1946

7 HEALTH SERVICE, SOUTH PACIFIC. New Zealand and Fiji governments and the Western Pacific High Commission signed agreement for the establishment of a South Pacific Health Service. Text: New Zealand Dept. of External Affairs, Publication No. 25.

November, 1946

1-2 GREAT BRITAIN—SYRIA. Reached agreement by exchange of notes at Damascus concerning the settlement of cases pending before the Syrian Mixed Courts. Text: *G. B. T. S.* No. 37 (1947), *Cmd.* 7140.

December, 1946

23-January 15, 1947 GREAT BRITAIN—NORWAY. Exchanged notes at Oslo concerning the transmission by post of diplomatic correspondence. Text: *G. B. T. S.* No. 42 (1947), *Cmd.* 7145.

January, 1947

1 AUSTRIA—CZECHOSLOVAKIA. Postal agreement came into force. Summary of provisions: *L'Union Postale* (Berne) April, 1947, pp. 133-139.

1 AUSTRIA—HUNGARY. Special agreement, concluded by the postal administrators of the two countries, came into force. Summary: *L'Union Postale* (Berne) April, 1947, pp. 136-139.

11-May 30 GREAT BRITAIN—ITALY. Effected agreement by exchange of notes at Rome for the recruitment of Italian workers for employment in foundries in the United Kingdom. Text: *G. B. T. S.* No. 54 (1947), *Cmd.* 7168.

- 22 GREAT BRITAIN—LEBANON. Reached agreement by exchange of notes at Beirut concerning the settlement of cases pending before the Lebanese Mixed Courts. Text: *G. B. T. S. No. 45 (1947)*, *Cmd. 7154*.

February, 1947

- 19/28 GREAT BRITAIN—UNITED STATES. Exchanged notes at Washington regarding interpretation of paragraph 6 of the Agreement on Settlement of Intergovernmental Claims of Mar. 27, 1946. Text: *G. B. T. S. No. 34 (1947)*, *Cmd. 7132*.

April, 1947

- 8-July 5 KOREAN OCCUPATION. In a series of 5 notes the Russian and U. S. Governments agreed to reconvene the Joint Soviet-American Commission. Texts of notes: *D. S. B.*, Apr. 20, 1947, pp. 716-717; May 4, pp. 812-813; May 11, p. 947; May 18, pp. 995-996; May 25, p. 1043; *N. Y. T.*, Apr. 12, 1947, p. 4; Apr. 23, p. 4; May 3, p. 6; May 11, p. 3; May 14, p. 10. The Commission re-assembled May 21. *N. Y. T.*, May 22, 1947, p. 11. Agreed June 7 on plans for the formation of a Korean national government. Text of decision: *D. S. B.*, June 22, 1947, pp. 1247-1249. The parleys were again deadlocked July 5 because of Russian refusal to admit wide basis of consultation. *N. Y. T.*, July 6, 1947, p. 22 and July 16, p. 10. U. S.-Soviet views on consultative groups: *D. S. B.*, Aug. 10, 1947, pp. 294-297.
- 17/28 AUSTRIA—GREAT BRITAIN. Effected agreement by exchange of notes at Vienna regarding the deferment of certain claims, some of which concern debts contracted before March, 1938. Text: *G. B. T. S. No. 59 (1947)*, *Cmd. 7186*.
- 19 GERMAN OCCUPATION. Great Britain, United States and France signed agreement in Moscow, for regulation of coal exports from the 3 western zones of Germany. Text: *G. B. T. S. No. 53 (1947)*, *Cmd. 7165*.
- 22 DENMARK—GREAT BRITAIN. Signed agreement at Copenhagen regarding the participation of a Danish contingent in the occupation of Germany. Text: *G. B. T. S. No. 52 (1947)*, *Cmd. 7164*.
- 22-May 5 HYDROGRAPHIC CONFERENCE. International Hydrographic Conference was held at Monaco. U. S. delegation: *D. S. B.*, Mar. 30, 1947, pp. 575-576. Report on the meeting: *D. S. B.*, June 22, 1947, pp. 1203-1204.
- 30/June 30 UNITED NATIONS. Military Staff Committee. Submitted report to the Security Council on Apr. 30. Text: *U. N. Doc. S/336*; *D. S. B.*, Aug. 3, 1947, Supplement, pp. 247-273; Dept. of State. *United States-United Nations Information Series No. 23*. Text of first section: *N. Y. T.*, May 4, 1947, pp. 48; *U. N. W. B.*, May 13, 1947, pp. 517-522. Submitted report to the Security Council June 30, giving British, Chinese, French, and U. S. provisional estimates for U. N. armed forces. *N. Y. T.*, July 1, 1947, pp. 1, 8. Text: *U. N. Doc. S/394*. Summary: *U. N. W. B.*, July 8, 1947, pp. 62-33. Soviet estimate released. Text: *U. N. Press Release MSC/28*. Table of estimates of five nations: *U. N. W. B.*, Sept. 16, 1947, p. 365.

May, 1947

- 1 ARGENTINA—UNITED STATES. Signed aviation agreement at Buenos Aires. Text: *United States Aviation Reports*, June, 1947, pp. 272-233.
- 1 NICARAGUA. Congress declared the continental shelf an integral part of its national territory. *N. Y. T.*, May 2, 1947, p. 5.
- 1-21 REFUGEE ORGANIZATION. Preparatory Commission opened 2d part of 1st session at Lausanne under chairmanship of Henri Ponsot of France. *London Times*,

- May 2, 1947, p. 3; *N. Y. T.*, May 2, 1947, p. 3. George L. Warren was the U. S. representative. *D. S. B.*, Apr. 20, 1947, p. 708. Agreed May 13 to assume as of July 1 responsibility for certain activities formerly carried on by U.N.R.R.A. until the permanent organization comes into being. *N. Y. T.*, May 14, 1947, p. 4; *London Times*, May 14, 1947, p. 4; *U. N. W. B.*, May 20, 1947, p. 526. At final meeting on May 21 adopted a report. Decided to frame its budget on a 75% basis. *London Times*, May 23, 1947, p. 3. Text of report: Preparatory Commission for the I.R.O. Doc. Prep./90/Rev. 1. Report on the meeting: *U. N. W. B.*, June 3, 1947, pp. 597-600.
- 2 GERMAN PROPERTY. Swiss Government announced that German property in Switzerland could be sold and the proceeds paid into blocked accounts. *N. Y. T.*, May 3, 1947, p. 5.
- 2-15 ECONOMIC COMMISSION FOR EUROPE. Opened meeting May 2 at Geneva with 18 countries represented. *London Times*, May 3, 1947, p. 4. Elected Emil Waerum of Denmark as chairman. *U. N. W. B.*, June 24, 1947, p. 696. Agreed May 6 that European Central Inland Transport Organization should end before Sept. 27, 1947. *N. Y. T.*, May 7, 1947, p. 7. Decided May 13 that the European Coal Organization should be absorbed into the Commission by the end of 1947. *N. Y. T.*, May 14, 1947, p. 19. Session ended May 15 after fixing July 5 as the next meeting date. *N. Y. T.*, May 16, 1947, p. 3; *London Times*, May 16, 1947, p. 3. Text of report: U. N. Doc. E/ECE/35. Summary of the meeting: *U. N. W. B.*, June 3, 1947, p. 601.
- 5 CZECHOSLOVAKIA. The system of People's Courts ended and the country returned to normal system of judicial organs and procedure. *N. Y. T.*, May 6, 1947, p. 16; *London Times*, May 6, 1947, p. 4.
- 5-July 5 FRANCE-SIAM. A Commission, composed of representatives of United States, China, Peru, France and Siam, started May 5 work of conciliation regarding the boundary dispute between France and Siam. The Commission, headed by William Phillips (U. S.), was set up in accordance with provisions of the agreement signed Nov. 17, 1946 by France and Siam. Members: *N. Y. T.*, May 14, 1947, p. 18. The Commission refused June 27 to accede to Siam's claims and recommended that the two nations undertake direct negotiations at Bangkok, and create a consultative commission to study border problems and other questions of common interest. *N. Y. T.*, June 28, 1947, p. 3. The Siamese Government's communiqué of July 5 declared Siam would not consider sponsoring with France a Pan-Southeast Asia Union or consultative commission unless France agreed to the independence of Laos and Cambodia. *N. Y. T.*, July 6, 1947, p. 25.
- 6 GOLD. British, French and U. S. notes to Poland requested that, before accepting Portuguese gold offered in payment for Polish coal, Poland require Portugal to provide satisfactory evidence that this gold was not looted from occupied countries by German authorities. *N. Y. T.*, May 7, 1947, p. 11. Text of U. S. note: *D. S. B.*, May 18, 1947, p. 1002.
- 6 IRAQ-TRANS-JORDAN. Details were published May 6 in Baghdad of 12 clauses of the 10-year treaty of alliance and friendship which was submitted May 4 to the Iraqi Parliament. *C. S. Monitor*, May 6, 1947, p. 3.
- 6-27 INTERNATIONAL CIVIL AVIATION ORGANIZATION. First assembly opened at Montreal May 6. *N. Y. T.*, May 7, 1947, p. 6. U. S. delegation: *D. S. B.*, May 4, 1947, p. 808. Elected Arthur S. Drakeford of Australia chairman. *N. Y. T.*, May 8, 1947, p. 3; *U. N. W. B.*, May 20, 1947, p. 526. Approved May 13 the

- draft agreement with United Nations and adopted an amendment to the I.C.A.O. convention in compliance with the U. N. General Assembly's resolution of Dec. 14, 1946, concerning that agreement. *U. N. W. B.*, May 20, 1947, pp. 526, 578-579. Voted May 16 to admit Italy to membership, subject to approval by the U. N. General Assembly and other provisions. *N. Y. T.*, May 17, 1947, p. 3. Assembly adjourned May 27. A special meeting will be held at Rio de Janeiro in October. Next regular session will convene in western Europe in the late spring of 1948. Short report on the conference: *N. Y. T.*, May 28, 1947, p. 4; *U. N. W. B.*, June 10, 1947, pp. 627-629. Report on the meeting: *D. S. B.*, June 15, 1947, pp. 1145-1151; *I.C.A.O. Monthly Bulletin*, June, 1947, pp. 1-19.
- 7 PAKAMA—UNITED STATES. U. S. Ambassador handed formal communication to Foreign Minister Alfaro proposing a new agreement for the use of defense sites in Panama. Such an agreement would replace the accord of May 18, 1942. *D. S. B.*, May 18, 1947, p. 1003.
- 7 UNITED NATIONS—ITALY. Italian Government forwarded on May 7 an official request for membership. *U. N. W. B.*, June 3, 1947, p. 607; *London Times*, May 8, 1947, p. 3. Text: *N. Y. T.*, May 20, 1947, p. 4.
- 7-July 5 POSTAL CONGRESS. Universal Postal Union opened session at Paris on May 7. *U. N. W. B.*, May 20, 1947, p. 526. U. S. delegation: *D. S. B.*, May 11, 1947, p. 934. Decided May 19 to increase weight allowed for printed matter in order to foster international cultural relations. Adopted resolution May 31 opposing an invitation to Spain to send a representative to the Congress. *N. Y. T.*, June 1, 1947, p. 26. On July 4 signed agreement with United Nations providing for collaboration. *N. Y. T.*, July 6, 1947, p. 22; *U. N. W. B.*, July 15, 1947, pp. 108-109. Text: *U. N. Doc. E/488*. The Conference closed July 5. Report on the Congress: *D. S. B.*, Sept. 21, 1947, pp. 585-588.
- 8-July 31 UNITED NATIONS. Security Council (Greek Question). Mr. Gromyko asked for a re-opening of the Albanian-Greek dispute. *N. Y. T.*, May 9, 1947, p. 2. On May 29 the Greek representative to the United Nations sent a note requesting that alleged incidents on the Greek-Yugoslav frontier be brought to the Council's attention. *U. N. W. B.*, June 10, 1947, p. 613. On June 27 the Council began debate on the Balkan Commission's report. *U. N. W. B.*, July 8, 1947, p. 67. Text of report: *U. N. Doc. S/360*. The Greek Government notified the Council July 14 that its territory had been invaded by forces from Albania on July 13 and asked action by the Council. Text of Greek letter: *N. Y. T.*, July 15, 1947 p. 3; *U. N. Doc. S/416*. On July 29 Russia vetoed U. S. resolution to establish a semi-permanent frontier commission. *N. Y. T.*, July 30, 1947, p. 1; *London Times*, July 30, 1947, p. 4; *U. N. W. B.*, Aug. 5, 1947, p. 183. In a letter of July 31 the Greek Foreign Minister asked the Council to invoke the provisions of Chapter VII of the Charter to halt the undeclared war in Greece. *N. Y. T.*, Aug. 1, 1947, pp. 1, 3. Text: *U. N. Doc. S/451*; *World Report* (Washington) Aug. 12, 1947, pp. 37-38.
- 9 GREAT BRITAIN—SIAM. British Prime Minister announced that, following an exchange of notes, the 1945 military agreement (under which Siam renounced all wartime territorial gains) had been abrogated. The 1946 agreement (in which Siam declared null and void all alleged acquisitions of British territory made later than Dec. 1941) was also annulled. *C. I. E. D.*, Apr. 21/May 11, 1947, pp. 252-253.
- 10 AERIAL LEGAL EXPERTS. Sixteenth and final session of C.I.T.E.J.A. met in Montreal with 16 nations represented. Arranged for liquidation of C.I.T.E.J.A.

- on Sept. 1, 1947, following transfer of its functions to the International Civil Aviation Organization. Report on the meeting: *D. S. B.*, June 29, 1947, pp. 1291-1292.
- 10 BOLIVIA—CHINA. Announcement was made of decision to exchange Ambassadors. *N. Y. T.*, May 11, 1947, p. 4.
 - 10 CHILE—UNITED STATES. Signed air transport agreement at Santiago. Text: *United States Aviation Reports*, June, 1947, pp. 284-295.
 - 12 HUNGARY—YUGOSLAVIA. Signature of a trade agreement was announced in Belgrade. *N. Y. T.*, May 13, 1947, p. 9.
 - 12 PEACE TREATY (Austrian). First meeting of the 4-power commission on the Austrian treaty opened at Vienna. The American member is Joseph M. Dodge. *N. Y. T.*, May 13, 1947, p. 15.
 - 12-June 17 UNITED NATIONS. International Law Committee. Committee on the Progressive Development of International Law and its Codification met at Lake Success. Elected Sir Dalip Singh of India as chairman, and J. L. Brierly of Great Britain as rapporteur. *N. Y. T.*, May 13, 1947, p. 13; *U. N. W. B.*, May 20, 1947, p. 525. Members: p. 571. Philip C. Jessup was U. S. member. *D. S. B.*, May 11, 1947, p. 953. Establishment of an international law commission to carry out progressive development and codification of international law was the chief recommendation. Summary of report: *U. N. W. B.*, July 1, 1947, pp. 13-16. Text: *U. N. Doc. A/AC.10/51* and *A/331*; this JOURNAL, Vol. 41 (1947), Supplement, pp. 18-26. Disposition of agenda items and check list of documents: *U. N. Doc. A/AC.10/57*. Text of report of U. S. delegate: *D. S. B.*, July 20, 1947, pp. 121-127.
 - 13 UNITED NATIONS—INTERNATIONAL CIVIL AVIATION ORGANIZATION. The agreement, signed Sept. 30, 1946 at New York, bringing the Organization into relationship with the United Nations, came into effect. *U. N. W. B.*, June 3, 1947, p. 596. Text of agreement: *U. N. Doc. A/106*; *United States Aviation Reports*, June, 1947, pp. 243-258.
 - 13/15 UNITED NATIONS. General Assembly. Special session adopted May 13 terms of reference for a commission of inquiry to investigate the Palestine problem. Text: *N. Y. T.*, May 14, 1947, p. 4. Session concluded May 15 with appointment of an 11-nation commission. Members: *London Times*, May 16, 1947, p. 6; *N. Y. T.*, May 16, 1947, pp. 1, 2. Text of resolutions adopted: p. 4; *U. N. Doc. A/310*; *U. N. W. B.*, May 20, 1947, p. 530. Article on the session: pp. 527-562. Proceedings: *G. A. O. R.*, 1st special session, 37. Report of New Zealand Delegation: New Zealand Department of External Affairs, *Publication* No. 31.
 - 15 REFUGEES. Italy signed agreement with Intergovernmental Committee on Refugees providing for a committee to promote early repatriation or emigration from Italy of refugees under the Committee's control. *C. I. E. D.*, May 12/25, 1947, p. 286.
 - 18 IRAN—SOVIET RUSSIA. Announcement was made of Iranian note to Russia asking repayment of £5,000,000 in loans and expenses incurred as a result of Russian occupation of northern Iran. *N. Y. T.*, May 19, 1947, p. 4.
 - 19 CHILE—CZECHOSLOVAKIA. Signed trade treaty at Santiago. *N. Y. T.*, May 20, 1947, p. 6.

- 19 FOOD AND AGRICULTURE ORGANIZATION—INTERNATIONAL LABOR ORGANIZATION. Draft agreement between the groups was submitted to the United Nations. Text, with report by Executive Committee of F.A.O. on interpretation of the agreement: *U. N. Doc. E/442*.
- 19-29 UNITED NATIONS. Fiscal Commission. First session was held at Lake Success. Elected Rodolphe Putman of Belgium as chairman of the 18-member commission, and the last of nine to meet. Members: *U. N. W. B.*, May 20, 1947, p. 569. Text of report: *U. N. Doc. E/440*. Summary of session: *U. N. W. B.*, June 10, 1947, pp. 623-625.
- 20 REPATRIATION. Text of Secretary Marshall's statement on U. S. policy on repatriation of displaced persons: *D. S. B.*, June 1, 1947, p. 1085.
- 20-July 8 REPARATIONS (Japanese). Far Eastern Commission announced May 20 a policy decision providing for distribution of reparations, based on each Allied nation's contribution to victory. *N. Y. T.*, May 21, 1947, p. 18; *London Times*, May 21, 1947, p. 3. Text: *D. S. B.*, June 1, 1947, p. 1069. Announced June 10 a policy decision regarding selection of plants for reparations removals, destruction or retention in Japan. Text: *D. S. B.*, June 22, 1947, p. 1201. On July 8 Allied Headquarters announced that reparations deliveries could commence immediately. *N. Y. T.*, July 9, 1947, p. 13.
- 21 GERMAN OCCUPATION. Accords were signed at Paris by France, Great Britain and United States establishing a basis for commercial exchanges between France and the Anglo-American zones of Germany. *N. Y. T.*, May 22, 1947, p. 16.
- 21/23 GREAT BRITAIN—UNITED STATES. Reached agreement by exchange of notes on use of Gander airport by U. S. airlines. Text: *G. B. T. S. No. 46* (1947), *Cmd.* 7157.
- 23 ESTONIAN ANNEXATION. Undersecretary of State for Foreign Affairs declared Great Britain had decided to recognize *de facto* Soviet administration of Estonia. *N. Y. T.*, May 24, 1947, p. 5.
- 23 INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT—AUSTRALIA. The Governors approved Australia's application for membership. The articles of agreement must be signed by Aug. 31, 1947. *N. Y. T.*, May 24, 1947, p. 4.
- 23 INTERNATIONAL MONETARY FUND—AUSTRALIA. Governors approved Australia's application for membership. The articles of agreement must be signed by Aug. 31. *N. Y. T.*, May 24, 1947, p. 4.
- 23 LATVIAN ANNEXATION. British Undersecretary for Foreign Affairs declared Great Britain had decided to recognize *de facto* Soviet administration of Latvia. *N. Y. T.*, May 24, 1947, p. 5.
- 23 LITHUANIAN ANNEXATION. British Undersecretary for Foreign Affairs declared Great Britain had decided to recognize *de facto* Soviet administration of Lithuania. *N. Y. T.*, May 24, 1947, p. 5.
- 23 SOUTH AFRICA—UNITED STATES. Signed air transport agreement at Cape Town. Text: *United States Aviation Reports*, June, 1947, pp. 296-308.
- 23/July 23 INTERNATIONAL COURT OF JUSTICE. Announcement was made May 23 that Great Britain had asked the Court for a judgment against Albania for the destruction of 2 British destroyers in the Corfu Channel last October. *N. Y. T.*, May 24, 1947, p. 4; *U. N. W. B.*, June 3, 1947, p. 581. Albania agreed July 23 to appear before the Court to answer British charges. *U. N. W. B.*, Aug. 5,

- 1947, p. 181; *N. Y. T.*, July 26, 1947, p. 1. Text of cables from Registrar of the Court to the United Nations: *U. N. Doc. S/453*.
- 23-July 28 UNITED NATIONS. Balkan Investigating Commission. Adopted on May 23 report to the Security Council recommending establishment for 2 years of a commission of inquiry and conciliation. Text: *U. N. Doc. S/360*. Text of majority recommendations: pp. 246-251; *N. Y. T.*, May 22, 1947, p. 20. Excerpts: *D. S. B.*, July 6, 1947, pp. 14-25. Mark F. Ethridge severed his connection with the Commission July 24. *N. Y. T.*, July 25, 1947, p. 9. Subsidiary group, on July 28, sent to Security Council an up-to-date, general report on its work. Text: *U. N. Doc. S/441*. Chronology of Balkan investigation, Dec., 1946-June, 1947: *U. N. W. B.*, July 8, 1947, p. 71.
- 24 FINLAND-SOVIET RUSSIA. Signed agreement at Moscow, opening the Porkkala territory to Finnish passenger and goods railway traffic. *London Times*, May 26, 1947, p. 3.
- 24 UNITED STATES-YEMEN. Signed agreement for the extension to Yemen of a million-dollar credit for the purchase of army surplus material. *N. Y. T.*, May 26, 1947, p. 5.
- 26 INTER-AMERICAN MILITARY COOPERATION. President Truman's message to Congress presented for consideration a proposed Inter-American Military Cooperation Act [standardization of arms, etc.]. Text of message and draft of a bill: *N. Y. T.*, May 27, 1947, p. 4; *Cong. Rec.* (daily) May 26, 1947, pp. 6019-6020; *D. S. B.*, June 8, 1947, pp. 1121-1122.
- 26 NETHERLANDS-UNITED STATES. Signed agreement at Washington settling their lend-lease accounts. Summary: *N. Y. T.*, May 29, 1947, p. 6; *D. S. B.*, June 8, 1947, pp. 1131-1132.
- 26/June 15 GREECE-UNITED STATES. U. S. Department of State made public June 18 an exchange of notes of May 26 and June 15 regarding administration of U. S. economic aid to Greece. *N. Y. T.*, June 19, 1947, p. 1. Text: p. 14; *D. S. B.*, June 29, 1947, pp. 1298-1300.
- 26-28 FOOD COUNCIL. Fourth meeting of the International Emergency Food Council held in Washington. Named a committee to study U. S. proposal for an international meeting of U. N. Foreign Ministers to consider pressing food problems. *N. Y. T.*, May 27, 1947, p. 5. Voted May 28 that a special cereals conference be held in Europe soon. Voted to extend the life of the Council to June 30, 1948. *N. Y. T.*, May 29, 1947, p. 4.
- 26-July 12 TURKEY-UNITED STATES. Signed agreement July 12 for the carrying out of the U. S. aid program in Turkey. *N. Y. T.*, July 13, 1947, p. 12. Text, together with exchange of notes of May 26 and 27: *D. S. B.*, July 20, 1947, pp. 144-145.
- 26-July 24 UNITED NATIONS. Palestine Committee. Special Committee on Palestine held brief opening meeting May 26 at Lake Success. Members of Committee: *N. Y. T.*, May 27, 1947, p. 9; *U. N. W. B.*, June 3, 1947, p. 592. On June 2 Emil Sandstroem of Sweden and Alberto Ulloa of Peru were elected chairman and vice-chairman. *N. Y. T.*, June 3, 1947, p. 8; *U. N. W. B.*, June 10, 1947, pp. 618-619. Arab Higher Committee notified Secretary General Lie on the 13th it would boycott the inquiry. Summary: *C. I. E. D.*, June 9/22, 1947, p. 352. Began work at Jerusalem on June 16. *London Times*, June 17, 1947, p. 4; *U. N. W. B.*, June 24, 1947, p. 689. Completed investigations in Middle East July 24. *N. Y. T.*, July 25, 1947, p. 8.

- 29 GERMAN OCCUPATION. U. S. and British military governments signed agreement to further economic integration of their two zones. *N. Y. T.*, May 30, 1947, p. 7. Summary: *C. I. E. D.*, May 26/June 8, 1947, p. 309. Text: *London Times*, June 3, 1947, p. 3.
- 30 BELGIUM—INDIA. Announced decision to exchange diplomatic missions at embassy level. India Information Services [*Press Release*] (Washington) No. 3389.
- 30/31 HUNGARY. Premier Ferenc Nagy resigned and was succeeded by Lajos Dinnyes. *N. Y. T.*, May 31, 1947, p. 1 and June 1, p. 1.
- 31 DIPLOMATIC IMMUNITY. By Executive Order 9863 President Truman designated U.N.E.S.C.O., International Civil Aviation Organization and International Telecommunication Union as eligible to enjoy the privileges, exemptions and immunities conferred by the International Organizations Immunities Act, approved Dec. 29, 1945. Text: *D. S. B.*, June 8, 1947, p. 1120.
- 31 INDIA—NETHERLANDS. Signed air transport agreement at New Delhi. India Information Services [*Press Release*] (Washington) No. 3387.

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- 2 HUNGARY—UNITED STATES. United States cancelled the remaining \$15,000,000 of Hungary's credit for U. S. surplus property in Europe. *N. Y. T.*, June 3, 1947, p. 1; *D. S. B.*, June 15, 1947, p. 1166.
- 2-17 UNITED NATIONS. Economic and Employment Commission. Held 2d session at Lake Success. Rept.: U. N. Doc. E/445. Summary: *U. N. W. B.*, July 1, 1947, pp. 10-12. Disposition of agenda items and check list of documents: U. N. Doc. E/CN 1/45.
- 2-July 18 INDIA. Viceroy, Viscount Mountbatten, announced June 2 his Government's plan to partition India. *N. Y. T.*, June 3, 1947, pp. 1, 12. Text of broadcast: *London Times*, June 4, 1947, p. 3. Prime Minister Attlee made similar announcement June 3 in the House of Commons. *London Times*, June 4, 1947, p. 4; *N. Y. T.*, June 4, 1947, p. 1. Text: p. 3; *Cong. Rec.* (daily) June 4, 1947, pp. 6519-6531. Mr. Jinnah of the Moslem League issued formal statement June 17 supporting freedom of choice by the Princes. *N. Y. T.*, June 18, 1947, p. 14; *London Times*, June 18, 1947, p. 4. The Partition Council formally came into existence June 27, replacing the Partition Committee, the personnel remaining essentially the same. India Information Services [*Press Release*] (Washington) No. 3409. On July 10 Prime Minister Attlee announced that when India is given independence, Viscount Mountbatten and Mohammed Ali Jinnah would be Governors-General respectively of the Dominion of India and of Pakistan. *N. Y. T.*, July 11, 1947, pp. 1, 8. The India Independence Bill became law on July 18, and will come into force August 15. *N. Y. T.*, July 19, 1947, pp. 1, 6.
- 3-19 NICARAGUAN RECOGNITION. No recognition will be granted by Guatemala, El Salvador and Panama according to announcements of June 3. *N. Y. T.*, June 4, 1947, p. 15. Pending further developments the United States announced it would not be disposed to grant recognition to the Somoza regime. *N. Y. T.*, June 6, 1947, p. 8; *D. S. B.*, June 15, 1947, p. 1177. United States announced on the 19th decision to withhold recognition. *N. Y. T.*, June 20, 1947, p. 4.
- 4-July 8 UNITED NATIONS. Security Council. Adopted June 4 the General Assembly's interpretation of procedure to be followed in the election of judges to the International Court of Justice. *U. N. W. B.*, June 17, 1947, pp. 662-663.

Text of General Assembly resolution, adopted Nov. 19, 1946: *U. N. Doc. A/64/Add. 1*, pp. 175-176. Referred to committee the membership applications of Ireland, Portugal, Albania, Outer Mongolia and Trans-Jordan. *N. Y. T.*, July 9, 1947, p. 5. Approved American plan of work for the Conventional Armaments Commission. *N. Y. T.*, July 9, 1947, p. 12. Summary: *U. N. W. B.*, July 22, 1947, pp. 129-130.

- 5 MARSHALL, GEORGE C. In an address at Harvard University commencement the Secretary of State called on the European countries to unite in planning their future economic welfare and outlined U. S. policy on foreign aid. *London Times*, June 6, 1947, p. 4; *N. Y. T.*, June 6, 1947, p. 1. Text: p. 2; *D. S. B.*, June 15, 1947, pp. 1159-1160; *Current History*, August, 1947, pp. 104-105; Dept. of State. *European Ser.* No. 25. Text of official British statement: *London Times*, June 9, 1947, p. 4.

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- 9 GREAT BRITAIN—POLAND. Exchanged notes on development of trade relations. *London Times*, June 10, 1947, p. 4.
- 9-24 HUNGARIAN OCCUPATION. Russia refused June 9 the U. S. request for copies of the purported confession of Bela Kovacs which was a forerunner of the recent *coup* against the regime of former Premier Nagy. *N. Y. T.*, June 10, 1947, p. 1. Text of confession as released by M.T.I., a Hungarian news agency: *N. Y. T.*, June 8, 1947, p. 6. U. S. note of June 11 to Control Council for Hungary protested developments in Hungarian political affairs and requested an investigation. *N. Y. T.*, June 12, 1947, pp. 1, 4. Text: p. 4; *D. S. B.*, June 22, 1947, pp. 1215-1216. British Minister-Designate presented a statement of his Government's views. *N. Y. T.*, June 12, 1947, p. 4. Text of General Sviridov's note of the 15th refusing proposal for a Big Three investigation of Hungarian political affairs: *N. Y. T.*, June 16, 1947, p. 6; *London Times*, June 16, 1947, p. 4; *D. S. B.*, June 22, 1947, p. 1216. British Foreign Office announced June 24 the Russian rejection of British request for copies of documents on the political crisis in Hungary. *N. Y. T.*, June 25, 1947, p. 15.
- 10 GREAT BRITAIN—SWITZERLAND. Reached agreement by exchange of notes at London regarding reciprocal abolition of visas. Text: *G. B. T. S.* No. 43 (1947), *Cmd.* 7149.
- 10 REFUGEES. France signed agreements in Paris with Great Britain and United States settling the conditions under which the French Government may recruit for work in France displaced persons of Slav or German origin, now in the Anglo-American zones of occupied Germany or Austria. *London Times*, June 13, 1947, p. 3.
- 10 RUMANIA—YUGOSLAVIA. Joint communiqué announced that the two governments had agreed on a revision of the Danube waterway navigation system and discussed conclusion in the near future of an agreement of friendship, coöperation and mutual assistance. *N. Y. T.*, June 11, 1947, p. 12.
- 10/18 BURMA. Constituent Assembly held inaugural meeting on the 10th. *London Times*, June 11, 1947, p. 3; *N. Y. T.*, June 11, 1947, p. 21. Assembly adopted resolution June 18 providing for an independent sovereign republic to be known as the "Union of Burma." *N. Y. T.*, June 18, 1947, p. 10; *London Times*, June 18, 1947, p. 3.
- 12 RUMANIAN OCCUPATION. U. S. Department of State announced on July 21 its decision of June 12 last to withdraw from the joint U. S.-Soviet Oil Commission in

- Rumania when it became obvious no hope existed of securing Soviet cooperation. *D. S. B.*, Aug. 3, 1947, pp. 225-227.
- 13 INDIA—NEPAL. Announced decision to exchange diplomatic representatives of the status of ambassadors. India Information Services [*Press Release*] (Washington) No. 3895.
 - 14 GREAT BRITAIN—ITALY. Effected agreement by exchange of notes in Rome to facilitate withdrawal of British forces after the ratification of the Italian peace treaty. *London Times*, June 16, 1947, p. 4. Text: *G. B. T. S.*, No. 47 (1947), *Cmd.* 7158.
 - 14 PEACE TREATIES. Text of President Truman's statement upon U. S. ratification of the treaties *D. S. B.*, June 22, 1947, p. 1214.
 - 16 CZECHOSLOVAKIA—GREAT BRITAIN. Signed 5-year treaty providing for cultural exchanges. *N. Y. T.*, June 17, 1947, p. 13. Text: *Czechoslovakia* No. 1 (1947), *Cmd.* 7155.
 - 16-25 ECONOMIC COMMISSION FOR ASIA AND THE FAR EAST. Ten nations were represented at the opening meeting in Shanghai, at which T. K. Tsiang was elected chairman. *N. Y. T.*, June 17, 1947, p. 13. Rules of procedure adopted on June 20; *U. N. Doc. E/CN.11/2/Rev. 1*. Text of report of the session: *U. N. Doc. E/452*. Summary: *U. N. W. B.*, July 3, 1947, pp. 75-76.
 - 17 EGYPT—GREAT BRITAIN. Egypt transmitted request to the Security Council for it to consider the Anglo-Egyptian dispute over the 1936 treaty. *London Times*, June 18, 1947, p. 3.
 - 17-18 FRANCE—GREAT BRITAIN. Foreign Secretary Bevin and Foreign Minister Bidault reached wide agreement on Secretary Marshall's proposal for economic rehabilitation of Europe. *N. Y. T.*, June 18, 1947, pp. 1, 6. Issued an appeal to Russia to join a conference to consider putting into effect the proposals. *N. Y. T.*, June 19, 1947, p. 1. Text: p. 10; *London Times*, June 19, 1947, p. 4. Russia agreed to meet the Ministers in Paris on June 27. *N. Y. T.*, June 23, 1947, p. 1.
 - 18 FRANCE—GREAT BRITAIN. Exchanged notes at London regarding the mutual application of the Chicago Air Transit Agreement of Dec. 6, 1944. Text: *G. B. T. S.* No. 62 (1947), *Cmd.* 7194.
 - 19 JAPANESE OCCUPATION. Far Eastern Commission adopted a statement of general policy for the occupation forces in Japan. *N. Y. T.*, July 12, 1947, p. 4. Text: *D. S. B.*, Aug. 3, 1947, pp. 216-221. Text of General McArthur's statement on the Commission's statement: pp. 221-222.
 - 19-July 11 INTERNATIONAL LABOR CONFERENCE. Held 30th session at Geneva. Elected C. J. Hambro as chairman. *London Times*, June 20, 1947, p. 3. U. S. delegation: *N. Y. T.*, May 30, 1947, p. 1; *D. S. B.*, June 8, 1947, pp. 1110-1111. Agenda: pp. 1111, 1137. Re-admission of Austria to membership was announced June 24. *N. Y. T.*, June 25, 1947, p. 21. Session closed July 11. *C. I. E. D.*, July 7/29, 1947, p. 423. 12 draft conventions were adopted. *U. N. W. B.*, July 22, 1947, p. 114. 31st conference to be held at San Francisco in June, 1948. *N. Y. T.*, July 11, 1947, p. 2.
 - 20 GREAT BRITAIN—Iceland. Reached agreement by exchange of notes at London for the abolition of passports. Text: *G. B. T. S.* No. 49 (1947), *Cmd.* 7159.

- 20 GREECE—UNITED STATES. Signed agreement in Athens providing that Americans be assigned to Greek Ministries to observe the aid program. Text: *N. Y. T.*, June 21, 1947, p. 8; *D. S. B.*, June 29, 1947, pp. 1300-1302; *T. I. A. S.* 1625.
- 20 IRAN—UNITED STATES. Signed agreement in Washington granting a \$25,000,000 credit to Iran for the purchase of war surplus equipment. *D. S. B.*, July 6, 1947, p. 47.
- 23-28 CARIBBEAN COMMISSION. Fourth meeting was held at Jamaica. Next meeting will be at Guadeloupe in March, 1948. *London Times*, June 25, 1947, p. 3 and June 30, p. 3. Summary of meeting: *International Organization* (Boston), Sept. 1, 1947, pp. 540-541.
- 24 HUNGARY—YUGOSLAVIA. Announced signature of a civil aviation agreement. *N. Y. T.*, June 25, 1947, p. 12.
- 24 SWEDEN—UNITED STATES. Effected agreement by exchange of memoranda whereby Sweden will ease its import curbs. Summary: *N. Y. T.*, June 26, 1947, p. 8. Text: *D. S. B.*, July 6, 1947, pp. 42-45.
- 24/July 12 RUMANIA—UNITED STATES. U. S. note protested the arrest of hundreds of the opposition party and the deprivation of civil liberties in Rumania. *N. Y. T.*, June 26, 1947, p. 1. Text: pp. 1, 3; *D. S. B.*, July 6, 1947, p. 38. Rumanian Government rejected U. S. protest on July 12. *N. Y. T.*, July 13, 1947, p. 22. Text: *D. S. B.*, Aug. 17, 1947, p. 330.
- 24-26 INTERNATIONAL JOINT COMMISSION (U. S. and Canada). Held meeting at Sault Ste. Marie, Ontario. Commissioners and staffs: *D. S. B.*, July 27, 1947, pp. 182-183.
- 25 AUSTRIA—UNITED STATES. Signed relief agreement at Vienna. *N. Y. T.*, June 26, 1947, p. 3. Text: *D. S. B.*, July 6, 1947, pp. 39-41.
- 25 CHINA—SOVIET RUSSIA. China issued communiqué summarizing negotiations with Russia concerning Dairen and Port Arthur. *N. Y. T.*, June 26, 1947, p. 12.
- 25 GERMAN OCCUPATION. U. S. Department of State announced that American Military Government had taken action to release from military government control properties in American zone and U. S. sector of Berlin which are owned by non-residents of Germany, who are citizens or residents of the United Nations or neutral countries, excepting Portugal and Spain. Summary: *D. S. B.*, July 6, 1947, pp. 41-42.
- 25 PALESTINE. The Government's report to the U. N. Commission on its stewardship since 1920 was made public. Short summary: *London Times*, June 26, 1947, p. 4.
- 25 RUMANIA—YUGOSLAVIA. Signed cultural treaty at Bucharest. *N. Y. T.*, June 26, 1947, p. 4.
- 25/July 21 GREAT BRITAIN—RUMANIA. British note protested Rumanian treatment of political opposition groups. *N. Y. T.*, June 26, 1947, p. 3. An additional British protest was delivered July 21. Excerpts: *London Times*, July 22, 1947, p. 3.
- 26 GREAT BRITAIN—SPAIN. Signed agreement supplementary to their monetary agreement of Mar. 28, 1947. Text: *G. B. T. S.* No. 48 (1947), *Cmd.* 7160.
- 26 UNITED NATIONS—UNITED STATES. Signed agreement defining the status of the U. N. headquarters district. The agreement defines the immunities and privileges of resident representatives of the United Nations and its specialized agen-

cies, etc. *N. Y. T.*, June 27, 1947, p. 10. Text: *D. S. B.*, July 6, 1947, pp. 27-32; *U. N. Doc. A/371*.

- 27-July 2 ECONOMIC CONFERENCE. Foreign Secretary Bevin and Foreign Minister Bidault met in Paris with Foreign Minister Molotov to consider plans in furtherance of proposed U. S. aid to Europe. Decided on secret discussions. *N. Y. T.*, June 28, 1947, p. 1; *London Times*, June 28, 1947, p. 4. Text of *Tass*' statement on Russia's position, favoring committee study of Europe's need and opposing any continent-wide reconstruction program: *N. Y. T.*, June 30, 1947, p. 4. Conference broke up July 2 with Russian refusal to cooperate with any proposals by Great Britain and France to implement Secretary Marshall's plan. *London Times*, July 3, 1947, p. 4; *N. Y. T.*, July 3, 1947, p. 1. Text of Mr. Molotov's statement and excerpts from those by Messrs. Bevin and Bidault: p. 4. Text of Mr. Molotov's statement: *Current History*, Aug. 1947, pp. 105-107.
- 28 REFUGEE ORGANIZATION—GREAT BRITAIN. British occupation authorities and the Preparatory Commission of I.R.O. signed agreement [in Berlin] by which the British Central Commission, acting as agent for I.R.O. will undertake the care of refugees and displaced persons in the zone and will be responsible for repatriation and resettlement. *London Times*, June 30, 1947, p. 3. Summary: Control Commission for Germany (British Element), *Monthly Report*, July, 1947, p. 12.
- 30 EGYPT—GREAT BRITAIN. Signed temporary financial agreement in London. *N. Y. T.*, July 1, 1947, p. 6; *London Times*, July 1, 1947, p. 4. Summary: p. 8. Text: *G. B. T. S. No. 51* (1947), *Cmd. 7163*.
- 30 U. N. R. R. A. Closed its books on distribution of nearly 3 billion dollars worth of food and supplies as the organization ceased to exist. *N. Y. T.*, June 30, 1947, p. 1.

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- 1 AUSTRIA—GREAT BRITAIN—HUNGARY. Announcement was made that Great Britain had protested the escape of 11 ships from Linz where they were being held as security for sums due to British creditors. Hungarian reply expressed regret and offered to make amends. No reply had been received from Austria. *N. Y. T.*, July 2, 1947, p. 6.
- 1 AUSTRIAN OCCUPATION. As of this date the costs of occupation by U. S. forces will be met with schillings acquired from the Austrian Government for U. S. dollars. *D. S. B.*, July 6, 1947, pp. 75-76.
- 1 INDIA—UNITED STATES. Henry F. Grady presented credentials as first Ambassador to India. *N. Y. T.*, July 8, 1947, p. 7.
- 1 ITALY—POLAND. Signed trade treaty. *C. I. E. D.*, June 23/July 6, 1947, p. 372.
- 1 REFUGEE ORGANIZATION—UNITED STATES. President Truman approved the bill providing for U. S. membership in I.R.O. Text of law: *D. S. B.*, July 27, 1947, pp. 179-180.
- 1 REFUGEES. Intergovernmental Committee on Refugees ceased to exist, its functions having been transferred to the International Refugee Organization. *D. S. B.*, July 13, 1947, p. 61.
- 1-21 BULGARIA—GREAT BRITAIN. British note of the 1st protested suppression of opposition papers in Bulgaria, and warned that such an act was contrary to the peace treaty and the Bulgarian law must be changed to accord therewith. *N. Y. T.*,

- July 2, 1947, p. 6. Bulgarian reply of July 3 justified its actions. British note of July 21 again protested. *N. Y. T.*, July 23, 1947, p. 8.
- 2 BRAZIL—CHILE. Signed a series of trade agreements. *C. I. E. D.*, June 23/July 6, 1947, p. 362.
- 2 EGYPT—VATICAN. Vatican announced decision to establish diplomatic relations. *N. Y. T.*, July 3, 1947, p. 6.
- 2 FRANCE—NEW ZEALAND. Announced signature at Wellington of a trade agreement providing £5,000,000 credit to France for purchase of wool. *N. Y. T.*, July 3, 1947, p. 7.
- 2 UNITED NATIONS—AUSTRIA. Austria applied for membership. *U. N. W. B.*, July 15, 1947, p. 81.
- 3 BELGIUM—LUXEMBOURG—NETHERLANDS. Announcement was made of passage of Belgian bill for ratification of the Customs Union between Netherlands and the Belgo-Luxembourg Economic Union. *London Times*, July 4, 1947, p. 4.
- 3 CZECHOSLOVAKIA—GREAT BRITAIN. Signed agreement in London supplementary to the monetary agreement of Nov. 1, 1945. Text: *G. B. T. S.* No. 57 (1947), *Cmd.* 7174.
- 3 ITALY—UNITED STATES. Signed agreement at Rome regulating assistance to Italy under the U. S. foreign relief program. *N. Y. T.*, July 4, 1947, p. 4. Text: *D. S. B.*, July 13, 1947, p. 97.
- 3/8 ECONOMIC CONFERENCE. Following failure of the conference of Foreign Ministers Bidault, Molotov and Bevin, France and Great Britain invited 22 other European nations to meet in Paris on July 12 to work out plans for economic aid. *N. Y. T.*, July 4, 1947, p. 1. Text of joint communiqué on the reconstruction program: p. 2; *Current History*, Aug. 1947, pp. 107–108. Text of invitation: *London Times*, July 5, 1947, p. 4. On July 8 Russia sent note to 14 nations stating its views on the proposed conference to implement the "Marshall plan." *United Nations World* (N. Y.) Sept. 1947, p. 63. Text of note to Sweden: *N. Y. T.*, July 15, 1947, p. 3.
- 4 UNITED NATIONS—UNIVERSAL POSTAL UNION. Signed accord in Paris providing closer relationship, but not affiliation. *N. Y. T.*, July 6, 1947, p. 22; *U. N. W. B.*, July 15, 1947, p. 108. Text: *U. N. Doc.* E/483.
- 5 FRANCE—MOROCCO. French Government announced the signature by the Sultan of Morocco of decrees creating a new form of government, the principal feature of which is the equal responsibility in the Cabinet of the native administrators with French officials. *N. Y. T.*, July 6, 1947, p. 26; *London Times*, July 7, 1947, p. 3.
- 5 POLAND. Polish Parliament granted to the State Executive Council the right to issue decrees making laws immediately effective, subject, however, to approval at next session of the Parliament. *United Nations World* (N. Y.) Sept., 1947, p. 62.
- 5 VENEZUELA. Signed and promulgated new constitution. *N. Y. T.*, July 6, 1947, p. 19.
- 5–16 ECONOMIC COMMISSION FOR EUROPE. Second session was held at Geneva. Text of report of the 1st and 2nd sessions: *U. N. Doc.* E/451. Summary of meeting: *U. N. W. B.*, July 29, 1947, pp. 150–151.

- 6 SPAIN. Referendum of July 6 on Franco's "law of succession" confirmed Franco as Chief of State and established procedure for selecting his successor. *N. Y. T.*, July 7, 1947, p. 1. Final returns were announced July 23, giving 92.94% in favor. Franco signed the law. *N. Y. T.*, July 27, 1947, p. 25.
- 6-August 1 AMERICAN REPUBLICS. Argentine Foreign Minister sent letter to the Foreign Ministers of American republics urging that those nations and the Vatican collaborate to establish a firm peace. *N. Y. T.*, July 8, 1947, p. 7. Text, with U. S. reply: *D. S. B.*, Aug. 17, 1947, pp. 337-340. Mexico's reply, outlining a "doctrine of internal peace," urged stronger support for the United Nations and Pan American Union as a means to peace. *N. Y. T.*, July 30, 1947, p. 2.
- 7 INTERNATIONAL LABOR ORGANIZATION—YUGOSLAVIA. Yugoslavian intent to withdraw in 2 years was announced by the Director General of I.L.O. *London Times*, July 8, 1947, p. 3; *N. Y. T.*, July 8, 1947, p. 20, *U. N. W. B.*, July 15, 1947, p. 82.
- 8 GREECE—UNITED STATES. Signed a relief-assistance agreement in Athens. Text: *D. S. B.*, July 20, 1947, pp. 139-141.
- 8 DOMINICAN REPUBLIC—GUATEMALA. Diplomatic relations were broken off by Guatemala. *N. Y. T.*, July 9, 1947, p. 8.
- 9 ITALY—PHILIPPINE REPUBLIC. Signed at Rome a treaty of friendship, providing for diplomatic and consular relations, conciliation and arbitration of controversies and parity of treatment for their nationals. *N. Y. T.*, July 10, 1947, p. 4.
- 9-12 CEREALS CONFERENCE. Met in Paris, having been called by Food and Agriculture Organization. 33 countries were represented. Its report was presented to the European economic coöperation conference on the Marshall plan. *N. Y. T.*, July 10, 1947, p. 3 and July 13, p. 7. U. S. delegation: *D. S. B.*, July 13, 1947, p. 79. Report on the conference: *F.A.O. Information Service Bulletin*, Aug. 22, 1947, p. 3.
- 10 CUBA—MEXICO. Signed cultural relations treaty. *N. Y. T.*, July 11, 1947, p. 7.
- 11 GERMAN OCCUPATION. U. S. Government sent a directive to the U. S. Military Governor defining objectives and basic policies for Germany since May, 1945. This superseded earlier directive [published Oct. 17, 1945]. *N. Y. T.*, July 16, 1947, pp. 1, 7. Text: p. 8; *D. S. B.*, July 27, 1947, pp. 186-193; *World Report* (Washington) July 29, 1947, pp. 33-37; Dept. of State *European Ser. No. 27*.
- 11 UNITED NATIONS—ROMANIA. Rumania filed application for membership. *U. N. W. B.*, July 22, 1947, p. 114.
- 11/17 EGYPT—GREAT BRITAIN. Egypt presented to the Security Council on July 11 complaint on British policy in Egypt and presence of British troops there. *N. Y. T.*, July 12, 1947, p. 1. Text of Egyptian complaint: p. 5; *World Report* (Washington) July 29, 1947, p. 39. Excerpts: *London Times*, July 12, 1947, p. 4. The complaint was placed on the Council's agenda July 17. *N. Y. T.*, July 18, 1947, p. 5.
- 11-25 PEACE CONFERENCE (Japan). United States proposed 11-nation conference to open Aug. 19, to draft peace treaty for Japan. Nations invited: *D. S. B.*, July 27, 1947, p. 182; *N. Y. T.*, July 16, 1947, pp. 1, 8. Great Britain announced approval of plan but requested later date. *London Times*, July 17, 1947, p. 4. On July 23 Russia rejected plan and proposed that Council of Foreign Ministers draft the treaty. *N. Y. T.*, July 24, 1947, pp. 1, 3. Text of Soviet statement: p. 3. China approved participation but proposed retention of

- the veto power in the conference. Summary of other replies: *N. Y. T.*, July 26, 1947, p. 3.
- 12 ARGENTINA—CHILE. Signed nitrate trade agreement. *N. Y. T.*, July 13, 1947, p. 14.
- 12 CZECHOSLOVAKIA—SOVIET RUSSIA. Announced 5-year trade agreement, signed in Moscow. *London Times*, July 14, 1947, p. 4; *N. Y. T.*, July 13, 1947, pp. 1, 8. Text of communiqué: p. 8; *London Times*, July 14, 1947, p. 4.
- 12-15 ECONOMIC CONFERENCE. Met in Paris under chairmanship of Mr. Bevin. *N. Y. T.*, July 13, 1947, pp. 1-2. Texts of Bidault and Bevin statements at first meeting: p. 3. Lists of 16 countries represented and of countries which refused invitation: *London Times*, July 14, 1947, p. 4. Adopted report of Working Committee July 13 and set up Cooperation Committee to prepare report on availabilities and requirements on a 4-year basis, to be submitted to U. S. Government before Sept. 1. *N. Y. T.*, July 14, 1947, p. 1. Text of report: p. 5. Adjourned July 15 until Cooperation Committee's report is prepared. To reassemble probably late in August. *N. Y. T.*, July 16, 1947, pp. 1, 3.
- 13 BULGARIA—SOVIET RUSSIA. Bulgaria announced approval of \$87,000,000 trade agreement. *N. Y. T.*, July 14, 1947, p. 1.
- 14 FALKLAND ISLANDS. Argentine Foreign Office published exchange of notes with Great Britain concerning possession of the Islands. *London Times*, July 15, 1947, p. 3.
- 14 GREAT BRITAIN—SWEDEN. Signed in London an agreement supplementary to the monetary agreement of Mar. 6, 1945. Text: *G. B. T. S. No. 55 (1947)*, Cmd. 7170.
- 14 UNITED NATIONS. Secretary General. Text of report on the work of the United Nations: *U. N. Doc. A/315*; *G. A. O. R.*, 2nd session, Suppl. No. 1.
- 15-25 REFUGEE ORGANIZATION. Third part of 1st session of the Preparatory Commission of the I.R.O. opened meeting July 15 at Lausanne. *London Times*, July 16, 1947, p. 3. U. S. delegation: *D. S. B.*, July 20, 1947, p. 133. William Hallam Tuck was appointed Executive Secretary of the Commission on July 18, succeeding A. J. Altmeyer who resigned. *London Times*, July 19, 1947, p. 3. Instructed Executive Secretary to ask Great Britain and France to transfer at once non-monetary gold in their zones, which is earmarked for resettlement purposes. *London Times*, July 24, 1947, p. 3. Voted July 24 that the I.R.O. should aid Volksdeutsche in Austrian refugee camps. *N. Y. T.*, July 25, 1947, p. 6. Closed session July 25. *N. Y. T.*, July 26, 1947, p. 6. Report of meeting: *D. S. B.*, Sept. 23, 1947, pp. 638-639. Report of the session: Preparatory Commission for the I.R.O. *Doc. Prep./126/Rev. 1*.
- 16 UNITED NATIONS—SPAIN. Secretary General announced action by member governments on the General Assembly's resolution relating to the recall from Madrid of chiefs of mission. *U. N. W. B.*, July 29, 1947, pp. 145, 178; *U. N. Doc. A/315*, p. 3; *G. A. O. R.*, 2nd session, Suppl. No. 1, p. 3.
- 17 FAR EASTERN COMMISSION. Filed report on activities from Feb. 26, 1946 through July 10, 1947. Text: Dept. of State *Far Eastern Ser. No. 24*.
- 17 FULBRIGHT ACT. President Truman announced appointment of 10-man Board of Foreign Scholarships to select American students for study abroad under the Act. List of Board members, list of countries where students may go, etc.: *D. S. B.*, July 27, 1947, pp. 198-199.

- 17 UNITED NATIONS—ETHIOPIA. Ethiopia notified United Nations that it would renounce U. N. reconstruction aid in favor of other member nations more immediately in need of assistance. *N. Y. T.*, July 18, 1947, p. 1; *U. N. W. B.*, July 29, 1947, p. 154.
- 18 FINLAND—HUNGARY. Signed trade agreement. *N. Y. T.*, July 19, 1947, p. 5.
- 18/23 POLAND—UNITED STATES. U. S. Department of State's special mission to appraise the situation in Poland regarding food and relief supply needs reported July 18 to the Secretary of State. Text of report: *D. S. B.*, Aug. 3, 1947, pp. 223-224. The State Department announced July 23 it would undertake no relief program for Poland. *London Times*, July 24, 1947, p. 4; *D. S. B.*, Aug. 3, 1947, p. 223; *N. Y. T.*, July 24, 1947, pp. 3, 5.
- 19 TRUSTEESHIP. President Truman signed the bill accepting the trusteeship agreement for the former Japanese-mandated islands and named Admiral L. E. Denfield as High Commissioner. *N. Y. T.*, July 20, 1947, p. 35. Text of the President's statement and of Executive Order 9875, establishing interim government: *D. S. B.*, July 27, 1947, pp. 178-179.
- 19/21 UNITED NATIONS. Economic and Social Council. Fifth session opened at Lake Success. *N. Y. T.*, July 20, 1947, p. 27; *London Times*, July 21, 1947, p. 3. Provisional agenda: *U. N. W. B.*, July 15, 1947, p. 91; *D. S. B.*, Aug. 3, 1947, pp. 209-210. Provisional list of delegations, observers, etc.: *U. N. W. B.*, July 29, 1947, pp. 156-157. Approved July 21 Hungary's application for membership in U.N.E.S.C.O. *N. Y. T.*, July 22, 1947, p. 12.
- 20-31 INDONESIA. On July 20 the Dutch Governor announced that Dutch troops had begun "police action" on various fronts, and stated that in view of Indonesian violations, the Dutch Government would no longer be bound by the truce and the Cheribon agreement. Excerpts from the Governor's statement: *N. Y. T.*, July 21, 1947, pp. 1, 3. Netherlands sent identic notes to Great Britain and United States explaining Indonesian crisis. Text: *N. Y. T.*, July 23, 1947, p. 3; *World Report* (Washington) Aug. 5, 1947, p. 39. U. S. Department of State issued July 21 statement of regret at Indonesian developments and indicated that the United States had adopted a "hands off" policy. *N. Y. T.*, July 22, 1947, p. 3; *D. S. B.*, Aug. 3, 1947, p. 230. Netherlands notified United Nations on July 21 of the situation. Text of letter: *N. Y. T.*, July 23, 1947, p. 3; *U. N. Doc. S/426*. Dutch Premier stated in Parliament July 23 that arbitration of the Indonesian dispute under Article 17 of the Cheribon agreement was impossible. *N. Y. T.*, July 24, 1947, p. 2. India in a letter to the Security Council on July 30 brought to the attention of the Council the situation. Text of letter: *N. Y. T.*, July 31, 1947, p. 3; *U. N. Doc. S/447*. Australia placed the dispute before the Council on July 30 and asked it to intervene to bring about arbitration of the dispute, as authorized by Chapter VII of the Charter. *N. Y. T.*, July 31, 1947, pp. 1, 3. Text of Australian letter: p. 3; *U. N. Doc. S/449*. British Foreign Secretary reported July 30 to the House of Commons that Great Britain had banned sale of all war supplies to the Dutch. *N. Y. T.*, July 31, 1947, p. 3. United States offered its services to the Dutch Government July 31 to mediate the dispute. *N. Y. T.*, Aug. 1, 1947, p. 1; and Aug. 2, p. 4.
- 21 ITALY—UNITED STATES. Signed agreement in Rome on sale of U. S. war surplus equipment. The agreement supplements agreement of Sept. 9, 1946. *London Times*, July 22, 1947, p. 3; *N. Y. T.*, July 22, 1947, p. 12.

- 21 U.N.E.S.C.O.—HUNGARY. Economic and Social Council approved Hungary's membership in U.N.E.S.C.O. *N. Y. T.*, July 22, 1947, p. 12; *C. I. E. D.*, July 21/Aug. 3, 1947, p. 433.
- 21 UNITED NATIONS—YEMEN. Yemen applied for membership. *N. Y. T.*, July 25, 1947, p. 6.
- 22 AUSTRIA—POLAND. Coal agreement was made public. *N. Y. T.*, July 23, 1947, p. 6.
- 22 REFUGEE ORGANIZATION—AUSTRALIA. Australia signed agreement with I.R.O. concerning migration of displaced persons to Australia. *N. Y. T.*, July 23, 1947, p. 7; *U. N. W. B.*, July 29, 1947, p. 146.
- 22-30 ADMINISTRATIVE SCIENCES. Fourth International Congress of Administrative Sciences met at Berne. U. S. delegation: *N. Y. T.*, July 22, 1947, p. 16; *D. S. B.*, Aug. 3, 1947, p. 215.
- 23 ARGENTINA—FRANCE. Signed 5-year commercial treaty. *N. Y. T.*, July 24, 1947, p. 4. U. S. had objected on grounds of discrimination but the protest was rejected. *N. Y. T.*, July 30, 1947, p. 7.
- 23 CHINA—GREAT BRITAIN. Signed 4-year air transport agreement. *London Times*, July 24, 1947, p. 3.
- 24-August 8 UNITED NATIONS. Narcotic Drugs Commission. Second session met at Lake Success. *U. N. W. B.*, Aug. 19, 1947, p. 238. Text of report: *U. N. Doc. E/575*.
- 25 MALAYA. British Colonial Office published proposals for setting up a Federation of Malaya. *N. Y. T.*, July 25, 1947, p. 2. Text: *Cmd. 7171*. Summary: *London Times*, July 25, 1947, p. 3.
- 25 RELIEF FUNDS. Voted by U. S. Congress, to assist countries occupied by American troops and other liberated areas. Hungary and Poland were barred from help, while Greece, Italy, Austria, Trieste and China were included. *N. Y. T.*, July 26, 1947, pp. 1, 5.
- 28/30 AXIS PROPERTY. British note of the 28th to Russia asked that the latter refrain from further confiscation of Axis assets in Hungary until other signatories to the Hungarian peace treaty have assured themselves that the assets are legitimate Axis property. Excerpts: *London Times*, July 30, 1947, p. 4. U. S. note, delivered July 29, protested to Russia against removal of Axis-owned assets in Bulgaria, Hungary and Rumania. Text: *N. Y. T.*, July 31, 1947, p. 7; *D. S. B.*, Aug. 10, 1947, p. 298; *World Report* (Washington) Aug. 12, 1947, p. 39. A similar note was sent by Great Britain on July 30. *London Times*, Aug. 21, 1947, p. 4.
- 30 UNITED NATIONS. Security Council (Indonesia). Indian Government officially called to the attention of the Council the Indonesian situation. Text of letter: *N. Y. T.*, July 31, 1947, p. 3; *U. N. Doc. S/447*. Australia placed the dispute before the Council and asked action under Chapter VII of the Charter. *N. Y. T.*, July 31, 1947, pp. 1, 3. Text of letter: p. 3; *U. N. Doc. S/449*. Both texts: *World Report* (Washington) Aug. 12, 1947, pp. 38-39.
- 31 GREAT BRITAIN—YUGOSLAVIA. Signed 2 agreements in London providing for settlement of accounts arising out of the war and the postwar nationalization of shipping in Yugoslavia. *London Times*, Aug. 1, 1947, p. 3.

MULTIPARTITE CONVENTIONS

INTERNATIONAL COURT OF JUSTICE. Statute. Optional Clause. San Francisco, June 26, 1945.

Declarations signed:

China, Denmark, Norway, Sweden, Turkey. *U. N. Doc. A/515*, p. 59; *G. A. O. R.*, 2nd session, Suppl. No. 1, p. 59.

INTERNATIONAL LABOR ORGANIZATION. Constitution, Instrument for Amendment of. Montreal, Oct. 9 1945.

Text: *Cong. Rec.* (daily) June 2, 1947, pp. 6303-6307.

PEACE TREATY (Bulgarian). Paris, Feb. 10, 1947.

Ratifications:

Great Britain. Apr. 29, 1947. *N. Y. T.*, Apr. 30, 1947, p. 11.

United States. June 14, 1947. *N. Y. T.*, June 15, 1947, p. 1; *London Times*, June 16, 1947, p. 4; *D. S. B.*, June 22, 1947, p. 1214.

PEACE TREATY (Finnish). Paris, Feb. 10, 1947.

Ratifications:

Finland. Apr. 27, 1947. *C. I. E. D.*, Apr. 21/May 11, 1947, p. 239.

Great Britain. Apr. 29, 1947. *N. Y. T.*, Apr. 30, 1947, p. 11.

PEACE TREATY (Italian). Paris, Feb. 10, 1947.

Ratifications:

Great Britain. Apr. 29, 1947. *N. Y. T.*, Apr. 30, 1947, p. 11.

United States. June 14, 1947. *N. Y. T.*, June 15, 1947, p. 1; *London Times*, June 16, 1947, p. 4; *D. S. B.*, June 22, 1947, p. 1214.

Signatures:

Cuba and Italy. June 30, 1947. *N. Y. T.*, July 1, 1947, p. 9.

PEACE TREATY (Hungarian). Paris, Feb. 10, 1947.

Ratifications:

Czechoslovakia (announced). *London Times*, June 7, 1947, p. 3.

Great Britain. Apr. 29, 1947. *N. Y. T.*, Apr. 30, 1947, p. 11.

United States. June 14, 1947. *N. Y. T.*, June 15, 1947, p. 1; *London Times*, June 16, 1947, p. 4; *D. S. B.*, June 22, 1947, p. 1214.

PEACE TREATY (Rumanian). Paris, Feb. 10, 1947.

Ratifications:

Great Britain. Apr. 29, 1947. *N. Y. T.*, Apr. 30, 1947, p. 11.

United States. June 14, 1947. *N. Y. T.*, June 15, 1947, p. 1; *London Times*, June 16, 1947, p. 4; *D. S. B.*, June 22, 1947, p. 1214.

PRIVILEGES AND IMMUNITIES, UNITED NATIONS. London, Feb. 13, 1946.

Ratification deposited:

Dominican Republic. Mar. 7, 1947. Dominican Republic. Secretaria de Relaciones Exteriores. *Boletín*, Mar., 1947, p. 29.

REFUGEE ORGANIZATION. Constitution. Flushing Meadow, N. Y., Dec. 15, 1946.

Signatures:

Argentina. June 10, 1947. *U. N. W. B.*, June 24, 1947, p. 690.

Australia. May 13, 1947. *N. Y. T.*, May 14, 1947, p. 4.

Belgium. May 1, 1947. *N. Y. T.*, May 2, 1947, p. 3; *U. N. W. B.*, May 13, 1947, p. 494.

Bolivia. June 5, 1947. *N. Y. T.*, June 6, 1947, p. 7.

Iceland. May 12, 1947. *N. Y. T.*, May 13, 1947, p. 13; *U. N. W. B.*, May 20, 1947, p. 526.

Panama. June 23, 1947. *N. Y. T.*, June 24, 1947, p. 12; *U. N. W. B.*, July 1, 1947, p. 2.

Peru. July 25, 1947. *U. N. W. B.*, Aug. 5, 1947, p. 182.

Ratification deposited:

United States. July 3, 1947. *N. Y. T.*, July 3, 1947, p. 7.

7 states have ratified and 13 signed subject to ratification. List: *U. N. W. B.*, July 29, 1947, p. 167.

SUGAR PRODUCTION AND MARKETING. Protocol. London, August 30, 1946.

Ratification:

United States. May 7, 1947.

Promulgation:

United States. May 27, 1947. *D. S. B.*, June 8, 1947, p. 1152.

DOROTHY R. DART

JUDICIAL DECISIONS

ŠZALATNAY-STACHO v. FINK *

GREAT BRITAIN; COURT OF APPEAL

[June 5, 1946]

The principle whereby absolute privilege attaches to official documents is based on public interest and does not necessarily apply to corresponding foreign documents. The principle of the comity of nations neither compels nor entitles the Courts of the United Kingdom, in proceedings in tort before them between citizens of a foreign State, to apply to acts done in the United Kingdom the law of such a State whereby a general protection, not afforded by the law of the United Kingdom, is given in civil suits to acts done by officials of the foreign State.

The territory of a State allied to his Majesty having been overrun by the common enemy the Government of that State was established in the United Kingdom. Accusations against the plaintiff, a civilian official of that Government, having been brought to the notice of the defendant, the prosecutor of a military tribunal of the State duly established in the United Kingdom, that official caused statements to be taken and embodied them in a file of documents, together with a document signed by him, marked confidential, which he sent to the Military Office of the President of the State. In a libel action in which the defendant pleaded absolute and qualified privilege, but not justification,

Held, that absolute privilege did not attach to the documents, but that qualified privilege did, and that there was no evidence of malice.

Hart v. Gumbach ((1872) L. R. 4 P. C. 439) distinguished.

Decision of Henn Collins J. (62 *Times Law Reports* 146) affirmed on different grounds.

This was an appeal from a decision of Mr. Justice Henn Collins in favor of the defendant in the action in which Dr. Benjamin Šzalatnay-Stacho, a Czechoslovakian subject, sued Mr. Karel Fink, of the same nationality, for damages for alleged libels published of him in the United Kingdom.

By his defense the defendant pleaded absolute privilege for the statements made by him; alternatively, that the statements were made without malice on an occasion of qualified privilege.

Mr. Justice Henn Collins gave effect to the first plea, and would, he said, in any event have given effect to the second.

The plaintiff appealed.

* 62 *Times Law Reports* 573.

Lord Justice Sovervell read the following judgment of the Court.—The plaintiff, a Czechoslovak citizen, was Acting Minister in Cairo under the Czechoslovak Government from 1934 to 1944. The alleged libel is contained in a document dated November 17, 1941, signed by the defendant, with documents attached and sent to the Military office or Chancellery of the President of the Czechoslovak Republic. The defendant, who is also a Czechoslovak citizen, was at the material time Public or General Prosecutor of the Czechoslovak Military Court of Appeal [a position corresponding roughly with that of the British Judge Advocate-General], a court established in this country under the Allied Forces Act, 1940, the Czechoslovak Government being in this country at that time as our ally. Before the war he was a practising lawyer. The document is plainly defamatory of the plaintiff, and—to use a neutral expression—is concerned with very serious accusations against him in his official position as Acting Minister, including a charge of treason and other criminal offences. The defendant admits that he made and sent the document; he does not justify, but pleads that the words were published by him without malice and in the honest belief that they were true. He says that the occasion was one of absolute privilege, or, alternatively, of qualified privilege. Mr. Justice Henn Collins decided that the occasion was one of absolute privilege. If he was wrong about that, he would have held that there was qualified privilege and no malice.

The document of November 17, 1941, is marked “duv,” which means confidential. It is headed: “The Military Office of the President of the Republic, London,” and the first three paragraphs are as follows: “The General Prosecutor received on several occasions information from members of the Czechoslovak Army in England regarding the activity of the Czechoslovak Envoy in Cairo, Dr. Szalatnay-Stacho. The above-named being a civil person, the General Prosecutor could not institute criminal proceedings and has therefore ordered administrative examinations of all persons who could elucidate the question. The contentions of Corporal Milos Kuna, which are supported in particular by the statement of Lieutenant-Colonel Josef Bartik as regards the opinion of the French and English Intelligence Service of the above-named Czechoslovak Envoy, are so grave that the General Prosecutor considered it his duty to bring the matter to the notice of the President of the Republic.” It proceeds: “The Envoy Dr. Szalatnay-Stacho is accused of the following.” There are then four paragraphs which may be thus summarized. They allege (1) that after March 15, 1939—the date of the German occupation of Prague—he established in Cairo connection with the German Legation and committed the crime of treason; (2) that he embezzled £2,500 Egyptian belonging to the Czech community in Egypt; (3) that he invited Czechoslovak workers to collaborate with the Germans, and dissuaded Czechoslovak citizens from joining the Czechoslovak forces in France; (4) that, in associating with or assisting three named Germans, he committed certain further crimes—namely, fraud, mili-

tary betrayal, and the misuse of official power. All the paragraphs refer to the provisions of the code dealing with the offences in question. A number of statements are attached. The first in date and the most detailed of the statements was by Corporal Kuna, who before the war was a merchant in Cairo.

On the issues as raised by the pleadings the truth of the accusations or allegations in the statements attached to the defendant's document is not in issue. There are no grounds for any suggestion that they are true. Evidence was, however, admitted that in fact, after March 15, 1939, the plaintiff took a strong line diametrically the opposite of that of which he was "accused" as set out in paragraph 1 above, and was not guilty of the treason or disloyalty alleged. It is also, perhaps, fair to the plaintiff to point out that he retained his position under the President of the Czechoslovak Republic till 1944, and was receiving his salary when he gave evidence. Mr. Beney told the Court that the plaintiff brought these proceedings in the hope that some plea would be raised which would enable the Court to investigate the truth of these charges. This is understandable. On the other hand, it is perhaps right to say that on the view put forward by the defendant as to his part in the matter, which the Court, agreeing with Mr. Justice Henn Collins, substantially accept, we can find no ground for the criticism of his conduct in these proceedings which was, perhaps, suggested on behalf of the plaintiff.

There is one matter of history which explains how the plaintiff came into possession of the document on which he relied. Before his appointment terminated in 1944, he had heard some rumors of charges against him. When he came back to London he was told confidentially that the defendant had made charges against him. He saw an opinion of the legal adviser to his Foreign Office. This document, of which he had had a copy, was not disclosed, but he said that it dismissed the charges as pure nonsense. The plaintiff, who by this means had obtained some knowledge of what had happened, made an application to the District Prosecutor to the Court Martial of the Czechoslovak Army for a criminal prosecution of the Commander-in-Chief, the defendant, and other persons. This is a proceeding which has no exact parallel in our laws, but appears to be a formal demand for a prosecution which was, in this case, for misuse of official power. This procedure is subject to appeal. It was in the course of these proceedings that the plaintiff saw the actual document relied on. There was, as a result of the plaintiff's application, no prosecution, but he issued the writ in the present action. It has been necessary to refer to this in order to explain how these proceedings started and it also may have some relevance to the plaintiff's complaint of the defendant's attitude in these proceedings. The Court is only concerned with the legal issues, but, if it is sought to base an argument on any failure of the defendant to express regret or take up a

friendly attitude, it may be necessary to bear in mind the plaintiff's first action with regard to the matters with which the case is concerned.

Mr. Justice Henn Collins decided that the document was absolutely privileged. He based this part of the decision on a finding that in Czech law an action like the present could not be brought against the defendant by reason of the fact that he was a State official and acting as such. He decided that, by the comity of nations, his Majesty's Courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their domestic Courts would afford. He relied on certain *dicta* in *Hart v. Gumbach* ((1872) L. R. 4 P. C. 439, at p. 464).

Before considering this reasoning it is necessary, in order to deal with the first argument for the defendant under this issue, to consider the question on somewhat wider lines. The application of the principles of absolute privilege to foreign official documents is one on which there is little, if any, direct authority. The principle in our law is based on public interest, and, as it seems to us, would not necessarily apply to corresponding foreign documents. At the material time the Czechoslovak Government was in this country as our ally in the war. This was an unprecedented state of affairs. Whatever may be the position in normal circumstances it may well be that in these circumstances the public interest would justify the application to Czechoslovak official documents of the principles applied to our own documents. Accepting this principle, it is necessary to consider, in the light of it, counsel's first submission for the defendant on this part of the case, which was that this document should be protected as the first step in criminal proceedings. He referred to *Watson v. M'Ewan* ([1905] A. C. 480) and to *Beresford v. White* ((1914) 30 *The Times* L. R. 591) which held that a proof of a witness had absolute privilege; to *Lillie v. Roney* ((1892) 8 *The Times* L. R. 642; 61 L. J. Q. B. 727), where a letter to the Law Society in the form prescribed for initiating disciplinary proceedings against a solicitor was held absolutely privileged; and to *Bottomley v. Brougham* (24 *The Times* L. R. 262; [1908] 1 K. B. 584), where the same principle was applied to the report of an Official Receiver to the Court under the Companies (Winding-up) Act. *Dawkins v. Lord Paulet* ((1869) L. R. 5 Q. B. 94) does not seem to us to apply to the defendant's action here. In that case the defendant, a military officer, was acting strictly within his official military duties with reference to a court of inquiry on another officer. In the view we take of this document, it was not the first step in criminal proceedings. At that time there were no Czechoslovak Courts available either here or in Czechoslovakia before which the plaintiff, not being a soldier, could be charged. Apart from this point we think that, having regard to the document and its destination, its purport may be summarized as follows: "This information has come into my hand supplemented by certain statements which I have taken from soldiers. The statements

accuse the plaintiff of serious crimes, which are specified. I forward the dossier for investigation and any action which may be thought proper." This, certainly, is far more remote from actual or contemplated proceedings than any of the cases cited.

It was not argued for the defendant that the document was protected as an act of State. His counsel did rely on *Hare and Meller's Case* (1587) 3 Leon. 1630). It is very shortly reported, but states that the exhibiting of a bill to the Queen is not in itself any cause of action, on the ground that the Queen is the head and fountain of justice, and therefore, it is lawful for all her subjects to resort to her to make their complaints. The circumstances in which the bill was exhibited are not set out, but it is, in our view, impossible to regard the present document sent to the Military Chancellery of the President as coming within any such principle as that stated.

Mr. Justice Henn Collins based his decision, as we have stated, on a different principle: although the document was made and published in England, he felt that he must consider what would have been the rights of the parties if the action had come before a Czechoslovakian Court. In *Hart v. Gumbach* (*supra*) the observations were *obiter*, and the position was, as it seems to us, essentially different. The action was brought before her Majesty's Supreme Court for China, between two British subjects both in the service of the Chinese Government, based on false representations alleged to have been made by the defendant in his official capacity in China. In that case, therefore, everything had happened in China, the country whose law it was suggested might be applied to the documents. Here everything happened in England. Having due regard to the exceptional position of the Czechoslovak Government we do not think that the principle of the comity of nations compels or entitles the Courts of this country to apply Czechoslovak law to acts done here in proceedings *in tort* between Czechoslovak citizens, that law giving a general protection in civil suits to acts done by officials which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out it would, in our opinion, have to be expressly provided for by legislation. We therefore decide that this document was not absolutely privileged.

There remains the question of qualified privilege, and, if that is established, of malice. In the first place it is necessary to be clear as to the relevance of Czechoslovak law. In our opinion the principles of English law are applicable to a document produced and published in England. In considering whether there was a duty on which a plea of qualified privilege can be based it is, of course, necessary to consider the position and duties of the defendant as an official of the Czechoslovak Government and the position of those to whom the document was published.

The defendant's action started as a result of the statement made by Corporal Kuna. The plaintiff, not being in the military forces, was outside the defendant's jurisdiction. But no official, as it seems to us, would be

justified in merely disregarding statements which suggested that a servant of the State had been guilty of disloyal action, if he honestly believed that they were or might be true. Counsel for the plaintiff was inclined to concede that, if the defendant had contented himself with passing on the original document to a proper authority, he could not have disputed that there would be a qualified privilege. He contended that what was done went beyond what privilege would protect. He submitted that the defendant had formulated charges, had himself initiated investigations, and passed on the result to the wrong authority. He said that the defendant, in a letter of March 22, 1944, had stated that he relied on an article in the Military Code of Procedure, which did not apply, and that in evidence he said that he had relied on a provision of the statute law, which did not cover what he had done.

These points have to be considered, but the general circumstances require to be clearly kept in mind. An official had information put before him alleging disloyalty and treason by another official who was under another department. Unless he had grounds for knowing that the allegations were false it was, in our opinion, clearly his duty to act. It was submitted for the plaintiff, first, that the defendant had exceeded his duty in having statements taken from a soldier who was referred to in the Kuna document, and later from other soldiers who, it was said, might have knowledge of the events in question. In his official capacity he was in a position to set in motion machinery for getting statements from soldiers. In our opinion he was justified in taking this course. The allegations were serious, and the defendant stated in the letter of March 22, 1944, already referred to, that there was at that time no department of the Ministry of the Interior dealing with State security.

The further statements might have supported, added to, or weakened the case as put forward in the original documents. Having got this material, it is said, he formulated charges in the document already referred to, of November 17, 1941, which he signed. In the statement of claim the various statements attached to that document take up some seventeen pages of fairly close typescript. It would seem clear that, in forwarding material of this kind to a higher authority, any official would summarize its effect. In our opinion this document is not, as was suggested, a formulation of charges which the defendant is putting forward on his own responsibility, but a summary of the charges made in the documents, with the addition of references to what the defendant regarded as the material sections of the criminal code. It was argued that the charges as formulated went beyond the evidence, including hearsay, of the statements. We are doubtful whether this is so, but, in any event, we are satisfied that it was an honest attempt to summarize the accusations. From the defendant's point of view these would fail to be considered by those to whom the document was sent in the light of any information which they already had and any further investigations which they chose to make.

Complaint was also made that the defendant had not made inquiries of other departments, including the Ministry of Foreign Affairs, where there would be the plaintiff's own reports as to his conduct, and, very likely, other information supporting his actions. The defendant, however, realized, quite rightly, that the plaintiff being a civilian it was not a case of which he could take charge. We have already stated our view as to the statements which he took from soldiers. He might well have been exceeding his duty if he had sought to carry out a wider investigation.

Looking at the matter in the light of the general principles of our law we do not regard either of these points as destroying the claim of privilege. A good deal of argument and cross examination was devoted to showing that the defendant had exceeded his statutory duties under Czechoslovak law. It was pointed out that he had no statutory duty to investigate charges and take statements except in cases where the charge under consideration was against a soldier. In his evidence, though not in a letter which he had previously written, he said that he acted under paragraph 12 of the Defence of the Republic Act. That paragraph makes it a criminal offence if any person who obtains knowledge in a credible manner that certain specified offences have been committed fails to report to authority. The specified offences include some, but by no means all, of the offences referred to in the document sued on. Counsel for the plaintiff, therefore, pointed out that this paragraph did not cover the defendant's action. He relied on the inconsistency between this evidence and the statements in the letter of March 22, 1944, previously referred to. It is obvious that the duty sufficient to support a plea of qualified privilege goes for wider than duties the breach of which is a crime. The evidence of the defendant was given through an interpreter, under considerable difficulties to counsel and, probably, to the witness. There may well have been some confusion in the witness's mind when he was asked under what "powers" he made his report. It may well be that the only duty enforceable by criminal sanction to which he could refer was the paragraph in question. The Court has, however, to have regard to all the circumstances in deciding whether there was a duty sufficient to support qualified privilege. The fact that he honestly thought that he was under a duty does not avail him; nor would a mistake as to the basis and extent of his duty, or as to the nature of the duty sufficient under our law to support a claim of privilege, be fatal, though it might be relevant on the question of malice.

In considering this question we have to apply English law, having due regard to the defendant's position and obligations as an official of the Czechoslovak Government. We have already dealt with the main grounds on which it was submitted for the plaintiff that the defendant exceeded the limits or abused the occasion of the alleged privilege. We have considered all the points put, including some which were more stressed on the issue of malice but may have some relevance to the present question.

Having regard, on the one hand, to the fact that the plaintiff was a civilian and, therefore, outside the defendant's official duties as a prosecutor, and on the other, to the defendant's position as a military officer holding a responsible position and bound to take action on the information put before him, we do not think that he did more than was his duty in the circumstances.

Counsel for the plaintiff took the further point that the defendant ought not to have sent the document to the Military Office or Military Chancellery of the President. We think that there is nothing in this point. The defendant had information that some of the matters dealt with had previously been reported to the President. It seems to us perfectly natural and proper that he, being himself a military officer, should have sent it as he did to the Military Chancellery of the President. In our view those to whom the document was sent had a common interest and duty with the defendant in the matters in question.

There remains the issue of malice. There was no suggestion of any personal ill-will extraneous to the actual acts which have been set out. Mr. Justice Henn Collins formulated the issue in this way: "Given the occasion, was the defendant using it in singleness of mind in pursuance of his duty, or was he not?" That, of course, is a question of fact. After reviewing the evidence he said: "First and last I have to ask myself whether the defendant was acting in good faith; and I am convinced that he was." The matter was re-argued before us. We do not think it necessary to deal with all the points in detail, some of which have already been dealt with when considering privilege. We will say a few words about one matter which was pressed on us. Much of the material is hearsay, and one document purporting to set out an earlier 'suspicion' of the intelligence service was said to be scandalous and irrelevant hearsay. Counsel for the plaintiff submitted as evidence of malice that the defendant had sent forward all these documents, and had not made a selection. We do not think that this affords any evidence of malice. We think that he was clearly right to forward the whole file. One may take as an example the intelligence report complained of and accept everything that counsel said about it. It was not suggested that the defendant had concocted it, nor, indeed, was he asked how it came into his possession. If higher authority in the course of its investigations became aware how groundless these suspicions were, it might well desire to investigate how they came to be put forward. It seems to us entirely consistent with the defendant's duty that he put forward everything which he had received. It would, of course, require strong reasons to induce us to differ from Mr. Justice Henn Collins, who saw the defendant and heard him, albeit through an interpreter, give his evidence. Having heard the arguments and considered the evidence we fully agree with his conclusion. In the result the Court is of opinion that the appeal should be dismissed.

THE SADO MARU *

GREAT BRITAIN; PROBATE, DIVORCE, AND ADMIRALTY

[December 6, 1946]

Prize Court—Cargo—Pre-war shipment—Japanese ship—War with Germany during voyage—Seizure of cargo as contraband of war destined for Hamburg and Rotterdam—Subsequent outbreak of war with Japan—Proceeds of sale—Sum retained in respect of freight payable to shipowner at destinations—Whether condemnable as prize—Claim by controller of enemy assets for compensation in lieu of freight.

Before the war with Germany in 1939 certain consignments of cargo were shipped on board the Japanese steamship *Sado Maru* for Hamburg and Rotterdam, freight being payable to the Japanese agents in terms of the bills of lading on delivery at the ports of destination. The war with Germany broke out during the voyage, the ship was arrested and searched by the Royal Navy, and the cargo was seized as contraband of war, the Japanese ship being permitted to proceed, as Japan was not at that time at war with Great Britain. The cargo was sold and the proceeds retained by the Admiralty marshal. Japan became a belligerent enemy in December, 1941, and in November, 1942, the proceeds of sale were condemned as lawful Prize to the Crown, the marshal retaining a sum for freight on the consignments, which would have been earned by the Japanese shipowners if the carriage had been completed. The proceeds from the Rotterdam consignment were afterwards released to the persons entitled except for a sum retained representing freight. The controller of the assets of the London branch of the shipowners claimed compensation in lieu of freight on all the consignments, contending that the original seizure was not of a hostile character.

Held, that it was not essential for the original seizure to be of a hostile character; that there was an implied condition that, in the event of hostilities and of the shipowners becoming an enemy, the right to freight would be condemnable as prize; that the money set aside in respect of freight from the released proceeds was condemnable to the Crown as lawful prize; and that no compensation in lieu of freight was claimable in respect of any of the goods.

The Fortuna ((1809) Edw. 56) referred to.

This was a claim for £2,267 3s. 10d. which arose out of an application by the Procurator-General who sought the condemnation as prize of the freight on certain consignments of cargo, shipped before the outbreak of war with Germany in 1939, in the Japanese steamship *Sado Maru* owned by the Nippon Yusen Kaisha.

* 63 *Times Law Reports* 63.

Mr. James Charteris Burleigh, an official appointed by the Board of Trade under the Trading with the Enemy Act, 1939, to control the assets of the London branch of the owners of the *Sado Maru*, claimed £2,267 3s. 10d. as compensation in lieu of freight on the ground that that sum would have been received as freight by the Japanese company on delivery of the goods in question at the bill of lading destinations.

The facts are fully set out in the judgment.

Lord Merriman, P., read the following judgment.—In this case the Crown seeks condemnation of the freight on ten consignments laden on board the Japanese ship *Sado Maru*, amounting to £2,267 3s. 10d. James Charteris Burleigh, the controller of the London branch of the Nippon Yusen Kabusiki Kaisya, the Japanese shipowners, has entered a claim for this freight on the ground that it would have been recovered and received by that branch after the goods had been carried to their destination. Strictly speaking, the claim is for compensation in lieu of the freight, which was payable in terms of the bills of lading on delivery at Hamburg or Rotterdam, as the case might be. The claim is based on the fact that this was an ordinary commercial shipment made before the outbreak of the recent war in Europe, and that, although that war had broken out when the ship herself was diverted and searched by the Royal Navy, and the goods in question seized in prize, the ship herself was not detained, but was promptly released as belonging to neutral owners and being herself innocent.

The goods were condemned in prize on November 19, 1942, as being contraband of war with an enemy destination, and therefore not protected by the Declaration of Paris, with the exception of a consignment of fatty acid which was the only parcel destined for Rotterdam and not Hamburg. This parcel, or rather the proceeds, for all these goods had in fact been sold and were represented in the hands of the marshal by the proceeds, had been released to the claimants who had satisfied the Procurator-General of their title, but the sum of £67 8s. 4d. in respect of the freight thereon was retained by the marshal for whom it might concern. Meanwhile, in December, 1941, Japan had become an enemy. It was expressly conceded, on behalf of the claimant, that no distinction need be drawn between the freight in respect of the cargo released, and that in respect of the cargoes condemned. The first question, therefore, is whether the Crown is entitled to condemnation of so much of the proceeds of these goods in the hands of the marshal as represents freight. The second question is whether, in any event, the present claimant, representing the London branch of the Japanese company, has any claim to these moneys. It has not been thought necessary to pursue the second question which, if the Crown is entitled to a decree of condemnation, inevitably became academic. Accordingly I have not been invited to read the affidavits or to investigate the documents on which the claim of the London branch, as such, is based.

The first question is of general importance. The claimant, by his counsel, has made it clear that his only anxiety is to discharge his duty as the controller appointed by the Board of Trade under the Trading with the Enemy Act, 1839, and to assist the Court in coming to a just decision, so that under section 3A (3) of that Act he may eventually make a proper distribution of the assets of the London branch.

The basis on which the Crown rests the claim for condemnation was stated by Mr. Nesbitt as follows: He admitted that, if Japan had remained neutral, compensation in of freight would have been payable in respect of these consignments, whether they were condemned or released, on the principle recognized in *The Fortuna* ((1809) Edw. 56), *The Prosper* ((1809) Edw. 72), and *The Juno* ([1916] P. 169), that, it being solely due to the incapacity of the cargo that the shipowner was prevented from effecting an entire execution of the contract of carriage, while he had done his utmost to carry it to its consummation, it was inequitable that the incapacity of the cargo should operate to the disadvantage of the ship. He submitted, however, that because Japan subsequently became a belligerent, the freight, being still in this country in the hands of the marshal, thereupon became liable to condemnation as good and lawful prize, as would the ship herself have been if she had not in fact proceeded on her voyage before Japan became a belligerent. I was told that this is a test case, possibly decisive of many similar cases. Accordingly, although I entertained no doubt in the course of the argument what my decision must be, I thought it advisable to put it into proper form.

Mr. Hodgson did not dispute that it is well settled prize law that, in certain circumstances, property in the hands of the marshal, including the right to receive freight or compensation in lieu thereof (which, to avoid circumlocution, I will hereafter refer to simply as freight), is liable to condemnation on the outbreak of hostilities if it belongs to an enemy subject. But he contended that this liability depends on the original seizure having a hostile character in relation to the particular property. The simplest illustration of a hostile seizure was, he submitted, the prohibition by Order in Council during a period of embargo in anticipation of actual hostilities, such as occurred during the Napoleonic wars, of the restoration by the Court to the owners, potentially belligerent, of ships or freight, or of the departure of the ships themselves. In the present case, so he contended, the seizure was directed against the cargo, and there was no hostile intention against the freight due to the admittedly innocent shipowners, and it was a mere accident that the cargoes or their proceeds had not been condemned, and the freight restored to the shipowners thereof, before Japan became a belligerent. This contention makes it necessary to examine some of the authorities on which Mr. Nesbitt relied. I have derived great advantage from a consideration of a treatise on *Prize Droits* in the form of a "Report to the Treasury on Droits of the Crown and of

Admiralty in Time of War," presented to the Treasury during the Crimean War by Mr. H. C. Rothery (who was registrar of the High Court of Admiralty from 1853 to 1878), revised and annotated in 1915 by Mr. E. S. Roscoe, the Admiralty registrar during the war of 1914-1918. The object of this treatise was to afford guidance to the Treasury with regard to the distribution of the proceeds of Droits, but it sets out, incidentally, the grounds of condemnation out of which these Droits arose; and this is its value for the present purpose, a value which is enhanced by the fact that it records the grants actually made to captors out of what would now be called the Prize Fund. Moreover, this treatise was referred to with marked approval by Sir Samuel Evans, P., in *The Roumanian* (31 *The Times* L. R. 111, at p. 113; [1915] P. 26, at p. 48).

I propose to begin with two cases, *The Prosper* (*supra*) and *The Fortuna* (*supra*) referred to in Mr. Rothery's treatise (at p. 86). I should say in passing that the reference to *The Fortuna* (*supra*) in the foot-note is inaccurate, the report in Edwards Reports obviously refers to a later voyage of this ship. To appreciate the full significance of these two cases for the present purpose it is necessary to bear in mind the following dates collected from (pp. 20 and 21) and the report of *The Prosper* (*supra*). Both vessels were Danish. Both were seized in 1807 on suspicion of carrying enemy property, and both were restored. The dates of seizure and release in the case of *The Fortuna* (*supra*) were July 13 and 27 respectively. In the case of *The Prosper* (*supra*) the dates do not appear. In each case, however, the question of the cargoes and freight had not been adjudicated at the time of the release of the ships. On September 2, 1807, an Order in Council was made placing an embargo on Danish property, and September 10, as appears from *The Prosper* (*supra*), an Order in Council directed the payment of all freight due to Danish subjects into the Admiralty Court. On November 4 war was declared with Denmark, and on December 18, the cargo in *The Fortuna* was condemned as lawful prize to the captors on payment of freight, which, as Mr. Rothery observes, "was in the cargo, but which belonged to the Danish owner of the ship," was condemned to the Crown as Danish property captured before hostilities. In the case of *The Prosper* (*supra*) the cargo proved to be Portuguese property and was ultimately restored as such. Nevertheless, it was restored subject to the payment of freight to the Crown, as succeeding to the rights of the enemy shipowners, and notwithstanding that the right to receive freight was a chose-in-action which the Danish shipowner was not in a position to enforce. It will be seen, therefore, that in each of these cases, though the ship herself had been restored, in *The Fortuna* (*supra*) certainly before either the embargo or the outbreak of hostilities, the freight was treated as still being in the hands of the marshal by virtue of the cargo in each case being still under adjudication, and became vested in the Crown by reason of the out-

break of hostilities, although in one case the cargo was condemned, and in the other it was restored.

The Trende Sodskende (also referred to in Mr. Rothery's treatise (p. 86)) illustrates the same point. In that case the vessel had been decreed to be restored. She had not left this country at the time of the embargo and was accordingly re-seized and ultimately condemned to the Crown as Danish property captured before hostilities. Meanwhile, the adjudication of the cargo had been in suspense, but it was subsequently condemned to the captors as enemy property, but the freight thereon was condemned to the Crown as Danish property captured before hostilities. The record of the grant made to the captors is extremely illuminating. They received nothing in respect of the ship, because she had been restored and afterwards re-seized to his Majesty's use, but "as the freight was not dependent on the ship, but was a thing reserved in judgment on the goods," ultimately condemned to the captors, the captors seemed to be entitled, so the King's Proctor reported, to a grant of one-fifth of the freight. It is only necessary to add that *The Prosper* (*supra*) was referred to with approval in *The Prinz Knud* (58 *The Times* L. R. 388; [1942] A. C. 684). It is worthy of note in passing that the preface to vol. 6, Christopher Robinson's Reports, sets out a list of cases under appeal to the Privy Council where the vessels were Prussian hostilities. In one case at least, that of *The Twee Gebroeders* ((1800) 3 Ch. Rob. 162), the Crown was appealing against a decree of restoration. I do not think that it is necessary to multiply examples. I will refer only to one other, *The Constantia Harlessen* ((1809) Edw. 232). This, like the case of *The Trende Sodskende* (*supra*), was a case in which the ship, before she was divested of her neutral character, had been captured and brought to Yarmouth, and freight was decreed to the Danish master by a Prize Court. But before the departure of the vessel the Danish hostilities broke out, and the ship was again seized and condemned to the Crown. Earlier in the voyage the cargo owners had advanced money on bottomry for certain necessary repairs to enable the voyage to proceed. In the circumstances this proved to be an advance against freight and not the subject of average. Accordingly, Lord Stowell held that, although bottomry bonds, generally speaking, are disallowed as the subject of a claim in prize, nevertheless, the owners of the ship and cargo, being entitled to set off against each other all deductions arising out of the immediate transaction, the Crown was obliged to accept the condemnation of the freight subject to the right of the cargo-owners to deduct the amount of the bottomry advances. In that case, although it is not expressly so stated, there appears to be no question of the cargo being liable to condemnation, seeing that the cargo-owners were reimbursed their advances; yet the Crown was entitled to condemnation of the freight subject to the reimbursement of advances, though the freight had originally been decreed to the Danish master while he was still a neutral.

The result, in my opinion, is that there is no foundation for imposing a condition that the original seizure of the freight itself, or of the goods in which the freight lies, must have been of a hostile character. But even if liability to condemnation on the subsequent outbreak of hostilities did depend on the intention at the time of seizure, I should still be of opinion that the seizure, although devoid of hostile intention in the first instance towards the particular subject-matter, as distinct from the rest of the property seized, would be subject to the implied condition that the intention might become hostile if the owner of the property became a belligerent enemy while the property itself remained in the custody of the marshal.

I hold that the sums in question are condemnable to the Crown as good and lawful prize. The Procurator-General does not ask for costs. The decree of condemnation, therefore, will be without costs.

[Solicitors—Treasury Solicitor; Messrs. Simmons and Simmons.]

BOOK REVIEWS AND NOTES

Reconocimiento de Gobiernos. By Eduardo Jimenez de Arechaga (h.). Montevideo: Biblioteca de Publicaciones Oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de Montevideo; 1947. Pp. 376.

There are few questions of international law upon which a monograph such as the one before us could be more timely. Again and again within recent years the international community has been called upon to decide whether a new government coming into power by methods in violation of constitutional procedures should be recognized as entitled to speak in the name of the state and be made responsible for its obligations. The problem is admittedly a complicated one, involving issues which cross the border line between the internal independence of the state and its obligations as a member of the international community. Professor Arechaga's volume examines with great care the various elements that enter into the problem of recognition and his discussion of them should make clear the need of defining more exactly the principles governing recognition and of establishing more effective procedures for their application in a given case.

In an introductory chapter the author surveys the various changes of government which give rise to the problem of recognition and presents the question whether the procedure of recognition should be maintained. Chapter I deals with the juridical nature of recognition; the conclusion is reached that recognition is not a matter for the arbitrary decision of the individual state but is controlled by principles of law which create on the part of third states a legal obligation to recognize a new government when the prescribed conditions have been met.

Turning to the problem of the "effectiveness" [*efectividad*] of the new government, the author points out the origin of this condition of recognition, what it means in practice, and how it is to be tested. The government must be a stable one; its authority must be respected. But constitutional forms need not be observed; and it is not necessary that the new government be subsequently approved either by vote of the people or of a constituent assembly. The test here is an objective one. The inquiry which third states must make into the internal conditions of the state is not "intervention" because it is imposed upon them as the necessary means of determining whether the new government actually possesses the authority it claims to possess.

With respect to the "responsibility" of the new government, its willingness to fulfill the obligations of the state, the author points out that while the observance of the obligations of the state might be implied from the

fact that the new government claims to represent the state, nevertheless the practice has grown up of requiring a specific declaration by the new government to that effect. But it is important, the author insists, that this prerequisite of recognition be not used as a "sanction," that is, as a means of obtaining special concessions rather than of insuring the fulfillment of international obligations. No conditions or terms may be imposed, the author contends, which are not strictly within the limits of international law.

The Chapter dealing with the conditions which should not be made a condition of recognition supplements effectively the discussion of the accepted prerequisites. Dynastic legitimacy is clearly to be excluded, as is the "constitutionalism" of President Wilson. Then follows a careful study of recognition as a form of intervention, with special reference to what the author calls "democratic legitimacy," in the sense of the requirement of popular approval prior, or it may be subsequent, to recognition. To the reviewer the author seems at times to stress too heavily the matter of intervention. Without questioning the general principle that each state has the right to choose its own form of government, it would seem that a minimum of decent conduct may be expected of a new government as a condition of recognition. The proclamation of respect for human rights and fundamental freedoms contained in the Charter of the United Nations would now seem to be sufficient basis for refusing recognition to a new government which should establish a regime on the basis of force and secure the acquiescence of the people by methods of intimidation and suppression.

Succeeding chapters deal with the "Organization of Recognition," whether as the result of consultation or by concerted action; with the "Form of Recognition," whether express or implied, simple or conditional, *de jure* or *de facto*; with "Competence to Recognize"; and with the "Effects of Recognition," the last chapter including a detailed examination of the status of unrecognized governments before the courts of foreign states.

Professor Arechaga is to be congratulated upon the careful and scholarly manner in which he has analyzed his subject and upon the fairness which he has shown in presenting the conflicting points of view. His volume, with its wealth of citations and references, is a valuable contribution to the study of a question which urgently needs to be brought under more specific rules of law.

C. G. FENWICK

Of the Board of Editors

The Grotius Society. Transactions for the Year 1944. Problems of Peace and War (Volume 30). London: Longmans, Green; 1945. Pp. 287.

As usual, these Grotius Society papers and discussions are of great interest to the student of international law. They are divided into two

parts: (1) Proceedings of the International Law Conference of 1944; (2) Papers read before the Grotius Society in the year 1944. In Part I the first paper, by Sir Arnold McNair, gives us the latest authoritative statement of the position of British Courts in case of conflict between international law and municipal law. While the American jurist may find here little that is new, several original ideas emerge from the discussion of the paper, and jurists from the United States, Belgium, The Netherlands, France, Poland, Norway, and Austria give brief analyses of the law in their respective countries on this difficult and important question.

Dr. Vladimir R. Idelson, a champion of individual rights, traces the emerging recognition of the individual as an international person, and advocates the grant to him of a right to plead in international courts. The difficulties in the way of such a solution are stressed by other speakers, and Professor Lauterpacht remarks that even as a mere object of international law the individual receives very inadequate protection. Dr. C. John Colombos' paper on the organization and functions of the future international authority is now chiefly of historical interest, but one matter stressed by him and others is well worth remembering today, namely, that without a just peace any world organization stands little chance of attaining its goal. In his presidential address Sir Cecil Hurst goes back to fundamentals, considering the nature of the state, the basic character and role of international law, and the explanation of its binding force.

In Part II Mr. Hugh McKinnon Wood spoke on "The Legal Relation between Individuals and a World Organization of States," dealing mainly with the status of staff members of the world organization, notably the matter of their independence and their immunities. Dr. Clive M. Schmitthoff, in his paper "The International Corporation," after surveying the precedents and proposals (B.I.S., Inter-American Bank, UNRRA, and others), advocates the creation of an international corporation, with special legal personality, to facilitate the integration of the various national economies into an ordered economic design, thus replacing international cartels and other combinations which regulated many world markets in the past. The paper deals with the legal rather than the economic problems involved in the creation of such an institution. Professor Lawrence Preuss deals with the American conception of jurisdiction with respect to conflicts of law on crime. After a doctrinal discussion followed by a review of legislation and leading cases, he concludes that the conception of the strict territoriality of American criminal law is inaccurate, for there is discernible in our law a marked extension of jurisdiction over crimes which contain extraterritorial elements.

In his paper "The Organization of Post-War Peace," Wing Commander W. J. Heyting maintains that war cannot be prevented by alliances, the League of Nations method, nor by pacifism, appeasement, or disarmament. Sanctions, too, have failed to prevent conflict. Thus, in his view, the only

way to prevent future wars is through the provision for overwhelming force, a plan for which he presents, but believes it should be coupled with an "Industrial Intelligence Organization" to report on unauthorized preparations for war. Dr. Egon Schwelb discusses legislation for enemy-occupied territory in the British Empire, showing that the British entertained no doubt of their power to legislate notwithstanding enemy occupations. He shows, by numerous examples taken from the present war, that they never deviated from the doctrine that the local legal order of occupied territory remains in force as it existed at the date of occupation, as amended by legislation passed by the legitimate sovereign.

In the final paper Dr. Samuel Dobrin discusses "Soviet Federalism and the Principle of Double Subordination," a problem arising from the amendment of the USSR Constitution in February, 1944, with a view to giving the Union Republics some standing in international law. In the author's view the result is a topsy-turvy arrangement which fails utterly to accomplish its object.

On the one hand . . . the rights of the Union Republics in international affairs have been made very wide, really unlimited, comprising, as they do, direct relations with foreign states, the conclusion of international agreements . . . and the exchange of diplomats and consular representatives with foreign Powers. On the other hand, the main instrument of the Union Republics for the exercise by them of their new rights is to be in every Republic a Union-Republican Commissariat for Foreign Affairs standing to the Union-Republican Commissariat for Foreign Affairs of the Union as a subordinate to a superior.

JOHN B. WHITTON

Of the Board of Editors

International Contracts and the Antitrust Laws. By Harry A. Toulmin, Jr. Cincinnati: W. H. Anderson; 1947. Pp. xviii; 1068. Index. \$15.00.

This volume is not a work of profound legal scholarship. Nor is its practical value to a lawyer obvious. The 18 points to be observed in drafting an international contract (pp. v-viii) would doubtless occur to the mind of any lawyer entrusted with such business, even if he had never seen this book. The same is true of the rather obvious generalizations derived from a review of recent cases which covers approximately 25 pages. These include such unassailable axioms as that "The law of international private agreements must therefore be viewed from the standpoint of international economics as well as from the legal standpoint" (p. 62); that the draftsman should not be oblivious of the question "of what is best for the interest of the United States, both economically and as a matter of national defense" (pp. 64-65); that it is wise to "look at these international private

agreements . . . from the point of view of a country "jury" and to give consideration also to the laws and policies of the United States government (p. v). The author further points out that Canada, too, has anti-trust laws (pp. 187-212).

Similarly, while a convenient compilation of statutory provisions is offered in the Appendix (pp. 920-1045), it is likely that a practicing lawyer in this field would have these (except perhaps the Canadian statutes) available in the U. S. Code Annotated or in *The Federal Antitrust Laws with Summary of Cases Instituted by the United States* issued by Commerce Clearing House, Inc. The author's comments on the statutory materials scarcely serve as more than index thereto (pp. 1-36, 44, 55-62).

The bulk of the volume consists of testimony given by attorneys of the Antitrust Division at hearings before the Senate Committee on Patents, 77th Cong., 2d Sess., on S. 2302 (pp. 72-127); and specimens of cartel agreements brought to light by the Division's investigations (pp. 216-312), as well as of briefs (pp. 865-895), indictments (pp. 313-376), and civil complaints prepared by the Division, together with specimens of consent decrees entered by the courts, in a number of antitrust cases (pp. 377-851).

Doubtless it should be gratifying to members of the Antitrust Division to learn that their literary productions in the course of official business are saleable *verbatim et literatim* at \$15.00 per volume, as well as suitable for presentation to the public eye in a more dramatized version by Robert R. Young in his full page advertisements regarding railroad slow-down agreements. This reviewer, however, would have preferred a treatment of this material using a technique somewhere between those extremes: for example, a commentary on these cases written in the manner of Thurman Arnold's *Bottlenecks of Business* (1940). For there is no doubt that an interesting account could be written about some of the agreements Toulmin sets forth: for example, how tungsten carbide, manufactured at a cost of \$8 per pound, was sold at an established price of \$453 by agreement with Krupp (pp. 115, 123); or how everlasting matches were suppressed (p. 172); or how the price of radium was kept at \$170,000 per gram until Canadian competition brought it down to \$25,000 (p. 198); or of how restraints of trade operated with respect to hormones, fertilizer, dyestuffs, metals, explosives, synthetic rubber, electrical and television equipment, and many other commodities (pp. 560, 50, 132, 143, 148, 183, 380, 772, 782).

But perhaps, instead of a textbook useful to practicing lawyers or attracting the interest of the general reader, the author's purpose was to prepare a collection of materials admirably suited for a modified "case method" of instruction in the subject treated. His volume differs from the usual type of case book in that, instead of judicial opinions, the student is taught to use indictments, complaints, decrees, and contracts as the basis of his study. The careful perusal of these original documents, without

the intrusion of comment or analysis by the author, might well prove as profitable and stimulating to the neophyte draftsman of international contracts as Langdell's method was to the fledgling common law lawyer.

EDWARD DUMBAULD

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Washington, D. C.

De La Conclusion des Traités Internationaux: Etude de droit constitutionnel comparé et de droit international. By Paul de Visscher. Brussels: Emile Bruylant; 1943. Pp. 294.

This study deals with a much debated problem in international and municipal law—the international validity of constitutional limitations upon the treaty-making power. The author modestly suggests that he merely wishes to make a small contribution toward the solution of the problem and then sets about his task in a very systematic and objective manner. He apparently has no *a priori* convictions. He has no particular doctrine to prove. He merely starts with the well-known fact that the rise of representative government has resulted in a rather embarrassing split of authority, in many countries at least, between the chief of state and the legislative branch of government with respect to treaty-making. Until the end of the eighteenth century the treaty-making power was vested almost exclusively in the chief of state. Today, while the chief executive still speaks for his state in its dealings with other countries, the treaty-making power is beset by a whole series of constitutional limitations designed to safeguard the prerogatives of the legislative assembly. Given this situation what happens if the chief of state ratifies a treaty in violation of a constitutional provision limiting his authority? This is the specific question to which the writer turns his attention. Part I of the book is devoted to a rather detailed examination of the constitutional procedures found in various countries. Part II deals with diplomatic instruments such as full-powers, instruments of ratification, and the clauses relating to ratification normally found in treaties and conventions. In Part III the author turns to the practice of nations examining certain international incidents including arbitral awards and the decisions of the Permanent Court of International Justice. In Part IV he looks at the problem from the theoretical point of view with particular reference to the monist and dualist schools of thought. Finally in Part V he pulls the threads of earlier chapters together and presents his own interpretation. Given the existence of far more important virgin fields which the international lawyer must help cultivate if world peace is to be preserved, some readers will be inclined to argue that it is a waste of time to work over ground now that

* Views here expressed are those of the author, and not necessarily those of any governmental department.

has already been plowed many times in the past. Nevertheless, the writer has turned out a scholarly monograph which deserves the attention of serious students of international law.

FRANCIS O. WILCOX

Washington, D. C.

Full Powers and Ratification: A Study in the Development of Treaty-Making Procedure. By J. Mervyn Jones. Cambridge: Cambridge University Press; 1946. Pp. xv, 182.

In view of the various studies which have appeared during the past twenty years relating to the problem of ratification some students of international relations may wonder why the present volume is necessary. It is true that the author has unearthed no new problems of world-shaking importance. It is true too that three of the nine chapters included in the book have already been printed in this JOURNAL or in the *British Yearbook of International Law*. But on the whole the reader is impressed by the facts that the work is scholarly, is well written and closely reasoned, and that the author has used both his primary and secondary sources exceedingly well. Moreover, in applying an essentially historical approach to an important subject which has heretofore been treated mainly from the point of view of doctrine, he has made an interesting and worth-while contribution to the study of contemporary diplomacy.

The book is concerned primarily with the procedure of treaty-making—with the methods by which international agreements are concluded. It is essentially, therefore, an analysis of the main changes which have taken place during the last three hundred years in the practice relating to the conclusion of treaties from the relatively simple transactions of chiefs of state of the seventeenth century to the more complex agreements of the modern state system. The work is divided into two main parts. Part I deals with the history and importance of full-powers and the changing nature of the full-power in view of recent developments in modern diplomacy. Part II deals with the meaning, nature, form, and effect of ratification and the development of the doctrine and practice relating to ratification. Following this analysis there appears a chapter on the constitutional limitations on the treaty-making power. An appendix of selected documents illustrative of the arguments developed in the book makes the volume more useful.

Throughout the work much attention is given to certain modern developments in the field of diplomacy. Thus the new doctrines of public law growing out of the French Revolution and the resultant growth of congressional government in the world have changed considerably the meaning and use of the full-power and the nature of the ratification process. Similarly, such developments as the great increase in the number of international conferences and the use of inter-governmental and inter-depart-

mental agreements have had their impact. The author analyzes these developments and places them in their proper historical perspective.

Very often students of international affairs are inclined to become so concerned with the day-to-day functioning of diplomacy that they fail to comprehend the true significance and meaning of the institutions and the procedures which the modern state system has evolved for the conduct of foreign affairs. This is the kind of book that will help us avoid such pitfalls.

FRANCIS O. WILCOX

Washington, D. C.

Le Contrôle International de l'Exécution des Conventions Collectives.

By Paul Berthoud. Geneva: Imprimerie de Saint-Gervais; 1946. Pp. 359.

Dr. Berthoud's study of international control of the execution of multi-partite conventions is a conscientious attempt to draw some general conclusions from a detailed survey of the provisions and proposals for such control in five selected fields—minorities, mandates, labor, narcotics, and disarmament. The final chapter draws the threads together and presents a classification and critical comparison of the elements of international control—its functions, organs, and instruments. Under "functions" the author distinguishes between occasional and regular ("permanent") control. Occasional control is that which is applied only on particular occasions, as when violations of a convention are alleged or suspected. Regular control consists of measures of supervision which are constantly or periodically applied irrespective of the existence of specific grounds for suspecting that violations have occurred or may occur. Another distinction made by the author is between "technical and judicial" control on one hand and "political" control on the other. Under "organs of control" the composition of the organs and the mode of appointment of their members are discussed. Under "instruments of control" the author considers various devices, such as periodic reports, questionnaires, petitions, complaints, and investigations, which have been used or proposed for assuring the execution of conventions. The author makes many sensible observations with respect to the effectiveness of the various elements of control.

In recent decades hundreds of books have attempted to deal with various problems of international administration. All too often the authors seem to assume that the paper work of the organization concerned adequately portrays the realities of the problems. Dr. Berthoud has not entirely escaped this tendency. In large part his conclusions are based on the provisions of the conventions and discussions at conferences supplemented by theoretical considerations rather than on concrete data as to the results actually obtained. It is not without significance that he devotes almost as much space to the abortive proposals for the control of disarmament as

to the relatively successful organization for the control of narcotics. His theoretical and formalistic approach does not permit him to see, for instance, that the participation of national administrative officials in international control organs often leads to better coördination of execution of the conventions on the national level. On the other hand, Dr. Berthoud appreciates the practical importance of the difference between essentially non-political objects of control, such as narcotics, and political objects such as minorities, mandates, and disarmament. Dr. Berthoud's approach, however, precludes any fruitful consideration of the real nature of this difference and of the underlying obstacles to effective systems of international control. With all its shortcomings, this book is of considerable interest at this time; its convenient and logical classification of the elements of control is particularly useful.

OLIVER J. LISSITZYN

Columbia University

Interpretations of Modern Legal Philosophies. Essays in Honor of Roscoe Pound. Edited by Paul Sayre. New York: Oxford; 1947. Pp. ix, 807. \$12.50.

Since it is only intended that the reviewer should comment here on those portions of this book that concern international law, it is obvious that such a treatment will give an inadequate evaluation of the book as a whole. A mere glance at the names of the thirty-eight contributors and the subjects upon which they write is impressive. It is a tribute of high quality to Dean Pound whose position in legal thought and education is so significant. The old world as well as the new, the Continental as well as the Anglo-American legal system, are represented here by outstanding exponents. While a few are short general essays, many are carefully documented with numerous notes and citations. An illustration of the latter is Jerome Frank's fifty page unconventional sketch of Blackstone with three hundred and sixty-five footnotes. In a different framework is Hans Kelsen's "The Metamorphoses of the Idea of Justice" primarily based upon the *Nicomachean Ethics*. From Rome comes Dr. Del Vecchio's thoughtful "Truth and Untruth in Morals and Law." This is but to name a few of the many scholars who have joined authorship in the volume.

Of particular interest to the student of international law is Lord Wright's essay on "National Law and International Law" with which the book closes. The point of view espoused by Lord Wright is the subject of much controversy among scholars and it is not clear that the author has advanced our thinking in his presentation. Briefly his question is "whether there can properly be said to be an international criminal law and what is its legal basis and by what machinery it can be enforced." It is not surprising that the London charter followed at the Nuremberg trials underlies the argument of Lord Wright, but to rest his case upon convention and

treaties—particularly the Hague Convention of 1907—is an attempt to create within international law a common law system of criminal offenses, a postulate which remains to be proved. The recent trial of war criminals is a precedent but hardly more than that, and though it may point the way it is somewhat forced to attempt to link such application to natural law and reach the conclusion that there is a body of such common law in international law.

In Professor Goodhart's essay on "An Apology for Jurisprudence" some attention is given to the requirements which international law must meet if it is to be regarded as law in the same sense as national law. The author first considers the definitions of law as given by Austin, Dicey, Gray, and others of the "state law school," and then of Kelsen. As to the last mentioned it is rather unexpected to find Professor Goodhart observing that "This view that war is a sanction for international law will come as a surprise to many persons." Having criticized other definitions, the author proceeds to state his own—that law is "a rule of human conduct which is recognized as being obligatory." International law would thus be obligatory because of membership in an international society. From this he proceeds to enumerate the essentials required to regard international law as law. These he states to be the organization of an international society, the recognition of the obligatory character of its rules under all circumstances, the recognition that violation of its rules in regard to one member is a wrong against all and finally that the rules must be concerned with basic principles.

Readers of this JOURNAL may be particularly interested in two other essays in the volume. Dr. Chroust, a former Research Fellow of Harvard Law School, presents a thoughtful essay "On the Nature of Natural Law." The paper "On the Everlasting Values of the Spanish School of Natural Law" is a very clear and sympathetic treatment by Dr. Alfredo Mendizabal of the great scholar Francisco de Vitoria.

Considering the volume as a whole, one is presented here with a compilation of high scholarship and catholicity of interest so characteristic of the man to whom it pays tribute.

LIONEL H. LAING

University of Michigan

Protection of Foreign Interests. By William McHenry Franklin. Washington: Government Printing Office; 1946 (Department of State Publication No. 2693). Pp. vii, 328. \$1.50.

This is the sort of book which students will welcome from the Department of State, and the sort which would appear to be extremely useful to Foreign Service officers. In every field of knowledge there are odd corners which have never been well explored and one of these is the practice by which the diplomatic agents of one state stationed in a second state protect

the interests of a third state within the second. In its traditional position as a neutral the United States has had a great deal of experience in such activity. Mr. Franklin has drawn his materials from the files of the Department and has thereby cleared up for students, as well as for administrators, one of the odd corners of diplomatic practice. Many of our diplomats during the past third of a century have doubtless wished for such an exposition as this.

Mr. Franklin distinguishes between "good officers" or "representation" and "protection" as the proper term to use, and justifies the latter. He devotes three chapters to historical development and derives therefrom ten basic principles which may be summarized as follows: absence of representation by the protected power is a requisite; an official request (except in extreme emergencies) is needed; the government and not the official grants the protection; the consent of the local power is required; resort to foreign protection is not necessarily a severance of relations; protecting officials do not become officials of the protected power; nationals of the protected power are not assimilated to nationals of the protecting power; the presence of a protecting power does not alter the responsibility of the local state toward aliens; a protecting official should not act contrary to the interests of his own government; and protection is given to the interests of a state rather than to those of a government. Two more chapters deal with Administrative Procedures and Specific Functions, and eleven appendices give a great deal of information as to actual practice.

It is a compact and authoritative little book. The chief criticism which this reviewer has to offer is that it should have been longer; its brevity is doubtless explained by the small amount of money which the Department has for such publications. The author could doubtless have contributed answers to other questions, such as the right of a conquering power to take over from protecting powers within the conquered area the files and assets of the protected power. Does this depend upon the terms of peace? Perhaps articles could be written in the *Department of State Bulletin* in further development, and in accord with the praiseworthy recent practice of the *Bulletin*. The book itself, however, is to be praised as a valuable illumination of what has been a rather dim corner.

CLYDE EAGLETON

Of the Board of Editors

Papers Relating to the Foreign Relations of the United States, 1931.

Washington, D. C.: Government Printing Office; 1946. Vol. I, pp. vii, 961. \$2.75; Vol. II, pp. cxvi, 1082. \$3.00; Vol. III, pp. cviii, 1091. \$2.75. Indices.

The year 1931 covered by these volumes was characterized by a worsening of the economic situation of Europe and by Japan's thrust into Man-

churia. The State Department was endeavoring by various means to avoid further involvement in foreign controversies. Volume I is taken up very largely with economic questions growing out of the world-wide depression and the endeavor to arrest further degeneration of economic conditions in Europe. On June 21, 1931, President Hoover proposed a moratorium on the inter-governmental debts growing out of the peace settlement of 1919. This was followed by long and difficult negotiations with the representatives of other nations, especially of France and Great Britain, whose economy would be affected by changes in the disposition of German reparations. The volume contains numerous memoranda, exchanges of notes and other communications relating to these negotiations.

The year 1931 was also characterized by political unrest and revolutions in the Latin American area. These events are reflected in the correspondence contained in the last portion of Volume I and in the first half of Volume II.

Volume III deals mainly with the Far Eastern crisis following the occupation of Manchuria by Japan and the beginning of Japanese military aggression. The volume also contains the record of the negotiations for the relinquishment of extraterritorial rights in China by the United States and other powers.

While much of the material is not directly within the field of international law, certain legal aspects of our foreign relations are not neglected. A ruling of the Department going back to 1925 when Mr. Kellogg was Secretary, is quoted in full, showing that the Department intends to "give special attention to the publication of important decisions made by the Department relating to international law, with a view to making available for general study and use the annual contributions of the Department to this important branch of jurisprudence" (Volume I, pp. iii and iv). An example of this kind of material is furnished by the record of the negotiations for the relinquishment of extraterritoriality in China, although the final acts came later. Another example is found in Volume I (pp. 821-824). On November 13, 1930, the representative of Czechoslovakia in Washington requested the Secretary of State to supply information as to the extent of the immunity of a foreign state before the courts of the United States and also as to whether diplomatic missions of the United States in foreign countries are entitled to represent their own government before the courts of such foreign states. No facts are given upon which the inquiry was based. The Secretary of State responded briefly saying that foreign states are immune from suit although there is no provision to that effect in the Constitution or in any Federal statute. The Secretary cited a few cases decided in our Federal courts but none more recent than 1902. Recent litigation has shown that such immunity is not unlimited and the problem will some day become acute. It has long ceased to be of mere academic interest.

The reviewer may perhaps be permitted to suggest that the usefulness of volumes such as these would be greatly enhanced if a statement relating to the final result of the negotiations upon each general subject-matter would accompany the collections of documents. This was done with notable success in Volume XIII of the Paris Peace Conference Series recently published.

ARTHUR K. KUHN

Of the Board of Editors

American Military Government: Its Organization and Policies. By Hajo Holborn. Washington: Infantry Journal Press; 1947. Pp. xiv, 244. Maps. Appendix. Index. \$3.50.

Professor Holborn has made a valuable contribution to the very inadequate literature on the subject treated, by producing the first work to come out of World War II dealing with the problems encountered by our Government in the formulation of military government policy and its application in occupied areas throughout the world. Although the main text of the book contains only 104 pages the author has managed, in a pleasant and skillful manner, to present a fairly complete and adequate picture of top-level policy formulation and planning with respect to the American occupation of Italy, Germany, Austria, Japan, and Korea. As the title implies, the book is confined to policy and planning only, and no extensive mention is made of administration. The major political documents on American and Allied Military Government, some of which have not been heretofore published, are brought together in the Appendix.

Although the author states that he "hopes that this book will be found helpful by all those who want to inform themselves about the management of American military government and its general policies during and since the War," one finishes this book with a feeling of bewilderment and confusion which is definitely not the author's fault. It is rather a tribute to the skill and clarity with which Dr. Holborn, formerly in charge of civil affairs and military government for the Office of Strategic Services, has presented the picture of the gradual evolution of military government policy from a state of organized chaos to its present state of coordinated confusion, which is largely due to the result of Russia's refusal to co-operate in carrying out the terms of the Potsdam Protocol. This technical volume will interest the general reader only slightly, but serve as a reference work in policy formation; actual field operations are given little attention here.

As early as 1941 the War Department realized that, as a result of the unprecedented scale of modern warfare and the necessity for waging all military campaigns in friendly territories before the Allied armies could reach enemy soil, arrangements would have to be made to keep the civilian

populations from interfering with military operations. Additional plans would have to be made with respect to these matters in enemy territory and complete Allied administrations would be required to replace the defunct governments in Japan and Germany. Of prime importance during combat was the protection of the health and security of the Allied forces, which depended to a large measure upon the prevention of outbreaks of disease, food riots and other disturbances. After surrender new problems of rebuilding friendly administrations and establishing new governments in enemy territories would have to be met. Thus it was realized that civil affairs (in liberated areas) and military government (in enemy areas) operations were bound to assume significant roles and were an essential contributory requisite for the successful conduct of military operations, as well as peace negotiations, and, as such, called for special planning and preparation. As pointed out by the author, "Civil affairs activities were undertaken to enhance the successful accomplishment of military campaigns, but were no less motivated by the earnest desire to conduct a civilized war from which it was felt an easier path would lead to an enduring peace."

During 1942 various agencies concerned themselves with civil affairs and military government planning. It was not until April, 1943, however, that the War Department established the Civil Affairs Division with "primary function to inform and advise the Secretary of War in regard to all matters within the purview of the War Department, other than those of a strictly military nature, in areas occupied as a result of military operations." Thus for the first time since our entry into the war did civil affairs receive any representation on the highest staff and War Department level which it required in order to achieve the coördination with other agencies so necessary for successful operations.

Considerable chaos and confusion continued, due to a continued lack of coördination and proper liaison between the leading policy-making agencies, until, December, 1944, when SWNCC (State-War-Navy Coordinating Committee) was established as a much-needed working link between the armed services and those responsible for foreign policy. This agency is still in operation and is at present functioning smoothly and efficiently.

Further difficulties were encountered in connection with difficult combined (United States and Great Britain), tripartite (British, United States and Soviet Russia), and quadripartite (Great Britain, France, United States and Soviet Russia) negotiations with respect to overall policy.

Throughout its period of operations our military government has been hampered by lack of competent personnel, an unfavorable press, and the ever-present lack of a definite foreign policy. Added to this is the persistent hope of the War Department that a civilian agency will be estab-

lished to relieve it of its burdens. If chaos and confusion have arisen in military government field operations, they have merely reflected the lack of coördinated policy at the top levels, as a result of which military government field personnel in the various theaters of operation have had to adopt a trial and error method and more or less shift for themselves.

American military government should be judged by its success or failure in achieving the political objectives of the United States and it should not be forgotten that in attempting to achieve these objectives American policies have to be harmonized with those of other powers and the application of these objectives in the field has to take into account the attitudes of officers representing other nations.

That military government now plays an important part in American foreign relations and constitutes a significant effort toward the achievement of a secure foundation of peace has been clearly borne out by the events of the past year. It has therefore been a unique test of American ability for constructive leadership in international administration and in the formulation of policies designed to continue the coöperation of the Allies in periods of peace.

ELI E. NOBLEMAN

Department of Justice
Washington, D. C.

American Military Government in Germany. By Harold Zink. New York: Macmillan; 1947. Pp. 272. Maps. Charts. Index. \$4.00.

When our Army and Navy were establishing schools of military government during the war one serious problem was caused by the lack of adequate texts. This was due mainly to the fact that cases of military occupation by our military forces had been rare and brief. The gap in adequate works on the subject is rapidly being filled with the appearance of excellent treatises on our military occupations undertaken during and since World War II. The present study of our occupation in Germany is one of the best to appear so far. True, since the job promises to be a long one, and the situation in Germany is still in full development, Professor Zink's work is by no means definitive; it should rather be considered in the nature of an interim report.

As such it is admirable. Trained in political science and government, and rich in experience gained with our army and military government in Europe, where he was editor of the *Handbook for Military Government in Germany*, the author gives us an expert and critical analysis of this whole vital experiment. The book is lively, comprehensive, and authoritative. Professor Zink does not pull his punches; at the same time he almost leans over backward in his effort to be fair and impartial to all concerned. Of course the specialist in international law will find here little of direct in-

terest; there is not a word in the book on the international law of military government. But it gives us the facts and criticism which the student of the law, and the jurist who frames it, can neglect only at their peril.

So much important material is contained in this book that a reviewer finds it difficult to do it justice. One can find here little to criticize, although some students of Germany will not agree with the assertion that "the experience of the first World War in Germany seems to indicate that it is more important to fill key positions with the strongest available men than it is to get rid of followers of the conquered regime, important as the latter may be" (p. 145). Also it seems that the author might have spared a few words of commendation for the United States Constabulary, trained by General Harmon to be a mobile force of disciplined and competent men to keep order in our zone.

According to Professor Zink an unprecedented amount of preparation was made both in Washington and in Europe for our task of military government. This included both the drafting of blueprints and the training of specialists. Too much emphasis, however, was placed on the combat phase of military government, to the neglect of the more difficult and more important post-combat phases. Furthermore, much of the value of planning was lost through divided counsel and because of uncertainty as to means and ends. Also many directives failed to reach their destination, or were modified or even completely disregarded by army commanders enjoying wartime autonomy long after V-E Day. Many officers, after months of intensive special training, were never used in military government at all, were released when their points came up, or were permitted to resign when discouraged over various defects in our policy. "At a very critical period American military government in Germany found itself without adequate personnel" (p. 37). Too many positions of high responsibility were given to army brass who, while sincere, had no qualifications for the task, or were unsuitable for other reasons.

Some of the most important divisions were woefully understaffed; this was particularly true of the sections dealing with education and democratization. In fact the author finds that these divisions have accomplished wonders in the light of the many extraordinary difficulties they had to face. In the matter of democratization (p. 185),

Too much emphasis was placed on the holding of elections, the framing of constitutions and laws, the setting up of machinery, and other more or less mechanical techniques. Too little attention was given to cultivating Germans disposed to support a democratic system in Germany, filling public offices with able Germans who could be expected to fight for the democratic cause during critical periods of attack in the future, and educating the Germans as to the meaning of representative democracy.

Denazification, which received the greatest attention from both military government officers and the American public, was more comprehensive and energetic in our zone than in any of the others. But our success in this matter was compromised by shifting policies and lack of coordination. In fact "at one time during the early Summer of 1945 the American military government detachments were operating under four different denazification directives" (p. 137). The largest American division, however, was by all odds that dealing with the economic program. Here again division of authority, a vague and changing policy, delay in making up our minds as to the amount of industrialization to be permitted (here, as elsewhere, the Morgenthau school exercised a harmful influence), and above all the unexpected failure to achieve the economic unification of Germany envisaged at Potsdam, combined to prevent the attainment of our economic objectives.

In sum, the American occupation policy has failed to meet the crucial test, namely, "not whether the United States has policies but whether it has a *clear-cut and reasonably well integrated set of plans based on a carefully considered and firmly grounded policy decided at the highest political level*" (p. 201; italics as in text).

But it would be an exaggeration to say that our action in Germany has been a complete failure. We have chosen to learn the hard way—through trial and error (p. 205), and we have "finally apparently achieved a fair measure of success in this undertaking" (p. 208). Nor is it too late to undertake the reforms which, in the author's view, are necessary if our program is not to fail. These reforms are (p. 262 ff.):

(1) An organization perfected by Washington to carry out the American policy of reeducation and democratization;

(2) The development of an awareness and interest on the part of the American people;

(3) A definite commitment to remain in Germany for at least another ten years;

(4) The establishment, at the earliest possible moment, of a civil administration to direct American reconstruction efforts in Germany; for this purpose, a separate agency, but of necessity assured of adequate financial support by Congress;

(5) An all-out effort to unify the four zones, for the reason that the success of our military occupation policy in Germany depends on the degree of cooperation among the occupying Powers.

All students of international problems will agree with Professor Zink that "The success or failure of Allied military government in Germany will in the long run determine in large measure whether the world can look forward to peace and reasonably stable economic conditions or whether

it will have to face again the horribly forbidding prospect of war on a world-wide scale and economic chaos" (p. 5).

JOHN B. WHITTON

Of the Board of Editors

International Transport and Communications. London and New York: Oxford University Press: *International Air Transport.* By Brig.-Gen. Sir Osborne Mance. 1944. Pp. ix, 117. *International Telecommunications.* By Brig.-Gen. Sir Osborne Mance. 1944. Pp. xii, 90. Index. \$1. *International Sea Transport.* By Brig.-Gen. Sir Osborne Mance. 1945. Pp. xii, 198. Index. \$3. *International River and Canal Transport.* By Brig.-Gen. Sir Osborne Mance. 1945. Pp. viii, 115. Index. \$1. *International Rail Transport.* By Sir Ralph Wedgwood. 1946. Pp. xii, 162. Index. \$3. *Frontiers, Peace Treaties International Organization.* By Brig.-Gen. Sir Osborne Mance. 1946. Pp. x, 196. Index. \$3. *International Road Transport, Postal, Electricity and Miscellaneous Questions.* By Brig.-Gen. Sir Osborne Mance. 1947. Pp. vii, 258. Index. \$3.75.

The increase of speed and efficiency in moving passengers and freight and in transmitting messages has brought the individual parts of the world appreciably closer together, and international transportation and communication have become factors of growing importance in world politics, commerce, and social developments. Under these circumstances the studies which Brig.-Gen. Sir Osborne Mance, the distinguished British transportation expert, has published under the auspices of the Royal Institute of International Affairs are serving a real need, particularly since they offer a wealth of both facts and ideas. Sir Osborne himself is the author of all sections on the various modes of transportation and communication except for the volume on railways which is written by Sir Ralph Wedgwood, well known retired railroad executive. Mrs. J. E. Wheeler, Mr. Campbell Adamson and Dr. Paul Christophersen acted as assistants to the authors.

The ties which have been established through transportation and communication between continents as well as between individual countries are thoroughly discussed. Particular emphasis is given to the questions of international organization. It is obvious that not only physical interconnections but, in addition, a great variety of treaties and conventions between governments as well as agreements between operator administrations became necessary to facilitate the exchange of passengers, freight and messages. But there is a marked distinction between the use of inland routes and their facilities by foreign operators—as in the case of water, air, highways, pipelines—on the one hand, and the conveyance of foreign traffic—partly in foreign vehicles—by inland operators (railroads, tele-

graph, telephone), on the other. It is primarily this distinction which influences the decision as to the extent to which technical and legal uniformity are desirable and to the extent to which there is an international interest in proper development and maintenance of facilities (as on international waterways). Sir Osborne's discussion of all these questions is highly interesting and his suggestions for future solutions deserve careful reading. In the past international organizations for each mode of transportation and communication developed separately in watertight compartments—except for some not too successful attempts by the old League of Nations to study borderline questions, such as those between rail and water and between rail and motor. Sir Harry advocates action to build up overall organizations for all modes of transportation and communication and to place them under the Social and Economic Council of the United Nations thereby leaving enough freedom for horizontal and vertical cooperation between individual groups.*

In his study of the freedoms of the air the author is inclined to see the best possibility for proper division of traffic in reciprocity agreements and he would go much farther in sea-air combinations than is permitted under present United States regulation. He thinks that through pooling of services and, ultimately, through international corporations, many pressing international problems can be solved in transportation and communication.

Students of transportation who have realized the strong competition which fuel carriers experience from electric power transmission will be pleased to find this field included in the discussion. There is also a thorough treatment of the methods to be used when new boundaries cross, or interfere with, existing transportation lines.

Sir Osborne's interest in the problems of transport coördination** is apparent when he explains the possibilities for international coördination. Most American readers will not, however, agree with his theory that government ownership (not operation) of all transport properties would equalize fixed charges and thus assure fairness of competition between all carriers.

International transportation and communication have important bearings on world security. The various organizations which are recommended for other purposes can also render useful services under the direction of the UN Security Council. International air transport and wire and wireless communication corporations would according to Sir Osborne's suggestions facilitate security control. Mr. Henry Wallace is quoted as going one step further by advocating operation of international air services by the air arm of the United Nations.

* The attempts which the European Central Inland Transport Organization made in this direction during its two years of existence are not mentioned.

** See for instance his *The Road and Rail Transport Problems*, London, 1940.

Events in international transportation and communication move so rapidly that the publication from time to time of revised editions of these valuable studies would be highly welcome.

L. M. HOMBERGER

The American University

Scientific Man vs. Power Politics. By Hans J. Morgenthau. Chicago: University of Chicago Press; 1946. Pp. x, 245. Index. \$3.00.

It is difficult to express the intellectual excitement with which the reviewer has read and reread this sincere and challenging little book. The challenge is fundamental, aimed directly at our accustomed methods of thought and action, and will probably arouse many an irritated response.

At the risk of oversimplification, Professor Morgenthau's thesis may be sketched as follows: "Scientific man, forever in search of the philosopher's stone, the magic formula which will provide scientific certainty in an uncertain world, is trapped in the blind alley of his own [rationalist] philosophy. Dazzled by the success of the scientific method" and assuming "that the social world is susceptible to rational control conceived after the model of the natural sciences," he attempts to substitute the collection of data for political wisdom and scientific formulae for statesmanship. Convinced that political and social problems, like those of mathematics and physics, "can all be solved rationally and with finality, once the right formula is discovered," he disregards the lessons of experience and condemns himself to continual defeat and frustration. By regarding reason as the primary motive of human action, by assuming that social action can be controlled through the scientific reason of the "social engineer," and by regarding politics as arbitrariness and unreason, and therefore a disease to be cured through the application of reason, rationalist philosophy has ended by misunderstanding the nature of man, the nature of the social world and the nature of reason, since reason itself submits to the control of irrational forces.

In the field of international affairs, continues the thesis, "the Western world has developed a political philosophy without a positive concept of politics." Politics being an evil *per se*, it was for "the science of peace" to detect that harmony of interests which in a rational world must underly apparent conflict, and formulate it as a scientific proposition. "Territorial claims, sovereignty over national minorities, the distribution of raw materials, the struggle for markets, disarmament, . . . the peaceful organization of the world in general—these are not 'political' problems to be solved temporarily and always precariously on the basis of the respective distribution of power among quarreling nations and of its possible balance. They are 'technical' problems for which reason will find one, the correct

solution, to the exclusion of all others, the incorrect ones. . . . The quest for and the defense of power then become aberrations from the scientific attitude, which looks for causes and remedies. . . . If we do not like the way things are, let us look for their cause and change things by changing the cause. 'There is essentially nothing to fight for; there is always something to analyze, to understand, and to reform.' However, until the governments of all nations become so reasonable as to permit the substitution of scientific standards for political evaluations, they may have to be coerced by the rule of law into abiding by reason. Yet the cry for "order under law" as an alternative to international anarchy is itself frequently based on the rationalistic assumption of the intrinsic regulative powers of the rule of law irrespective of social conditions.

The failure of "the science of peace" to give guidance for successful political action is in part the failure of the rationalist philosophy to understand the nature of man as an essentially irrational political animal. Politics is a struggle for power over men and power politics is inseparable from social life itself. "In order to eliminate from the political sphere not power politics—which is beyond the ability of any political philosophy or system—but the destructiveness of power politics"—what is required "is not the rationality of the engineer but the wisdom and the moral strength of the statesman. The social world, deaf to the appeal to reason pure and simple, yields only to that intricate combination of moral and material pressures which the art of the statesman creates and maintains. . . . As Goethe's wisdom put it: 'While trying to improve evils in men and circumstances which cannot be improved, one loses time and makes things worse; instead, one ought to accept the evils, as it were, as raw materials and then seek to counterbalance them.'"

Such, in part, is Professor Morgenthau's thesis. It is not his intention to provide a hand-book on the art of politics: "A book such as this can picture the disease but . . . must leave the production of neat and rational solutions to those who believe in the philosophy against which this book is written."

If the author occasionally places upon his premises a burden which they will not support, the book nevertheless deserves a wide reading. Whether or not the bankruptcy of modern statesmanship stems inevitably from the misconceptions of rationalist philosophy may be open to debate; but the decadence of the political art, the fruitless search for automatic "solutions" and universally applicable "scientific" formulas in politics are too painfully prevalent to dismiss lightly so honest and thoughtful an analysis as Professor Morgenthau has written. Brilliant in style and replete with learning, the book should prove a major contribution to political thought.

HERBERT W. BRIGGS

Of the Board of Editors

From a Political Diary: Russia, the Ukraine, and America 1905-1945. By Arnold D. Margolin. New York: Columbia University Press; 1946. Pp. viii, 250. Index. \$3.00.

A volume such as the present one confronts the reviewer with a difficult, if not impossible, task; to do it justice it is necessary to cleave in twain a work of distinct, but decidedly uneven, merit.

The first part of the volume presents, in an objective and scientific manner much of what has hitherto been accessible only in the form of highly purposive, that is, propagandist, literature. Precisely because American thought has tended to be molded, in both the Czarist and Soviet periods, by Great Russian perspectives on men and events Dr. Margolin's calm and factual depiction of the Little Russian, or Ukrainian, point of view furnishes the reader a much needed corrective. Just as the optometrist finds it necessary to overcome long-standing distortions by the use of corrective lenses, so the author, with deep erudition and an independent perspective, brings plainly into view a well focussed picture of what much Muscophil historiography has tended to obscure. Conceived in a firm belief in self-determination, the author's narrative has undergone four decades of political gestation. To say that it is mature is understatement. It can now be brought forth to serve as an effective antidote to the traditional anti-nationality outlook of earlier historians.

After initial chapters giving a thumbnail sketch of the Russian Revolution, in which he took an active part, Dr. Margolin, who became, in this period, Assistant Minister of Foreign Affairs of the Ukrainian Democratic Republic, traces the Ukrainian Liberation movement in its triple aspects, constitutional, military, and diplomatic, with great sympathy and insight. He does this with an authenticity which only a key participant, equipped with essential source-documents, can provide. The fourth chapter (pp. 37-51), dealing with "The Ukrainian Delegation at the Peace Conference, 1919," is a genuine contribution alike to the literature on the subject, which is very scarce and to the interpretation of events, which have not, to my knowledge, ever received so synoptic a treatment, or one carried through with such exceptional ability. Of almost equal merit is the fifth chapter (pp. 52-71) dealing with his "Diplomatic Mission to the United Kingdom, 1920" which penetratingly depicts the muddled state of affairs not only in the London of the Russo-Polish war period but also in the days of the First Assembly of the League of Nations at Geneva, where the Ukraine's application for admission was given an official hearing, and, after considerable discussion, rejected. These two compact, highly authentic chapters, together with their relevant appendices (pp. 177-197), form the core of the volume and conclude its first part.

A useful service is performed by Dr. Margolin in the second part in bringing together between the covers of one book and interpreting with *Zeitgeist* background, the successive memoranda submitted between 1933

and 1944 to the President of the United States or the Department of State. These, *inter alia*, counselled a Commission of Inquiry before American recognition of the Soviet regime; gave perspicacious warning in 1933 of German plans for expansion toward the East and of the danger of an alliance of Germany, Italy, and Japan. Other memoranda, with less intuition, impressed upon the directors of American policy, both before and after the outbreak of World War II, the tremendous strength of separatist tendencies in the USSR, which, as the event proved, did not significantly materialize. Margolin wound up, just before World War II, with the suggestion (pp. 117, 222) of a return of the German colonies and other ways of appeasing Germany, Italy, and Japan, as ways of deflecting Nazi attention from the Ukraine and other parts of Eastern Europe. In the retrospect of eight years, this appears to have been singular lack of foresight. Even after war broke, Margolin forecast, in November, 1939, the setting of a huge trap for Russia (pp. 121, 224), and therefore urged an immediate cessation of hostilities, the return of the German colonies, and all-round appeasement. After our entry into the war the author memorialized the State Department with significant statistical and confessional data about Slavs in Europe and America.

The final portions of the volume are sharply critical of Yalta and Potsdam, though Dr. Margolin breathes a note of inescapable optimism following Japan's surrender. While not following a definite law of diminishing returns, the volume is of decidedly greater importance in its earlier chapters, which in and of themselves would suffice to earn lasting credit to the work for their precise and accurate account of what went on concerning the Ukrainian Democratic Republic in the critical biennium following World War I.

MALBONE W. GRAHAM

The Soviet Impact on the Western World. By Edward H. Carr. New York: Macmillan; 1947. Pp. xii, 114. \$1.75.

This small book is a reprint of six lectures given by the author at Oxford in February and March, 1946. Like Professor Carr's earlier books, it is an excellent work, based on a deep personal knowledge of international affairs and much study. There are no slogans, there is no wishful thinking in it. It is a study on the Soviet impact on the Western World—"a decisive historical event." This impact is studied from the viewpoint of politics, economics, ideology, and that of foreign policy. That the Soviet Union is here to stay and that it exercises immense power in Europe, physically and ideologically, is taken for granted by the author. What shall Great Britain do in this dilemma? This is the author's principal question. While giving a very interesting and objective account of Soviet

ideas, institutions and policies, the author does not subject them to a criticism. Not whether the Soviets are right, but what can be done in the face of the Soviet challenge, worries the author.

He does not fear or foresee war with the Soviet Union. He hopes that she is "hardly subject to those specific stimuli which dictated expansionist policies to capitalist Britain in the 19th century and may dictate such policies to the capitalist United States in the 20th." Whether this hope is still well founded today, after what has happened since these lectures were given and in the light of the "Truman Doctrine," designed precisely to "contain" the aggressive Soviet expansionism, remains to be seen. But the author has worries enough about the Soviet impact, even if the peace is not broken. There is the challenge of Soviet "democracy," of Soviet planning, of Soviet propaganda, of Soviet fervor for lifting the standard of the proletariat—even the American slogan of the "common man," the author holds, is, to a great extent, due to the impact of Marxism and the Soviet Union.

The author hopes that the solution of this dilemma can be found internally by adopting some middle way between Soviet "democracy" and British democracy. Planning is inevitable, already as a national emergency measure, as post-war Britain is confronted with the task of radical economic readjustment. But it is hoped that such a middle way may leave intact personal liberties and the right to dissent.

As to foreign policy, the Soviet Union has brought back realism and has put an end to the liberal belief that power can be eliminated from politics by an "appeal to reason" or by an "enlightened public opinion," to all that which the author calls the "humbug" of the League of Nations period. Soviet foreign policy is frankly based on power and extolls, therefore, the role of the Great Powers, restricted to the "Big Three"; its conception of the UN is basically one of a world-wide "European Concert."

As there are, at the present time, only two Great Powers, each surrounded by a number of "friendly States" (the dislogistic term is "satellites"), the author proposes that Great Britain become the nucleus of a third Great Power, "embracing the Empire and Commonwealth and extending to western Europe," exactly the same remedy as the one shrewdly proposed, years ago, in a London speech of Field Marshall Jan Smuts.

The book, in pointing out the Soviet impact, shows the decline of Great Britain, internally by impoverishment, externally by imperial retreat. It also reveals the fundamental difference between Laborite England and the United States of America.

JOSEF L. KUNZ

Of the Board of Editors

NOTES

La posizione internazionale di Fiume dall' armistizio all' annessione. By Luigi Pateani. Florence: Carlo Co.; 1940. Pp. 162. The book under review gives a full-fledged investigation of the story of Fiume after World War I. The Appendix reprints the most important documents and gives an exhaustive bibliography. We are led from the proclamation of the State of Fiume on October 30, 1918, to the Interallied occupation, to d'Annunzio's *coup*, to the "Adriatic Crisis" at the Paris Peace Conference, and on to the direct Italo-Yugoslav negotiations. By the Treaty of Rapallo of November 12, 1920, Italy and Yugoslavia recognized the independence of the State of Fiume "in perpetuity," but already by the Italo-Yugoslav Accord of Rome of January 27, 1924, Fiume was annexed by Italy, whereas the suburbs of Susek went to Yugoslavia. The end of 1920 had seen a four-days war between Italy and Fiume, d'Annunzio's resignation; and the Pact of Abbazia, by which Fiume recognised the Treaty of Rapallo.

As is common with the Italian School, the author distinguishes strictly between international politics and international law. His investigation is a legal one. By analyzing the problems of the birth of a new State and an effective *de facto* government under the rules of international law, he tries to show that Fiume was from the beginning an independent state. D'Annunzio did not create the State of Fiume, neither did the Treaty of Rapallo: the latter only recognised an already established independent state. The author, therefore, deplores that no representative of the State of Fiume was admitted to the Paris Peace Conference; he also holds Italy's hostile attitude toward Fiume after the Rapallo Treaty to have constituted an illegal intervention by Italy in the affairs of another independent state.

That the State of Fiume wanted from the beginning to be incorporated into Italy did not detract from its independence, but was only the exercise of the right of national self-determination, which, as the basis of the Paris Peace Treaties, had become positive international law. National self-determination was bound to prevail over Fiume's attribution to Yugoslavia by the secret London Treaty of 1915. Curiously enough, he sees no contradiction between Italy's demand for the Austrian South Tyrol and the much-praised principle of national self-determination which it flagrantly contradicted, but sustains this demand on the basis of "contractual right" under the same Treaty of London.

Writing in 1940, the author speaks with obvious pride of Italy's final triumph. By the Peace Treaty of 1947 Italy loses not only Fiume, but also Pola and Trieste: *Sic tempora mutantur*.

JOSEF L. KUNZ

Of the Board of Editors

Note sul Diritto Diplomatico della Repubblica Fiorentina. In Appendice: Costituzione per gli Ambasciatori 1421-1525. By Giuseppe Vedovato. Florence: G. C. Sansoni; 1946. Pp. 85. Appendix. Index. This little pamphlet sheds additional light on the development of the institutions of diplomacy in Renaissance Italy and on the environment in which the modern law of diplomatic privileges and immunities began to take shape. "Diplomatic law" in the title of the pamphlet refers to the Florentine law

concerning the organization of diplomatic missions, rather than the privileges and immunities of foreign diplomats. Texts of the Florentine "constitutions for ambassadors" in the period 1421-1525 are given in the appendix.

Very striking is the care with which provision was made in Florence for the apprenticeship of young men preparing for diplomatic careers. Prominent citizens not uncommonly considered diplomatic appointments as heavy burdens, since they meant long absences from home and business, often in hostile and treacherous surroundings, as well as considerable expense. The immunities to which foreign ambassadors were theoretically entitled were frequently disregarded. The subsequent emphasis on the strict rules of immunity which today may seem too absolute and far-reaching had its roots in the diplomats' hardships in the period here considered.

OLIVER J. LISSITZYN

Columbia University

Board for the Vigilance and Final Disposal of Enemy Property. Précis of Its Activities from Its Creation to January 15, 1946. By José Manuel de Olano. Buenos Aires: Argentine Republic, Ministry for Foreign Affairs and Worship; 1946. Pp. 67. This publication in English by the Argentine Government contains the report of the President of the Board which was charged with the custody of enemy property in Argentina by a decree of March 31, 1945. A concise account of the operations of the Board is followed by statistical tables and the text of pertinent decrees. Of special interest to readers of this JOURNAL will be the reconciliation, at pages 3-5, of the apparent contradictions between the terms of the Act of Chapultepec relating to enemy property and the provisions of the Argentine Treaty of 1857 with Germany in regard to the property rights of individuals in the event of war. The President of the Board explains that the treaty refers to natural persons residing within Argentine territory and not misbehaving or breaking the laws. Clearly articulating a point of view which has long prevailed in this country, but which has not always been understood, the President of the Board says, in regard to such persons:

If their good conduct has remained unchanged, and they have not transgressed against the laws—as is stated in the 1857 Treaty—or if their activities are not considered a menace to the security of the State or to the welfare and security of the American nations . . . they are not affected by the emergency measures which the Argentine Government only applies to the capital of inhabitants of the country, whatever their nationality, notoriously connected with the diffusion of totalitarian ideologies, and to that capital owned by Germans or Japanese residing in Axis countries, who by reason of their place of residence must be considered as having contributed to the war effort of their respective countries.

EDGAR TURLINGTON

Of the Board of Editors

Précis de Droit International Privé. By P. Arminjon, Paris: Dalloz; 1947 (3rd ed.). Vol. I (*Notions Fondamentales*), pp. 462. The favorable reception accorded the earlier editions of this work has induced the author to present a third edition greatly enlarged and brought down to date. The

present volume deals exclusively with fundamental concepts. The volumes yet to appear will discuss conflicts of law in chapters arranged according to the particular fields of law in which they occur. The author continues to oppose the deductive methods based purely upon *a priori* reasoning, which he maintains has no more valid basis in private international law than in any other branch of law. As in the earlier editions he seeks a solution of conflicts of law in what he denominates as *les circonstances de rattachement*, developed from the facts of each case. He refuses to follow the post-war trend of some French writers to apply French law in many cases for reasons principally of national policy. A welcome feature of this new edition is the enhanced space accorded to questions of conflicts growing out of arbitrations, both public and private, and also conflicts of law in the interpretation of international conventions.

A. K. K.

Of the Board of Editors

A Textbook of Jurisprudence. By George W. Paton. London: Oxford University Press; 1946. Pp. x, 528. Table of Cases. Index. \$6.00. The American student accustomed to the case method in the study of law does not turn naturally to a general text book for his statement of principles and rulings. But Professor Paton's study is more than a student's textbook. It is a scholarly work governing a wide range of subject matter and showing an excellent grasp of materials both in English and other languages. The author's personal preference for sociological jurisprudence or the functional school is shown but, while the influence of Pound and Holmes is clear, Mr. Paton does not neglect other points of view.

In a work of this scope it is not to be expected that the subject of international law can command much space. In his chapter on "The Definition of Law" he devotes five pages to the problem of international law wherein he declares that until there can be a distinction between lawful and unlawful war a firm basis for international law does not exist, as Kelsen has previously pointed out. Paton's conclusion is "that international law can hardly be described as law" (p. 71) but he does not dismiss the subject so categorically as this statement would make it appear. In another connection the author gives the rule "While it is not quite true to say that international law is part of the law of England, there is, nevertheless, a presumption that statutes should be interpreted, as far as possible, so as not to conflict with the rules of international law" (p. 469).

The function of the textbook in the study of law is illustrated by the author in a further consideration of the field of international law where the body of case law is inadequate. In this connection Paton poses an interesting question: "Would the doctrine of binding precedent have become established had the textbook enjoyed greater prestige?" (p. 203).

Although the author has prepared his textbook with his Australian students in mind, American teachers will welcome this volume as a good general treatise and handy reference work.

LIONEL H. LAING

University of Michigan

The United Nations Conference on International Organization. Selected Documents. United States, Department of State, Publication 2490, Conference Series 83. Washington: Government Printing Office; 1946. Pp.

viii, 992. Appendixes. \$2.75. It is indeed fortunate for students of the United Nations that the Department of State, so soon after the end of the San Francisco Conference, should have provided them with this indispensable source book. Although limited to documents of general interest, this collection provides a broad picture of the work of the United Nations Conference on International Organization. It is particularly valuable for the layman and the student, for the specialist will want to consult the larger work, in fifteen volumes, issued by the United Nations Information Office in New York, entitled *Documents of the United Nations Conference on International Organization*.

Since the work of the San Francisco Conference was based on the Dumbarton Oaks Proposals, these have been printed in full, together with the amendments thereto offered by various governments. Students of the Charter will find the arrangement of these amendments very helpful, for they have been placed immediately after the chapters, sections and paragraphs of the Proposals to which they apply.

The Reporters' records of the twelve technical committees are reproduced, together with the reports of certain subcommittees. But the summary reports (condensed minutes) of individual meetings are omitted. In addition, the summary reports of the Executive and Steering Committees are included, and the minutes of the sessions of the commissions, and plenary sessions of the Conference. A list of officers, delegates, and unofficial representatives of intergovernmental organizations, literal prints of the Charter, the Statute of the International Court of Justice, and the inclusion of the *Interim Arrangements* as well as a report of the first meeting of the Preparatory Commission, all serve to add further interest to this invaluable work, a "must" desk book for every serious student of the United Nations in particular and of international organization in general.

JOHN B. WHITTON

Of the Board of Editors

One World or None. Edited by Dexter Masters and Katherine Way. New York: McGraw-Hill; 1946. Pp. x, 80. \$1.00. This is a collection of essays written by distinguished authorities on the atomic bomb and its potentialities for future war and peace. Individually the essays are excellent and convincingly written; collectively they present a fairly well rounded picture though composed of disparate parts. After an Introduction by A. H. Compton and Foreword by Niels Bohr articles follow from Philip Morrison, Harlow Shapley, E. P. Wigner, Gale Young, J. R. Oppenheimer, H. H. Arnold, L. N. Eidenour, E. U. Condon, F. Seitz and H. Bethe, Irving Langmuir, Harold Jre, and Leo Szilard.

No such galaxy of stars from the political science field is presented. The nearest approach to a political scientist is Walter Lippman, though Albert Einstein is also cast in that role. Both look toward world government as the necessary answer to the danger. A final statement from the Federation of American Scientists puts the responsibility exactly where it necessarily belongs—upon the individual citizen.

Though the book makes little contribution from the viewpoint of political science it contains materials fundamental to the work of the political scientists in devising the necessary controls for the new and dangerous instrument. There are statements, brief but informative, as to the possible danger of the bomb, as to its effect upon air war and the revival of

private war, as to an atomic arms race and the possibilities of an inspection system. It is a useful popular introduction to the new problem, and is addressed to a popular audience.

CLYDE EAGLETON

Of the Board of Editors

Who Makes Our Foreign Policy? By Blair Bolles. New York: Foreign Policy Association; 1947. Pp. 94. 35¢. This is one of the Headline Series written by the Washington representative of the Foreign Policy Association. He takes up in their order the contributions made by the President, the Departments, members of Congress, the no-man's-land of our Constitution, public opinion, and teamwork among all these groups. It is a factual account of the duties of each derived from written documents. It doubtless is informative. The American public knows more facts about foreign affairs and understands less than any people probably anywhere. The author leaves no space for the propaganda of foreign governments, although Sir Gilbert Parker was very frank in acknowledging the facts in Harper's magazine for 1918. Doubtless the Department of State carries on much publication activity, including propaganda among American citizens for policies it has determined upon. Whether this gives the citizen understanding is another question. When John Bassett Moore first published his *Digest* in 1897-1906 Secretary Sherman informed him that the files of the Department were completely at his disposal without exception. With the Foreign Relations now fifteen years behind time it is doubtful whether the same latitude would be given today. We are living in a new world and are likely to find the going hard.

EDWIN BORCHARD

Of the Board of Editors

Americans in Persia. By Arthur C. Millspaugh. Washington: The Brookings Institution; 1946. Pp. ix, 293. Appendix. Index. \$3.00. Far from limiting his field of interest strictly to Americans in Iran, Dr. Millspaugh has given in this volume a valuable first-hand account of the interaction of Russian, British, and American foreign policy in a typical buffer state. Although the handling of the material cannot be called entirely unprejudiced, because of Dr. Millspaugh's past connection with the Iranian Government as Administrator General of the Finances of Persia, it may be said in extenuation that the author has been somewhat successful in maintaining his sense of balance and in writing with admirable restraint. He has woven around the story of his mission as a private American citizen under contract to the Persian Government the pattern of power politics and international conflict which led to consideration by the United Nations of the Persian problem.

If, in the author's characterizations of the foreign policies of the three Great Powers in Persia, the United States comes off a disappointing third, his conclusions must not be marked off as based on failure of his mission to receive American support at crucial moments. It is probably with some justice that he has written:

When I arrived in Persia on January 29, 1943, I found the Legation badly understaffed and correspondingly over-worked. Though well informed of wartime economic affairs, with which it was constantly

and actively concerned, the Legation appeared to have little knowledge of political currents or of anything else that went beneath the surface or outside of the capital. It is not far from the truth to say that, with respect to its gathering of information, our Legation was half-blind and half-deaf.

While Dr. Millspaugh may show himself less objective in his discussion of the Soviet Government's concept of necessary domination of certain border states for security purposes than did Max Lerner in his fairly dispassionate *World of the Great Powers*,* he does outline with what seems to be substantial fidelity the factors which influence Russian foreign policy today and does assess with reasonable accuracy the limits to which Russia will go to achieve her ends. The author believes Soviet policy is based among other things on fear, jealousy, suspicion, and what Eleanor Roosevelt has called an "inferiority complex." While Dr. Millspaugh concludes that Russia "is bent on a widening expansion of power, by either annexation, absorption, or domination," he believes that the men of the Kremlin, "while ready to bluff and bully to the limit," do "not want another world war or for the present any sizable war."

As the inescapable solution of the Persian problem, if one is to be found, the author suggests a three-power agreement. He does not believe that United Nations consideration of Russo-Persian relations effected any real solution of the problem. On the contrary, he holds that it served as an opiate to mask the granting of important oil concessions to Russia in northern Iran. He shows no less recognition of the difficulties implied in a solution through three-power control. As a matter of fact, Dr. Millspaugh considered such an agreement impossible at the time he completed his book. "Our ability to bring the rulers of Moscow to a constructive solution," he wrote, "depends almost entirely on the extent to which we talk to Stalin in the language of power and in realistic terms." It is not impossible that the Truman Doctrine and the Marshall Plan would be accepted by the author as changes for the better in American foreign policy which may make it possible for American diplomats concerned with the Persian problem eventually to "move forward with confidence and courage toward constructive achievements commensurate with our responsibilities and with the greatness and power of our country."

ROBERT E. ELDER

Colgate University

Persistent International Issues. By George B. de Huszar, Editor. New York and London: Harper; 1947. Pp. 262. Index. \$3.00. The editor is directly responsible for the chapters entitled "The Need for a Preventive Policy," "Politics," and "Summary and Conclusions." The other nine chapters—"Relief and Rehabilitation," "Displaced Persons," "Health," "Food and Agriculture," "Transportation," "Industry and Trade," "Money and Finance," "Labor" and "Education"—were contributed, respectively, by Roy F. Hendrickson, Fred E. Hoehler, George K. Strode, Walter W. Wilcox, Hobart S. Perry, J. Anton de Haas, Michael A. Heilperin, Otis E. Mulliken and George N. Shuster. The authors state and discuss problems upon which nations must work together, rather than issues by which nations are divided. They give considerable detail regarding

* Max Lerner, *World of the Great Powers*, 1947, pp. 18-27.

what had been done toward the solution of these problems down to the beginning of 1946. Their discussion of what should be or is likely to be done about these problems in the near future or in the long run is relatively meager. The editor puts a familiar thought into an effective phrase in his observation (p. 8) that peace is "the by-product of the solution of major international problems." Since the clear statement of a problem is proverbially the first step toward its solution, the essays brought together in this book are well worth attention.

ELGAR TURLINGTON

Of the Board of Editors

States and Morals. A Study in Political Conflicts. By T. D. Weldon. London: John Murray; 1946. Pp. 302. \$2.75. The avowed aim of this book as stated by its author, a Fellow of Magdalen College, is "to show grounds for believing that the idea of political philosophy as a body of demonstrated truths is deceptive. I am convinced that no single statement of what the state is or of what it ought to be can command universal assent." Reason for believing in the importance of this position is that the author sees a danger in contemporary tendencies toward dogmatism in political and moral theories. When any group makes of its political ideology a gospel, final and uncompromising, to be exported everywhere, it enters, he holds, upon a course evocative of war. Not only is this true of devotion to the organic state as in Germany and Russia. It can be true of missionary devotion to radical democracy as well. The moral of the argument is that states should aim to live peaceably together even though their political faiths may be irreconcilable. Because all political philosophies rest on unprovable moral sentiments it is not wise for any particular state to make excessive claims for its own or to expect all mankind to accept it as the norm.

As against political dogmatism, Weldon holds that political theories should all be regarded as practical working hypotheses, no one of which is explanatory of all the facts. The organic theory of the nature of the state, whether advanced by Aristotle, Rousseau, or Hegel, all of whose systems Weldon analyzes, is strong in recognition of the corporate unity of society but weak in upholding the importance of the individual. The theory of the state as based on force—maintained by Thomas Hobbes and Karl Marx—recognizes the state as a construct of man and as an instrument of sovereign power, but is also indifferent to the individual. The liberal democratic theory, as expressed by John Locke, rests the authority of the state on consent, or the active voluntary cooperation of all its members. This is true for a society in which there is an agreed standard of moral behavior, but since societies differ at this point, it is capable of only limited, not universal, application. All these considerations serve as restraints upon dogmatizing about political finalities. More deterrents follow.

In a long chapter on "States in Theory and Practice" Weldon shows, with much interesting discussion, that no one of the great states—Germany, Russia, the United States, or Great Britain—fully exemplifies the political theory which it professes. Neither do these states agree in their understandings of the relation between the state and the individual. Not one can claim that the general validity of its theory is actually confirmed by experience. On the basis of these observations political theories turn out to be faiths by which states live rather than insights into immutable truth.

All this has important bearing on the question whether we can ever hope to achieve an ultimate political ideology for world society, a universal ideal to which all peoples will eventually give assent. Since Plato's time that aspiration has been common among political philosophers. It is Weldon's contention, however, that the question cannot be answered until the moral bases of politics are examined.

That examination is made in an important chapter entitled "Politics and Morals," with the conclusion that there is no one set of moral standards universally accepted. In the organic state moral duties derive from the demands of one's station in the state, but there is no guarantee that what the state demands will necessarily be good. The state founded on force has no moral basis whatsoever, since it is bound by no respect for honesty and justice as such. The democratic state has a truly moral basis in its respect for the rights of individuals. However, if this is taken to mean the rights of man in general it is devotion to an abstraction. On the other hand, if it means the rights of individuals as responsible moral agents then the moral basis is not universal, for individuals view moral obligations differently and within limited systems of personal relationships. It thus appears that we have no universal moral standards, no international ethos, on which to base a genuine world state.

To those interested in establishing a universal scale of moral and political standards Weldon's conclusion is doubtless disappointing. What hope is there for common human welfare on this globe if we have only "numerous states with radically different moral sentiments and radically opposed political theories based on them"? Constructive coöperation seems out of the question. The author's attitude, however, is not wholly pessimistic. In the course of a few centuries, he thinks, some single moral and political system may conceivably be worked out and universally accepted. In the meantime it is the part of wisdom and common sense to frankly agree to differ about our ultimate faiths while lowering our crusading zeal sufficiently to compromise and avoid the folly of letting ideological devotions become the cause of actual war.

Weldon's practical counsel is sound. One could still wish, however, that, while making his point, he had devoted more of his admirable erudition to a search for common elements in diverse political systems which might point the way toward a possible international ethos for the more greatly integrated world of the future.

CLARENCE H. HAMILTON

Oberlin College

The Political Handbook of the World. Parliaments, Parties, and the Press as of January 1, 1947. Edited by Walter H. Mallory. New York: Harper; 1947. Pp. 214. \$3.50. For the twentieth year this useful and handy reference book for the student of current affairs makes its welcome appearance. As usual it provides in compact form essential information on the composition of governments, Parliaments in the various countries of the world, the programs of political parties and leaders, and the political affiliations and editors of leading newspapers and periodicals. Important information is also furnished on the structure, functions, and membership of the United Nations, including the International Court of Justice and the Specialized Agencies. The evident and appreciated value of this annual compilation would be greatly enhanced if its editorial practices would be

more uniform and, on occasion, more refined. For instance, the Foreword states that an effort has been made to select those newspapers "which are most apt to be quoted abroad." Under Germany, however, we find a list of some 160 papers, while Polish papers number about fifty. In the case of Austria we find the statement that "there is also an active provincial press" but no indications that it includes the only "independent" papers in the country, that is, those without affiliation with and domination by a political party. None are listed, but under France we find some forty-five "provincial papers." In neither Austria nor Germany do we find a mention of press associations as in the case of other countries. Under the name of some countries periodicals are listed under newspapers, in others separately, in still others not at all. Under Austria there is no description of the platforms of the three political parties while such information is provided for Hungary's six parties, including two which elected one and two members, respectively, to Parliament. Some differentiation seems to be indicated when one finds the designation "Independent Democratic" applied to both *PM* and *The New York Times*. It would never occur to most readers that these two papers have a common denominator other than the place of publication!

JOHN BROWN MASON

Oberlin College

Constitutions, Electoral Laws, Treaties of States, in the Near and Middle East. By Helen Miller Davis. Durham, N. C.: Duke University Press; 1947. Pp. xx, 446. Map. \$5.00. The appearance of this book would appear to illustrate the law of supply and demand but as a matter of fact Mrs. Davis has been working on it for some fifteen years. It appears at a moment when it can be very useful. The Arab states have become united and organized and an increasingly important factor in world politics and the Palestine problem has come to a head as a matter of community interest.

Some of the materials in the book have been very difficult to obtain, as the list of acknowledgments shows. The problem of translation has not been easy. A number of the documents have never been put into English before. Some of them were not available, or were rare, in the countries of their origin. It was, indeed, one of the purposes of the author to make such texts more available to the peoples to whom they apply, since the limited knowledge of Arabic, and the numerous dialects of the area, make the audience for them in their original tongues a small one.

English readers will be delighted to have available documents which are now of much importance and for which they have an increasing need. They deal with the "crossroads of civilization"; the area is of strategic importance; oil in the area is an international issue; the United States is vitally concerned through the Truman Doctrine. These documents contain essential information as to the internal systems and as to the international arrangements concerning the states in the area.

The countries covered are Afghanistan, Egypt, Iran, Iraq, Lebanon, Palestine, Saudi Arabia, Syria, Transjordan, and Turkey. The very number of them is surprising. For each of them important constitutional documents are given as well as international agreements, and Part II includes the relevant multilateral treaties. No index is needed but there is a list of

supplementary materials found in footnotes. Mrs. Davis' labor of love is very well justified; it is a good job, and a useful one.

CLYDE EAGLETON

Of the Board of Editors

British Security. London: Royal Institute of International Affairs; 1946. Pp. 176. This is a survey of the English position *vis-à-vis* foreign countries as of the end of 1945. It seeks an unattainable end and, in recommending the insurance of British security by reliance upon the United Nations, it has already become obsolete by virtue of the failure of that organization to keep the peace. That realization was already present in the minds of the draftsmen of the report and Hanson Baldwin informs us that national armament and national military establishments are now greater than ever before. This English report is nevertheless of some value as indicating British policy and British commitments in various parts of the world. There is the usual dash of British hypocrisy and propaganda which must, perhaps, be taken for granted. Realistically considered, the report has been overtaken by events. The emphasis is almost exclusively on political relations to the neglect of economic verities. Strikingly characteristic is the place assigned to the United States. It is the indicated underwriter of most British commitments for which England will furnish the necessary know-how.

EDWIN BORCHARD

Of the Board of Editors

The Meeting of the East and the West. By F. S. C. Northrop. New York: Macmillan; 1946. Pp. xxii, 532. Index. \$6.00. This volume contains thirteen chapters and a series of acknowledgments, a preface in which the author deals with the contemporary world, The Culture of Mexico, that of the United States and the British Democracy, German Idealism, Russian Communism, the Culture of the Catholic Church, Western Civilization, the Culture of the Orient, the meaning of Eastern Civilization, especially in India, China and Japan. There follows an attempt to find or indicate the basic problems of all these countries. This volume differs from most books written by Western authors in that it betrays in many chapters a personal knowledge of certain Asiatic areas. This does not mean that each reader will agree with all the statements made in the volume—because its readers as a general rule will never have set foot outside of this country. None the less for those that have travelled in Europe, Asia, Africa there is a recognition that the Cultures and Civilization of Europe, and Asia—plus America—are not the same and still have many aspects of difference.

The author makes comments on religious bodies which still affect personal life in Asia and appears to realize that most of the religions of the world are of Asiatic origin. Perhaps herein lies the difference between the Orient and Occident. There are many differences, but one which appears most strongly to the observer is that the sense of individuality is predominant in Occidental culture while that of the Orient seems to be eminently one of impersonalism, that is, one of absorption of the individual in the family or in the commune. Freedom from enforced initiative is the main object of aspiration of the native born Occidental, whereas in Oriental ethics more and precise emphasis is placed on loyalty and obedience to

the family and commune. This is due to the difference of social structure wherein the individual holds his place. Similarly, the Hindu will emphasize caste and the Chinese will emphasize the commune, which is the family in the larger sense, joined together by the cult of common ancestors and the use of property that is common in ownership.

Thus to bring these Races closer together and to introduce them more completely to the average Westerner, Mr. Northrop suggests that

Religious reform is essential because

The traditional forms and methods of political oratory, literature, and religious ceremonies have conditioned the attitudes, the feelings, preferences and reactions of men.

Education aims primarily at the empirical and rational mind but religion extends to that of which science and philosophy persuade the intellect—and from the intellect to the heart, the emotions and from the habits of the individual to the communal habit of the group.

Because of the variety of religions in Asia, America, and Europe this will be difficult, for each religion has a theoretic or scientific basis which cannot be changed suddenly, because of the habits and customs which these have formed. The author seems to imagine that the alien cultures and religions of the East and West are really tending to meet or be less hostile to each other. Supposing this to be possible and that religious cultures of Asia and Europe and America should draw closer together so as to reinforce each other and even possibly complement one another, is it to be supposed that the habits and customs of man will readily change? But the two world wars 1914–1918 plus 1939–1944 have forced nations to change their political and economic plans as the New York Times said in January, 1944:

The England of Adam Smith has gone forever—when England ceased to be the workshop of the world the doctrine of *laissez faire* vanished. . . . The British are not going to abandon private enterprise but they are determined to win peace, if it means scrapping some industries and concentrating on new ones.

Such a statement as Mr. Northrop inserts (p. 190) in his book may mean changes in economic policies and in political life itself. But will it mean any fundamental changes in religion?

FOYD CARPENTER,

Georgetown, D. C.

East Versus West. By Kodanda Rao. London: Allen and Unwin; 1939. Pp. 256. Indexes. 6/-. This volume, written by an Asiatic, attempts to interpret what is culture and what is civilization, due to the spread of differing factors of culture—and tends to produce the idea that ideas of differences of civilization and race are superstitions. The author divides his book into 4 parts, of which Part I deals with race and culture and then seeks to state his general problem. Part II contains opinions drawn from the writings of six persons who have written on the East and West. Part III speaks of the unity of the West and the moral values of the East and West.

Part IV speaks of current concepts, the coincidences and correlation, with a conclusion. Apparently the author does not appreciate that the words Orient and Occident are derived from the Roman language,—*occido* to fall, or fall down; *orior* (possibly the or may be derived from the San-

krit ar or the Greek $\alpha\alpha$) carrying the sense of getting up, or rising—consequently the pages dealing with racial and cultural developments largely indicate how persons unacquainted with the Greco-Latin tradition strain the meanings of words as they are used today. The real problem demands whether the Greenwich Line is to be used for general cartography. Then East and West are easy terms to evaluate. But few critics or authors speak plainly about the use and origin of these two words.

Too many books are written upon Asia and America by persons who have never visited these areas. Hence the loose usage of the words East, West, Culture, Civilization. The attempts of the author to place the views of men like Dr. Hu-Shih before the public are excellent, especially as this Chinese author is a master of pithy sentences, as his *Chinese Renaissance* discloses. He expresses his position in the formula, "The difference between Eastern and Western Civilization is primarily a difference in the tools used."

Few remember that China invented printing, gunpowder, paper. But no one speaks of the Chinafying of the West because they made use of these inventions. Yet many spoke of a Westernized Japan after her victory over China, then Russia, then Germany; is it not more likely that the general inaccuracy of modern speech is the cause of the continued misuse of words, or the ever present attempt to twist the meaning of words, in the West. To meet this the book of Mr. Kodando Rao may be of great use. Because the quotations from Western authors seem to indicate his desire to bring to the East the thoughts, the ideas, and methods which the West is steadily developing, especially in shattering distance and shortening communications. These will ultimately bring the seacoast and capital cities much closer together, because all these cities will use the new ideas. But will these new ideas change the habits of the persons living in mountains and inland valleys; if environment develops culture, how are the inland valleys to be brought into contact with new cultural ideas? Remember the backwardness of China and India in education. How can the lack of education be remedied? Where is the revenue to be obtained to install schools, aeroplane stations, telephones, radio? How are different languages and dialects to be overcome?

This book will be read by many who do not know the history, the habits, or the manners of most of the races of Africa and Asia yet these two continents comprise practically one-half of the world in area, and have more than one-half of its population; again they will be surprised that there is no mention of Mohammedanism in the Index. But the literary style is pleasing. The mass of information contained does credit to the author.

BOYD CARPENTER

Georgetown, D. C.

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* Mention here neither assures nor precludes review later.

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THE
AMERICAN JOURNAL
OF
INTERNATIONAL LAW



VOLUME 41

1947

PUBLISHED BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

PUBLICATION OFFICE:
LANCASTER PRESS, INC.
LANCASTER, PA.

EXECUTIVE AND EDITORIAL OFFICE:
700 JACKSON PLACE, N.W.
WASHINGTON 6, D. C.

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UNITED NATIONS

DOCUMENTS ON THE DEVELOPMENT AND CODIFICATION OF INTERNATIONAL LAW*

1. HISTORICAL SURVEY OF DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION BY INTERNATIONAL CONFERENCES**

April 29, 1947

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* Documents and following note provided by Dr. Yuen-Li Liang of Division of Development and Codification of International Law of United Nations Secretariat.—M. E.

By Resolution 94 (1), adopted on 11 December 1946, the General Assembly of the United Nations, acting in pursuance of Article 13 of the Charter of that organization, established a Committee on the Progressive Development of International Law and its Codification, to consist of seventeen members and assigned to study the methods by which the General Assembly should encourage that development and codification, methods suitable for securing the coöperation of the several organs of the United Nations and for enlisting the assistance of other national or international bodies in that task.

In the Resolution of the General Assembly the Secretary-General of the United Nations was requested to provide such assistance as the Committee might require for its work. The memoranda on the development and codification of international law which follow were accordingly prepared by the Division of the Development and Codification of International Law of the Secretariat of the United Nations for the use of the Committee. These memoranda embodied (1) a historical survey of the development of international law and its codification by international conferences (A/AC.10/5), (2) a history of the codification of international law in the Inter-American system (A/AC.10/8), (3) a note on the private codification of public international law (A/AC.10/25), (4) a memorandum on the methods for enlisting the coöperation of other bodies, national and international, concerned with international law (A/AC.10/22), (5) a working bibliography on the codification of international law (A/AC.10/6), and (6) a memorandum on the methods for encouraging the progressive develop-

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ment of international law and its eventual codification (A/AC.10/7); of these items (4) and (5) are omitted here.

While most of the memoranda were intended for the purposes of reference, the Memorandum on the Methods for Encouraging the Development of International Law and its Codification (A/AC.10/7), containing observations which the Secretariat presented to the Committee, was specially designed to facilitate the discussion of the problems involved. This memorandum, as proposed in a memorandum of the Rapporteur of 16 May 1947 (A/AC.10/26), was taken by a decision of the Committee at its seventh meeting on 21 May as a general basis for discussion.

A Report was adopted by the Committee to be considered by the General Assembly during its Second Session in September, 1947; this document was reproduced in this Supplement at page 18, above. The value of the memoranda to the Committee, and the work of the Secretariat in their preparation, was suitably acknowledged both by individual members of the Committee and by the Rapporteur on the conclusion of his task.

** Memorandum prepared by the Secretariat; doc. A/AC.10/5, 29 April 1947.

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PART I

THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

A. GENERAL

The development of the Law of Nations by means of conscious efforts of Governments may be said to have originated at the Conference of Vienna, 1814/1815. The Powers signatories of the Treaty of Paris of 1814 adopted, on 19 March 1815, Regulations regarding the rank of diplomatic agents Declaration concerning the abolition of the slave trade on 8 February 1815, and Regulation regarding free navigation on rivers on 29 March 1815 (Martens, *Nouveau Recueil*, V. II, 1818, pp. 432, 434, 449).

The work begun in Vienna was continued at Aix-la-Chapelle, where a new class of diplomatic agents was added to the Vienna Rules and where the Great Powers, on 15 November 1818, solemnly declared "leur invariable résolution de ne jamais s'écarter, ni entre eux ni dans leurs relations avec d'autres états, de l'observation la plus stricte des principes du droit des gens, principes qui dans leur application à un état de paix permanent, peuvent seuls garantir efficacement l'indépendance de chaque gouvernement et la stabilité de l'association générale" (Martens, N. R., IV, page 560).

One of the most remarkable events in the early stages of the process of formulating rules of international law at international conferences was the Declaration of Paris of 16 April 1856. Signed by seven Powers assembled at the Congress of Paris and enunciating four rules of maritime law, "the Declaration of Paris was the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which received something like universal acceptance" (cf. H. W. Malkin, "The Inner History of the Declaration of Paris," *British Year Book of International Law*, Vol. 8, 1927, page 2).

The development of written international law through the restatement of principles of existing law or through the formulation of new law (these two methods being frequently undistinguishable), was pursued at over 100 international conferences or congresses held between 1864 and 1914, resulting in over 250 international instruments (cf. List of multipartite international instruments from 1864 to 1914 in Hudson, *International Legislation*, Vol. I, 1931, pages xx-xxxvi).

During the twenty-seven years from 1919 to 1946, over 700 multipartite agreements were concluded of which the prevalent majority entered into force for a varying number of states. Some conventions became binding upon as many as seventy states, viz., the Universal Postal Conventions were ratified or adhered to by seventy-two states. Altogether during approximately the same period 4,834 international instruments were regis-

tered with the League of Nations and published in 205 volumes of its Treaty Series.

While some of the instruments never became binding upon states, they may be said to have contributed to the experience of Governments in their search for solutions through international legislation of the manifold problems of international relations. Many instruments were isolated events dealing with particular problems. A substantial number, however, represents the fruit of a sustained effort of Governments to develop conventional international law for certain aspects of international relations at successive international conferences.

Thus the laws of war, both on land and on the sea, were progressively tackled at the Congress of Paris of 1856, and the Conferences of Geneva of 1864, of St. Petersburg of 1868, of Brussels of 1874, of Paris of 1884, of The Hague of 1899, 1904, and 1907, of Geneva of 1906, of London of 1909, of Washington of 1922, of Geneva of 1925, and 1929, and of London of 1930. Of these the Brussels Conference of 1874 for the codification of the rules and usages of war on land and the London Naval Conference of 1908/1909 resulted in instruments which never entered into force. The Brussels Conference was nevertheless regarded as "epoch-making, since it showed the readiness of the Powers to come to an understanding regarding" a code of laws and customs of war (cf. Oppenheim, *International Law*, Vol. I, 4th ed. by McNair, 1928, page 78).

The London Naval Conference represents a landmark in the movement for the codification of international law and its preparation was said to constitute "a model never yet surpassed in the annals of diplomacy. The method and care with which this Conference was prepared facilitated the proceedings enormously" (Records of the Eighth Ordinary Session of the Assembly of the League of Nations, 1927, O. J., Special Supplement No. 54, page 204). The London Naval Conference is therefore discussed separately in this Memorandum (cf. Part I).

The unification of private international law was promoted at six governmental conferences held in 1893, 1894, 1900, 1904, 1925 and 1928. Sanitary questions formed the subject of fifteen conferences held in 1851, 1859, 1866, 1874, 1881, 1885, 1892, 1893, 1894, 1897, 1903, 1907 and 1911/12, 1926 and 1938. International postal communications were regulated at twelve congresses held in 1863, 1874, 1878, 1885, 1891, 1897, 1906, 1920, 1924, 1929, 1934, 1939. Seventeen international geodetic conferences took place between 1864-1912. The protection of submarine cables was on the agenda of seven international conferences held between 1863 and 1913. Fourteen international conferences for the regulation of sugar tariffs met between 1864 and 1937. International telegraphic communications were regulated at ten international conferences meeting in the period from 1864 to 1908. Since 1932 the regulation of telegraph and telephone communications was

combined with the regulation of radio, and the Telecommunication Union was established at the Madrid Conference in 1932.

The Latin Monetary Union was the subject of nine conferences between 1865 and 1921, while four international monetary conferences were held between 1867 and 1892, and a Monetary and Economic Conference was held in London in 1933 and four conferences on bills of exchange met in 1910, 1912, 1930, and 1931.

Five general international conferences on weights and measures took place between 1889 and 1921. Eight international conferences on the transportation of merchandise by railroads were held between 1878 and 1933. Two international conferences for the publication of customs tariffs were held in Brussels in 1888 and 1890. The protection of industrial property was the subject of ten international conferences held between 1880 and 1934 and the protection of artistic and literary property was the subject of seven international conferences held between 1884 and 1928. The International Maritime Conference to define the rules of the road at sea met at Washington in 1889. International conferences on maritime law were held in Brussels in 1905, 1909, 1910, 1922 and 1926, and on safety of life at sea at London in 1914 and 1929. A Load Line Convention was adopted at London in 1930. The regulation of international waterways and certain question regarding agricultural and cultural problems were on the programme of numerous conferences.

The Hague Peace Conferences of 1899 and 1907 made a contribution to the evolution of conventional international law in many fields and, for this reason, occupy a special position.

Aerial navigation was the subject of a conference held in Paris in 1910. The Paris Peace Conferences of 1919 set up an Aeronautical Commission for the purpose of framing a convention. The result was the Convention on the Regulation of Aerial Navigation of 13 October 1919. This was the first international convention relating to aerial navigation. An Ibero-American convention was signed in Madrid on 1 November 1926, and in inter-American Convention was adopted at Havana on 20 February 1928.

Treaties concerning the protection of minorities were concluded between the Principal Allied and Associated Powers and Poland (28 June 1919), Yugoslavia (10 September 1919), Czechoslovakia (10 September 1919), Rumania (9 December 1919), and Greece (10 August 1920). Furthermore, the Treaties of Peace with Austria (10 September 1919), Bulgaria (27 November 1919), Hungary (4 June 1920) and Turkey (24 July 1923) contained provisions regarding the protection of minorities.

The Conferences resulting in the Convention concerning the International Hydrographic Bureau of 30 June 1919, the Convention for the Establishment of an International Institute of Refrigeration of 21 June 1920, and the Convention for the Creation of an International Office of Chemistry of 29 October 1927 may also be mentioned.

General Conventions concluded under the auspices of the League of Nations and international labour conventions are discussed elsewhere in this Memorandum (cf. *infra*, Part II).

B. PREPARATION OF CONFERENCES AND CONVENTIONS

General

There appears to have emerged no uniformity in the preparatory procedure for international conferences and conventions from the rich experience in promoting the progressive development of international law during a period of over one hundred years. Generally, international conferences were preceded by diplomatic exchanges. In such cases the initiating Government proposed the agenda for the conference in more or less definite form. The Hague Peace Conferences are a case in point.

In some fields certain Governments have displayed a marked continuity of interest. Thus the Government of the Netherlands initiated and prepared the conferences on the unification of private international law held successively at the Hague since 1893, the British Government initiated conferences on the safety of life at sea and the Government of Belgium took the initiative in convening conferences on the unification of maritime law (cf. below).

In the case of international unions, such as the Universal Postal Union, and the Telegraphic and Telecommunication Union a certain uniformity of method evolved.

The International Conferences of American States, the League of Nations and the International Labour Organization have made a substantial contribution to the development of conventional international law in many of its branches. They also developed techniques of preparing the work of international conferences which are discussed elsewhere in this Memorandum.

The first Conference for the Codification of International Law held at the Hague in 1930 deserves particular attention from the point of view of the preparatory technique employed by the League of Nations (cf. *infra*, Part III).

Certain private international and national scientific institutions such as the Institute of International Law, the International Law Association, the International Maritime Committee, the International Shipping Conference, the Harvard Research in International Law have facilitated and laid the ground work for some of the diplomatic conferences concerned with the progressive development of international law. It may be noted that the Conference for the Codification of International Law of 1930, highly appreciating the scientific work which has been done for codification in general and in regard to the subjects on its agenda in particular,

considered it desirable "that subsequent conferences for the codification of international law should also have fresh scientific work at their disposal and that, with this object, international and national institutions should undertake at a sufficiently early date the study of the fundamental questions of international law, particularly the principles and rules and their application, with reference to the points which are placed on the agenda of such conference" (cf. *infra*, Appendix 10).

The Hague Peace Conferences

The Russian Circular Note of 30 December 1898 contained a list of subjects to be submitted for discussion at the First Hague Peace Conference. Similarly, the Russian Notes of March/April, 1906 outlined the programme for the Second Hague Peace Conference.

In spite of the lack of adequate preliminary preparation the Hague Conferences, drawing upon the work and experiences of preceding conferences, reached agreement on several conventions of outstanding importance and thereby greatly stimulated the movement in favour of codifying international law.

The Second Hague Peace Conference, however, feeling the lack of adequate preparation of its deliberations, in recommending the holding of a Third Peace Conference, called the attention of the Powers "to the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition." With this end in view the Conference proposed that "some two years before the probable date of the meeting, a preparatory Committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a programme which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This Committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself" (Final Act of the Second International Peace Conference, 18 October 1907. Malloy's Treaties . . . between the United States and Other Powers, Vol. II, 1910, page 2579).

Postal Conferences

An interesting example of preparatory technique is offered by the postal conferences. The international conference convened in 1874 for the purpose of regulating postal communications was prepared by the initiating Government, which submitted a draft of a postal union. The Regulations adopted by the Conference on 9 October 1874 for the execution of the Treaty relative to the formation of a General Post Union provided in Article XXVII, paragraph 13, that in the future the work of congresses should be

prepared by the postal administration of the host country in collaboration with the International Bureau created by that Conference. The succeeding Congress, however, in Article XXX, paragraph 8 of the Regulations attached to the Convention of 1 June 1878 for the formation of the Universal Postal Union charged the International Bureau with the task of preparing for the work of future congresses, or conferences. The International Bureau continues to be in charge of this function (cf. Article 183 of the Regulations for the Execution of the Universal Postal Convention concluded at Buenos Aires on 23 May 1939).

The preparatory procedure for postal congresses generally begins with proposals submitted by the various postal administrations to the International Bureau a year before the next Congress. The Bureau assembles proposals in a "Cahier des Propositions" which is distributed to all members for comment. Upon receipt of comments and counter proposals the Bureau prepares a new edition of the "Cahier" which serves as agenda for the Congress (cf. H. R. Turkel, "International Postal Congresses," *British Year Book of International Law*, Vol. 10, 1929, page 171).

The Universal Postal Congress, meeting in Madrid, adopted on 23 November 1920 the proposal to set up a research committee ("Commission d'Etudes") composed of representatives of seven administrations to study the possibility and the means of improving and simplifying the acts of the Postal Union with regard to their form and wording (Documents du Congrès Postal de Madrid, 1920, Vol. II, 1921, page 792).

The Committee held two meetings in 1921 and 1922 respectively and, with assistance of two sub-committees, adopted on 14 April 1922 revised texts of the Principal Convention and its Regulations and a general report. These documents were transmitted to the members of the Union with the request to let the International Bureau know by 31 December 1922 whether they agree that the projects of the Committee may serve as the sole basis of the propositions to be made for the next congress (Report of the Committee to Rearrange the Universal Postal Convention of Madrid and Recommend any Changes Deemed Necessary. Washington, 1923, page 6).

The Universal Postal Convention adopted at the Stockholm Congress on 28 August 1924, added to the organs of the Union, in Article 17, Commissions charged by the Congress or Conference with the study of particular questions. Also, following the precedent of the Madrid Congress, the Stockholm Congress established a Research Committee ("Commission d'Etudes") of fourteen member administrations to study the ways and means of simplifying and accelerating the work of the Congresses (Article XII of the Final Protocol).

The London Congress of 1929 established a Preparatory Commission of fourteen administrations to prepare the work of the next Congress and, in particular, to study, compare and co-ordinate proposals, and to submit a project and a report susceptible of serving as basis of discussion at the

next Congress. The report and project should be transmitted to each administration at least four months before the opening of the next Congress (Article XIV of the Final Protocol).

It may be noted that nearly all members of the international community are members of the Universal Postal Union.

Conferences for Unification of Private International Law

An interesting example of preparatory techniques is offered by the Conferences convened by the Government of the Netherlands for the unification of private international law. Preparatory to the First Hague Conference on private international law, 12-27 September 1893, the Government of the Netherlands transmitted to the Governments a memorandum and the text of the laws and conventions in force in the Netherlands. The memorandum consisted of two parts. In the first part the Netherlands Government stated its views relating to the forthcoming conference and in the second part it formulated a draft programme in the form of a questionnaire which could be submitted for discussion at the Conference. The Netherlands Government suggested that the twelve invited Governments submit to the Conference statements regarding the legislation in force in their countries with respect to private international law. All the Governments responded to this suggestion (cf. *Actes de la Conférence de la Haye chargée de régler diverses matières de Droit International Privé*, 12-27 Septembre 1893, La Haye, 1893, Première Partie, pages 2-7 and Deuxième Partie).

The Royal Commission for the Codification of Private International Law, created in 1897 by the Netherlands Government, and similar commissions in other countries were instrumental in preparing the third Hague Conference on private international law. The Netherlands Government communicated to the invited Governments a draft programme for the third conference with the request for their observations and counter-proposals. The Royal Commission examined the documentation received from the Governments and drew up a systematic memorandum indicating, with reference to each article of the draft programme, the proposals and amendments submitted by the Governments (*Documents relatifs à la Troisième Conférence de la Haye pour le Droit International Privé*, 1900, page 1). The preparatory documentation thus assembled was then submitted to the conference.

The Third Conference expressed the "vœu" that the procedure "qui a été heureusement suivi pour la préparation de la Conférence actuelle" should be applied in preparation for the Fourth Conference on Private International Law, (cf. *Protocol Final* of 18 June 1900. *Actes de la Troisième Conférence de la Haye pour le Droit International Privé* 29 Mai-18 Juin 1900, page 246). The Netherlands Government complied

with the desire expressed by the Third Conference and in October 1902 communicated to the Governments a "projet de programme d'une Quatrième Conférence" and requested their replies. The Royal Commission examined the documentation received from the Governments and drafted a "tableau systématique," indicating under each article of the draft programme the proposals and amendments submitted by the Governments as well as its own thoughts on the subject (Documents relatifs à la Quatrième Conférence de la Haye pour le Droit International Privé, 1904, page V).

The method employed so successfully was resorted to again in preparing for the Fifth and Sixth Conferences of 1925 and 1928. It may be noted that questionnaires were employed by the Netherlands Government in connection with these two conferences. On the basis of the replies and documentation relative to the legislation in force in the invited countries, a "tableau synoptique" was drawn up on each of the topics which had not been discussed at the preceding conference (Conférence de la Haye de Droit International Privé, Documents relatifs à la Sixième Session tenue du 5 au 28 janvier 1928, page 11).

Conferences on Sea Transport

Conferences on sea transport may be divided roughly into those dealing with the unification of private maritime law and those concerned with safety regulations. The Belgian and British Governments have generally taken the initiative in convening the former and latter respectively, whereas the League of Nations and the International Labour Organization have been responsible for promoting the international regulation of certain related questions (cf. *infra*, Part II, A and Part II, B).

The preparatory work for conferences convened by the Belgian Government was largely performed by the International Maritime Committee, an unofficial body established in 1897 for the purpose of furthering the unification of maritime law (cf. Sir Osborne Mance, *International Sea Transport*, 1945, pages 5-27). The Conference held in Brussels in 1910, attended by all the maritime States of Europe, the United States of America, and most of the South American States, adopted on 23 September the Convention for the Unification of certain Rules of Law with respect to Collision between Vessels and the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea. Both conventions were ratified by twenty-six states.

The Brussels conference of 1924 adopted the International Convention for the Unification of Certain Rules relating to Bills of Lading which was signed on 25 August 1924 and ratified by sixteen states. The Convention is based on the rules drafted by the International Law Association in co-operation with the International Maritime Committee and the so-called "Hague Rules 1922" adopted by the latter (cf. Mance, *op. cit.*, page 29).

At the same conference the Convention for the Limitation of the Responsibility of Ship-owners was signed on 25 August 1924. It was ratified by twelve states.

The Brussels Conference of 1926 adopted two instruments: The Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, and the Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages. Both were signed on 10 April 1926. The former Convention was adopted after prolonged preparatory work carried out by the International Shipping Conference and the International Maritime Committee (cf. Mance, *op. cit.*, page 31). An Additional Protocol, proposed by the British Government, was signed at Brussels on 24 May 1934, and both the Convention and the Additional Protocol were ratified by thirteen states (cf. Mance, *op. cit.*, page 32). The preparatory work for the Convention on Maritime Liens goes back to 1907 (cf. Mance, *op. cit.*, page 33). This Convention was ratified by fourteen states.

Safety at sea was the subject of the International Marine Conference held at Washington in 1889. No convention was signed at the time. Following the Titanic disaster in 1912, the British Government convened a conference in London which on 20 January 1914 adopted the Convention on the Safety of Life at Sea. Following substantial preparatory work undertaken by the International Shipping Conference since 1921, the revised Convention on Safety of Life at Sea was signed at London on 31 May 1929 (Hudson, *International Legislation*, Vol. II, No. 218, page 2,724). This replaced the 1914 Convention for those states that ratified it (cf. Mance, *op. cit.*, page 39). The 1929 Convention was ratified by thirty-five states.

The protection of life and property at sea is also treated in the Load Line Convention signed at London on 5 July 1930 (Hudson, *International Legislation*, Vol. V, No. 267, page 843). The Preparatory work for this Convention was carried out by the International Shipping Conference (cf. Mance, *op. cit.*, page 41).

It may be noted that, according to Article 61 of the Safety of Life at Sea Convention, the British Government is charged with communicating to the Contracting Governments proposals for the modification of the Convention. Such modifications enter into force if accepted by all the Contracting Governments. On 17 January 1933, the British Foreign Secretary informed the Contracting Governments that a modification of Regulation 19 (2) had been accepted and entered into force in accordance with the procedure laid down in Article 61 (cf. Hudson, *International Legislation*, Vol. VI, No. 323, page 281).

The Load Line Convention, in Article 20, provides a similar method for effecting modifications.

International Telecommunication Conferences

The Service Regulations of the Telegraphic Convention of 14 January 1872 charged the International Bureau of the International Telegraphic Union with the task of preparing future international telegraphic conferences. The duties of the Bureau were extended in 1885 to include international telephones under service regulations adopted in that year.

Conferences dealing with maritime radio-telegraphy were held in Berlin in 1903 and 1906, and in London in 1912. The Radio-telegraphic Convention of 1906 entrusted to the Bureau the same duties in regard to radio telegraphy as it already discharged in the field of telegraphy. The Radio-telegraph Convention signed at Washington on 25 November 1927, embraced all radio communications (cf. Hudson, *International Legislation*, Vol. III, No. 185, page 2,197). It provided in Article 17, paragraph 1 for the establishment of an International Technical Consulting Committee on Radio Communication. Under Article 16 the International Bureau of the Telegraph Union was charged with the work pertaining to the Conferences, including examining requests for changes in the Convention and the Regulations annexed thereto.

At a joint conference held at Madrid in 1932, it was decided to consolidate the existing international organizations for telegraphs, telephone and radio in an International Telecommunication Union (cf. Hudson, *International Legislation*, Vol. VI, No. 316, page 109). Under Article 17, paragraph 2 (a), of the Madrid Convention the Bureau of the International Telecommunication Union is charged with the work preparatory to the following conferences at which it shall be represented in an advisory capacity. Pursuant to Article 16 consulting committees may be established for the purpose of studying questions relating to the telecommunication services. Three such Consulting Committees, the Telephonic, the Telegraphic and the Radio, have been set up.

Sixty-eight States have ratified or acceded to the Madrid Telecommunication Convention.

*Air Transport Conferences**Public Air Law*

The Convention on the Regulation of Aerial Navigation opened for signature at Paris on 13 October 1919 (Hudson, *International Legislation*, Vol. I, No. 9, page 359) ratified or acceded to by thirty-nine States, provided in Article 34 for the establishment of a permanent commission under the name International Commission for Air Navigation, generally known by its French initials C.I.N.A. The C.I.N.A. was placed under the direction of the League of Nations. Under Article 34 its functions included: to receive proposals from, or to make proposals to, any of the contracting States for the amendment or modification of the provisions of the Conven-

tion, and to notify changes adopted; to discharge certain duties conferred upon it by specified Articles of the Convention and to amend the provisions of the technical Annexes A-G; and to give its opinion on questions which States may submit to it.

The activities of C.I.N.A. were summed up as follows: "(1) A Council charged with ensuring the application of the Convention and its normal evolution by proposing in due season to the contracting States the amendments called for by the development of international air navigation; (2) an international parliament having power at all times to adapt the technical regulations to the requirements of air traffic; (3) a tribunal settling in first and last instance disagreements which may arise between contracting States with regard to the technical regulations which it has the power to enact" (cf. Sir Osborne Mance, *International Air Transport*, 1944, page 18).

Protocols amending the 1919 Convention and prepared by the C.I.N.A. were adopted in 1922, 1923, 1929 and 1935 (cf. Hudson, *International Legislation*, Vol. I, Nos. 9b, 9c, 9d, and Vol. VII, No. 412).

The C.I.N.A. cooperated with the International Office of Public Hygiene in preparing the draft of the Sanitary Convention for Aerial Navigation opened for signature at the Hague on 12 April 1933 (Hudson, *International Legislation*, Vol. VI, No. 326, page 292).

Private Air Law

As the functions of C.I.N.A. were related to the 1919 Air Navigation Convention, the French Government, in 1923 proposed a conference to discuss the codification of international private air law. The First International Conference on Private Air Law, meeting in Paris in 1925, adopted a resolution for the setting up of an International Technical Committee of Aerial Legal Experts, known by the initials of its French title CITEJA, to prepare draft codes for diplomatic Conferences. The Committee of Experts was constituted in Paris in 1926. The work of CITEJA was purely advisory. Its main tasks were to study questions referred to it by the diplomatic conferences and, in particular, to prepare draft conventions on topics assigned to it by the diplomatic conferences. Such draft conventions were submitted to diplomatic Conferences convened by the French Government in 1929, 1933 and 1938. Between 1926 and 1938 CITEJA held thirteen annual sessions to some of which experts from non-member states were invited.

The Second International Conference on Private Air Law, held at Warsaw in 1929, adopted the Convention on the Unification of Certain Rules regarding International Air Transport, signed 12 October 1929 (Hudson, *International Legislation*, Vol. V, No. 235, page 100).

The Third International Conference on Private Air Law at Rome adopted the Convention for the Unification of Certain Rules relating to

Damages Caused by Aircraft to Third Parties on the Surface and the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft. Both instruments were opened for signature at Rome on 29 May 1933 (cf. Hudson, *International Legislation*, Vol. VI, Nos. 328, 329, pages 327, 337).

The Fourth International Conference on Private Air Law at Brussels adopted the Convention for the Unification of Certain Rules relating to Assistance and Salvage of Aircraft at Sea, and a Protocol on Aviation Insurance. The Convention was signed on 29 September 1938.

Not all of the draft conventions submitted by CITEJA were adopted by the diplomatic conferences. Thus the Fourth Conference referred back to CITEJA for further study the draft convention for the Unification of Certain Rules relating to Aerial Collisions. The four conventions prepared by CITEJA and adopted by the diplomatic conferences constitute an important contribution to the progressive development of international private air law.

C. THE INTERNATIONAL NAVAL CONFERENCE

London, December, 1908–February, 1909

Origins

The International Prize Court Convention

The Convention for the Establishment of an International Prize Court adopted by the Second Hague Peace Conference on 18 October 1907 provides in Article 7 that in the absence of treaty provisions applicable to the case, the Prize Court shall apply the rules of international law or, if no generally recognized rules exist, the Court shall give judgment in accordance with the general principles of justice and equity. An effort was made at the Hague Conference to reach agreement on various questions relating to maritime war. Owing to lack of time it was not possible for the powers to establish agreement on all points.

Proposal for a Conference

On 27 February 1908, the British Government proposed to the principal naval Powers (Germany, Spain, France, Italy, Russia, Japan, Austria-Hungary, the United States and the Netherlands) to hold a conference in London in order to agree on the generally recognized rules of international law and thus ensure the establishment of the International Prize Court. The following eight subjects were suggested for inclusion on the programme of the Conference: contraband, blockade, continuous voyage, destruction of neutral vessels prior to their condemnation by a Prize Court, conversion of a merchant vessel into a warship on the high seas, transfer of merchant vessels from a belligerent to a neutral flag during or in con-

temptation of hostilities, and the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property was enemy property.

In order to facilitate the work of the proposed Conference, the British Government suggested that the Governments should interchange memoranda stating their views of the correct rules of international law on each of the subjects listed above and that these should include references to the authorities on which these views were based.

The British Government further suggested that if the idea of a conference was accepted, each government should send delegates equipped with full powers to negotiate and conclude an agreement.

All the Governments to whom the British proposal was addressed forwarded to that Government memoranda of their views as to the subjects mentioned therein.

Preparation of Bases of Discussion

On 14 September 1908, the British Government, noting that its invitation had been accepted by the Powers concerned, informed them that it would prepare for the Conference, "as a suitable basis for its deliberations, a draft declaration in terms which shall harmonize as far as may be possible the views and interpretations of the accepted law of nations as enunciated in the memoranda of the several Governments."

Codification v. Legislation

In a note of 10 November 1908, the British Government informed the Powers that "the main task of the Conference will not . . . be to deliberate *de lege ferenda*, as the Peace Conferences have been called upon, and may again be called upon, to do with a view to develop and extend the scope of the conventional law of nations. The proposed Declaration should . . . place on record that those Powers which are best qualified and most directly interested, recognize, as the result of their common deliberations, that there exists in fact a common law of nations of which it is the purport of the Declaration, in the common interest, to set out the principles." The British Government thus intended "not to suggest any new doctrines, but to crystallize, in the shape of a few simple propositions, the questions on which it seems possible to lay down a guiding principle generally accepted." The British Government also declared that "in regard to other questions which cannot be so dealt with . . . (it) will be happy to consider in the most conciliatory spirit such proposals as have been or may be put forward with the view to the adoption of special conventional stipulations" (Misc. No. 4 (1909), Cd. 4554, page 19).

The document prepared by the British Government was transmitted to other Governments on 14 November 1908, under the title: "Statement of the Views Expressed by the Powers in their Memoranda, and Observations

Intended to Serve as a Basis for the Deliberations of the Conference" (*Ib.*, pages 19, 20, 33).

Declaration v. Convention

It is apparent from this Statement, that the purpose of the Conference, as seen by the British Government, was to reach an agreement on a "Declaration" rather than a "Convention." British Government, in an introductory note to the Statement, observed that:

La 'déclaration' proposée doit avoir pour objet d'énoncer, avec le plus de précision possible, les points sur lesquels il y a identité entre les principes suivis et même, s'il y a lieu, entre leur application pratique, ainsi que les points sur lesquels l'expérience acquise et la communauté des conditions modernes du commerce maritime, de la navigation et de la guerre navale permettent aujourd'hui d'exprimer les principes généraux du droit international, qui se sont fait jour peu à peu à travers les errements séparément suivis dans chaque pays. Il ne s'agit donc pas à cet égard pour la Conférence de statuer *de lege ferenda*, comme les Conférences de la Paix ont été ou seront appelées à faire en vue de développer le domaine des stipulations conventionnelles internationales. A la différence d'une "convention," créant des règles particulières aux Etats Contractants, la "déclaration" projetée doit être, dans l'opinion du Gouvernement de Sa Majesté, la reconnaissance par les Puissances les mieux qualifiées et les plus intéressées, délibérant en commun, que, dans l'état actuel des relations mondiales, il existe véritablement un droit commun des nations, dont elle entend dégager les principes dans l'intérêt de tous. La force obligatoire de ce droit commun a été constatée par l'article 7 de la Convention de La Haye précitée.

A la différence encore d'une convention, qui ne saurait être modifiée que par de nouvelles stipulations, les règles reconnues aujourd'hui pourront être appliquées ou développées, le cas échéant, avec telles modifications que la Cour trouvera nécessaires pour donner aux principes leur vraie portée en présence des progrès du jour.

Le Gouvernement de Sa Majesté se plaît à espérer qu'en formulant ainsi 'les règles généralement reconnues du droit international' expressément prévues comme base des décisions devant être imposées par la Cour des Prises, la Conférence évitera à tous les pays les surprises et les doutes, nuisibles au commerce pacifique comme aux bonnes relations politiques, et qui n'ont actuellement souvent pour cause que le défaut d'expression autorisée d'un droit, auquel tous les Etats ont l'incontestable souci de se conformer.

En préparant le travail qui va suivre, le Gouvernement de Sa Majesté n'a donc nullement eu vue de suggérer des principes nouveaux, mais seulement de cristalliser en quelques propositions simples les questions sur lesquelles une doctrine dirigeante paraît pouvoir être formulée. Sur les autres questions, il sera heureux de participer à l'examen des propositions qui ont été ou pourront être faites en vue de stipulations conventionnelles particulières (*Proceedings of the International Naval Conference, held in London December 1908-February 1909, Misc. No. 5 (1909), Cd. 4555, pages 57, 58.*)

Some of the Powers, it appears, were in favour of a code of rules "binding on the contracting parties in case of war between two or more of them, and only on condition of reciprocity, no distinction being made between rules already acknowledged by the consensus of nations to be of general validity, and others introducing new elements not hitherto admitted to have the force of international law." The British Government, in commenting upon this approach, stated that it was not likely to produce a result "which would effectually guarantee the application of known rules by the International (Prize) Court." Stressing the advantages of a Declaration as against a Convention, the British Government declared that "any proposition of law enunciated by the chief naval Powers as expressing in their opinion, the existing, correct, and general rule in the matter, would, they are convinced, carry such weight that its uniform enforcement could be almost certainly relied upon" (Sir Edward Grey to Lord Desart, 1 December 1900, Misc. No. 4 (1909), Cl. 4554, page 22).

The proposed Conference would be free to discuss new rules. Its principal task, however, would be "a restatement of the underlying principles" of the law of nations "in words adapted to present-day circumstances" which would furnish the opportunity "of arriving by common agreement at a uniform definition of the main principles of the existing law, to whose spirit all nations are without doubt anxious to conform" (*Ib.*, page 22).

The London Conference

The International Naval Conference, held in London from 4 December 1908 to 26 February 1909, was attended by delegates from Great Britain, the United States of America, Germany, Spain, France, Italy, Japan, the Netherlands, Russia and Austria-Hungary.

The Conference adopted the "bases of discussion" prepared by the British Government as a starting point for the examination of the principal questions of existing international law. After a first reading in a series of plenary meetings, the Conference decided to conduct the necessary detailed discussion in a Grand Committee, which, in fact, was the Conference sitting in Committee. This device was resorted to in order to enable the delegates to talk more informally and without the restraint of a formal record of the proceedings in official minutes. The Grand Committee concentrated on reaching agreement on the general outline of the final Declaration.

Questions presenting special difficulties were discussed in an Examining Committee, composed of one delegate of each of the participating Governments. The Conference also established a Legal Committee to discuss certain technical questions. At an advanced stage of its deliberations, on 17 February 1909, the Conference appointed a Drafting Committee which, on the basis of a draft submitted by the Delegation of Great Britain, was instructed to prepare the final text.

Results of the London Conference

The Conference, after deliberating for almost three months, adopted a Final Protocol, a Declaration concerning the Laws of Naval War, and a General Report.

General Report

The General Report to the Conference, prepared by Professor Renault and adopted by the Conference, contains "a most lucid, explanatory and critical commentary on the provisions of the Declaration." It was pointed out by the chief Delegate for Great Britain that "in accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and that consequently foreign Governments and Courts, and, no doubt also, the International Prize Court, will construe and interpret the provisions of the Declaration by the light of commentary given in the Report" (Delegates for Great Britain at the Naval Conference to Sir Edward Grey, 1 March 1909. Misc. No. 4 (1909), Cd. 4554, page 94).

Final Protocol

The Final Protocol adopted by the London Naval Conference on 26 February 1909, in addition to formal statements contains a wish ("voeu") which was intended to pave the way for the ratification of the International Prize Court Convention of 1907 by the United States. The delegates agreed in this wish to call the attention of their Governments to the advantages of concluding an arrangement whereby States which for constitutional reasons experience some difficulty in ratifying the Hague Convention of 1907 for the establishment of an International Prize Court, should have the power, at the time of depositing their ratifications, to add thereto a reservation to the effect that resort to the International Prize Court in respect of decisions of their national tribunals shall take the form of a direct claim for compensation.

The Declaration concerning the Laws of Naval War

The Declaration, adopted by the Conference on 26 February 1909, was said to represent the *media sententia* of the views and practices prevailing in the different countries. The General Report pointed out that the rules embodied in the Declaration "must not be examined separately, but as a whole, otherwise there is a risk of the most serious misunderstandings." The success of the Conference was due to compromise and mutual concessions. The rules adopted by the Conference were therefore "not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none" (General Report presented to the Naval Conference on behalf of its Drafting Committee, Misc. No. 4 (1909) Cd. 4554, page 34).

The Declaration, in a Preliminary Provision, striking the keynote to the following particular provisions, states: "The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law." The purpose of the Conference, it will be recalled, was not to create new rules but above all "to note, to define, and, where needful, to complete what might be considered as customary law" (General Report, *loc. cit.*, page 35). In thus enunciating principles of international law, recognized by the chief naval powers, the Declaration was intended to facilitate the establishment of the International Prize Court.

Among the Final Provisions of the Declaration there are several indicative of the technique of codification as applied by the London Naval Conference. Article 65 enunciates the principle that "the provisions of the present Declaration must be treated as a whole, and cannot be separated." The work of the Conference being the result of mutual concessions and adaptations, it was thought necessary to exclude the possibility of attaching reservations to any of the rules (General Report, *loc. cit.*, page 66).

The Declaration was subject to ratification and remained open for signature up till 30 June 1909, by the Plenipotentiaries of the Powers represented at the London Conference.

Article 69 of the Declaration provides explicitly for the right of denunciation. Such denunciation, however, "can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years." The General Report concludes that "it follows implicitly from Article 69 that the Declaration is of indefinite duration" (General Report, *loc. cit.*, page 67).

The Declaration was open to accession by Powers not represented at the London Conference. The reason for this, as stated in Article 70, was the great importance which the Powers represented at the Conference attached "to the general recognition of the rules which they have adopted."

Unsolved Problems

Two subjects, inscribed in the programme of the Conference, were not solved. These were the legality of the conversion of a merchant vessel into a warship on the high seas and the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property was enemy property (General Report, *loc. cit.*, page 35).

Action by the Powers after the London Naval Conference

While the London Naval Conference succeeded in reaching agreement on the Declaration concerning the Laws of Naval War, none of the Powers

represented at the Conference ratified the Declaration. The Declaration therefore did not enter into force.

In the War between Italy and Turkey, 1911-1912, both belligerents in their naval operations, conformed apparently to the rules laid down in the London Declaration. Turkey was not invited to the London Conference and had not acceded to the Declaration.

During the World War I, on 6 August 1914, the Government of the United States inquired of the belligerent powers whether they would apply, upon condition of reciprocity, the rules of naval war as laid down in the unratified London Declaration of 1909. Germany and Austria-Hungary agreed. As some of the Allied Powers, however, refused to apply the Declaration in its entirety, the United States withdrew its suggestion. Nevertheless, Great Britain and France put into effect the London Declaration with some modifications. The British and French Government having found the Declaration unadaptable to the circumstances of World War I, ceased to apply it on 7 July 1916, and reverted to the rules of international law.

PART II

THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW BY THE LEAGUE OF NATIONS

A. GENERAL SURVEY OF THE LEGISLATIVE ACTIVITIES OF THE LEAGUE OF NATIONS

About one hundred and twenty international instruments were concluded under the auspices of the League between 1920 and 1939. These instruments, variously designated as conventions, agreements, arrangements, protocols, acts, procès-verbaux or declarations, promoted the progressive development of international law in many fields of international relations. The great majority of conventions concluded under League auspices had for their object the general regulation of relations between states. Some conventions related to particular situations such as the economic rehabilitation of certain countries (Austria, Hungary, Bulgaria etc.).

Preparation of General Conventions to be Negotiated under the Auspices of the League of Nations

The Committee of Experts

The Assembly of the League of Nations, in a Resolution adopted on 24 September 1929, requested the Council to set up a committee of seven experts to investigate "the reasons for the delays which still exist and the means by which the number of signatures, ratifications or accessions given to the Conventions referred to above could be increased." The Council

accordingly appointed a committee of eight members on 15 January 1930. The Committee, meeting in Geneva from 28 April to 2 May 1930, considered two questions:

1. The reasons for the delays at present operative in the procedure or ratification of conventions concluded under the auspices of the League; and
2. The means by which the numbers of signatures, ratifications or accessions of the above-mentioned conventions could be increased.

The Committee noted that "the preparatory work of the Conferences and the discussions at the conference are not in all cases conducted by the officials who have the responsibility of advising upon the definite acceptance of the convention and its application in their countries, but is entrusted to experts on the question under consideration, who are not responsible officials of the competent Government departments." The Committee also pointed out that in the case of some conventions "their urgency may not be appreciated by the Government departments" and that some conventions "are not of special interest to all the signatories" (Report of the Committee Appointed to Consider the Question of Ratification and Signature of Conventions Concluded under the Auspices of the League of Nations, Doc. A.10 1930. O.J. Special Supplement, No. 85, pages 142, 143).

With regard to preparatory work the Committee further observed that "it would be well if more extensive preparatory work could be done before the Conference, so that the Governments may become more fully acquainted with the questions under consideration and be in a position to form their opinions on the various points raised after sufficient study and investigation. The issue of questionnaires to obtain preliminary observations, followed by the circulation of draft conventions giving the opportunity for the submission of amendments, in advance, might serve a useful purpose by bringing to the notice of the conference points which might otherwise involve delays and difficulties at a later date" (*Ib.*, page 144).

The Committee also thought "that the methods recently adopted by the International Labour Organization and the procedure recommended by the Conference on the Codification of International Law (The Hague, 1930) might be found to contain suggestions which may be useful when the adoption of a new procedure is under investigation" (*Ib.*, pages 144, 145).

The Committee, referring to a proposal that a convention should be drawn up by a conference to fix the procedure to be adopted in international conferences held under the auspices of the League and to prepare model texts for the formal articles of these conventions, declared that "if the proposals made in the foregoing paragraphs are sanctioned by a resolution of the Assembly, much more practical and useful results will be achieved than those which could be obtained by the adoption of a convention of the kind mentioned above" (*Ib.*, pages 146, 147).

The Resolution of the Assembly of 3 October 1930

The Assembly of the League adopted on 3 October 1930 a Resolution, proposed in the Report of its First Committee, which was based upon the above Report of the Committee appointed to consider the question of ratification and signature of Conventions concluded under the auspices of the League of Nations, and upon proposals made by some delegations. (For the text of the Resolution see Appendix 1). Section IV of the Resolution of 1930 was reconsidered and amended by the Assembly in 1931. (For the text of Section IV as amended by the Resolution of 25 September 1931, see Appendix 2).

Special Preparatory Procedures

The Preamble of Section IV declares that the preparatory procedure which it lays down for the conclusion of general conventions under the auspices of the League, shall be followed in all cases excepting those "where previous conventions or arrangements have established a special procedure or where, owing to the nature of the questions to be treated or to special circumstances, the Assembly or the Council consider other methods to be more appropriate." This exception was designed to safeguard the preparatory procedure developed and followed by the technical organizations of the League. In the view of some of these organizations the exception was essential. Thus the Economic Committees of the League, commenting upon the 1930 Resolution, stated that certain agreements were of use only if prepared and concluded within a relatively short time. Similarly, the Financial and Fiscal Committees noted that the preparatory procedure laid down by the Assembly may require three to four years and that in certain cases a more expeditious procedure may be desirable. The Advisory and Technical Committee for Communications and Transit, noting that the preparatory procedure proposed by the Assembly involved no modification of its own rules, declared that these rules "which involve continuous contact for the study of all questions with those specially concerned by means of discussion and inquiries carried on by the Advisory and Technical Committee and by its permanent committees, are inspired by the prudent considerations which guided the Assembly in the adoption of the resolution of 3 October 1930, and that these methods, being peculiarly adapted to the study of the technical problems of communications and transit, guard against the premature summoning of international conferences which may be called upon to conclude conventions" (cf. Doc. A.28. 1931. O.J. Special Supplement, No. 94, pages 115, 119).

Standard Preparatory Procedure

The standard preparatory procedure for the conclusions of general conventions was briefly as follows (cf. Appendix 2 for text of amended Section IV of 1930 Resolution):

1. Any organ of the League, envisaging the conclusion of a general convention, should submit to the Council of the League a memorandum stating why it would be desirable to conclude the convention in question.

2. If the Council approves the recommendation in principle, a draft convention and an explanatory memorandum should be submitted to the Governments for their comments.

3. The draft convention together with the observations of the Governments should then be submitted to the Assembly of the League for a decision whether the subject appeared *prima facie* suitable for the conclusion of a convention.

4. In case of an affirmative action by the Assembly, the Council should arrange for a new draft convention based on the observations submitted by the Governments. The new draft convention together with the observations submitted by the Governments should be sent to the Governments for their comments.

5. The Assembly, on the basis of such comments should decide finally whether a convention should be concluded and, in case of an affirmative action, whether the draft should be submitted to a conference.

Thus the standard preparatory procedure laid down in 1931 falls into two stages: The first, called the procedure of "taking into consideration," is designed to clarify the question whether a conference should be convened. This stage ends with the decision of the Assembly that the subject is *prima facie* suitable for a convention. Then the second stage, in which the bases of discussion for the Conference are prepared, begins (Report of the First Commission to the Assembly, Doc. 33, 1930. O.J. Special Supplement, No. 84, page 571).

Altogether this procedure provided for three affirmative decisions by the chief organs of the League—one by the Council and two by the Assembly—and for two consultations of Governments prior to the convening of a conference. In this manner the League intended to ensure careful preparation of the subjects selected for conventions and a measure of Government consent which, in turn, would ensure the adoption of such conventions by a conference and their ultimate ratification by Governments (cf. paragraph 2 of the Preamble).

In addition, the Resolution of 1930 in paragraph V provides that "at future conferences held under the auspices of the League of Nations at which general conventions are signed, protocols of signature shall, as far as possible, be drawn up on the general lines of the alternative drafts set out in Annexes I and II of the present Resolution."

The protocol of signature in Annex I provides that the signatories undertake to submit the convention for parliamentary approval within an agreed period of time or to inform the Secretary-General of the League of their attitude regarding the Convention. According to paragraph II of the proposed protocol of signature a new conference may be held if the con-

vention fails to secure the ratification of an agreed number of Governments. This procedure may be suitable for most general conventions.

With regard to conventions whose usefulness depends upon their speedy entry into force for a large number of states, the protocol of signature in Annex II envisages the possibility of a new conference being convened by the Council of the League if the convention has not become binding on an agreed date for the agreed number of states.

The Assembly Resolution laid down a standard procedure but left the way open for special procedures adapted to meet special needs. Thus, with a view to speeding up the procedure for the entry into force of conventions dealing with minor or technical matters, paragraph VI of the Resolution envisages the possibility of signing instruments in the form of governmental agreements which are not subject to ratification. It will be recalled that the technical organizations of the League strongly insisted that the provision in the Preamble of paragraph IV of the Resolution for excepting existing procedures or special questions from the application of the general preparatory procedure laid down by the Assembly, was essential.

The Subject Matter of General Conventions Concluded Under the Auspices of the League of Nations (For a list of Agreements and Conventions concluded under League Auspices cf. Appendix 3)

The legislative work of the League of Nations, comprising a wide range of subjects affecting relations between States, may be roughly classified as follows:

International Law

The contribution of the League of Nations to the progressive codification and development of international law is discussed in Part III of this Memorandum. Two conventions, however, concluded under the auspices of the League may be mentioned here: The Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court, concluded on 16 February 1937 (cf. Hudson, *International Legislation*, Vol. VII, Nos. 499 and 500, pages 862, 878).

Arbitration and Security

The Committee on Arbitration and Security, set up on 30 November 1927, was responsible for the General Act for the Pacific Settlement of International disputes adopted by the Assembly of the League on 26 September 1928. The same Assembly adopted a series of model bilateral and multilateral treaties (treaties A, B, C, D, E and F) concerning the pacific settlement of international disputes, non-aggression and mutual assistance. This Committee also prepared the Convention on Financial Assistance and the Convention to Improve the Means of Preventing War, approved

by the Assembly on 29 September 1930 and 26 September 1931 respectively (cf. Hudson, *International Legislation*, Vol. V, Nos. 207 and 296, pages 751, 1,090).

In this field the following instruments may also be noted: The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, the Declaration regarding the Territory of IFNI, and the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, adopted by the Conference on the Traffic in Arms on 17 June 1929 (cf. Hudson, *International Legislation*, Vol. III, Nos. 142, 142a, 143, pages 1634, 1669, 1670).

Economic and Financial

The Committees of the Economic and Financial Organization of the League contributed to the development of international law through international conventions and agreements in a number of fields. The following instruments may be noted:

Unification of Commercial Law

Three conventions were concluded on Bills of Exchange and Promissory Notes and three conventions were concluded on Cheques on 7 June 1930 and 19 March 1931 (cf. Hudson, *International Legislation*, Vol. V, Nos. 258-260, 283-285, pages 516-569, 889-932).

Settlement of Commercial Disputes

A Protocol on Arbitration Clauses of 24 September 1923, and a Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 (cf. Hudson, *International Legislation*, Vol. II, No. 93, page 1,062; Vol. III, No. 183, page 2,153).

Agricultural Credit

The Convention for the Creation of an International Agricultural Mortgage Credit Company of 21 May 1931 (cf. Hudson, *International Legislation*, Vol. V, No. 290, page 959).

Treatment of Foreigners

This question is discussed below.

Counterfeiting Currency

The Convention and two Protocols for the Suppression of Counterfeiting Currency of 20 April 1929 (cf. Hudson, *International Legislation*, Vol. IV, Nos. 216-216b, pages 2692 ff.).

Customs

The Convention relating to the Simplification of Custom Formalities and Protocol of 3 November 1923 (cf. Hudson, *International Legislation*, Vol. II, No. 100, page 1094).

Bones, Hides and Skins

One Convention and Protocol each relating to the Exportation of Bones, and of Hides and Skins of 11 July 1928 (cf. Hudson, *International Legislation*, Vol. II, Nos. 204-205, pages 2495 ff.).

Veterinary Questions

Three conventions to facilitate the trade in meat and meat products were signed at Geneva on 20 February 1935 (cf. Hudson, *International Legislation*, Vol. VII, Nos. 402-404, pages 1 ff.).

Economic Statistics

A Convention and Protocol relating to Economic Statistics were concluded at Geneva on 14 December 1928 (cf. Hudson, *International Legislation*, Vol. IV, No. 210, pages 2,575 ff.).

Whaling

A Convention for the Regulation of Whaling was entered into on 24 September 1931 (Hudson, *International Legislation*, Vol. V, No. 295, page 1,081). A further Agreement for the Regulation of Whaling was signed at London on 8 June 1937 (Hudson, *op. cit.*, Vol. VII, No. 485, page 754).

Model Conventions

In addition to promoting international legislation in various fields of international economic relations through the preparation of international conventions, the Economic and Financial Organization of the League facilitated bilateral accords between states through the preparation of model conventions. Thus it has been noted that between 150-200 bilateral conventions, in fact the majority of bilateral conventions, dealing with problems of double taxation and concluded in the 1930's, were based on model conventions drawn up in 1928 by a general meeting of Governments experts (cf. Essential Facts About the League of Nations, 1939, page 230, and Martin Hill, *The Economic and Financial Organization of the League of Nations*, 1946, page 74). The Fiscal Committee of the Economic and Financial Organization observed that the existence of draft conventions which Governments can employ as a model when negotiating bilateral treaties "has proved of real use in such circumstances in helping to solve many of the technical difficulties which arise in such negotiations." In the view of the Committee "this procedure has the dual merit that, on the one hand, in so far as the model constitutes the basis of bilateral agreements, it creates automatically a uniformity of practice and legislation, while, on the other hand, inasmuch as it may be modified in any bilateral agreement reached, it is sufficiently elastic to be adapted to the different conditions obtaining in different countries or pairs of countries. The Committee is strongly of opinion that this procedure is likely in the end to lead to more satisfactory results and to have a wider and lasting effect than the convocation of an international conference with a view to concluding a multilateral conven-

tion, even though it may at first attract less general attention and interest" (Report of the Fiscal Committee to the Council of the League of Nations on the Fifth Session of the Committee. Doc. C. 252, M. 124, 1935. II. A., page 4).

Where the method of model treaties was considered undesirable, the method used sometimes was that of formulating recommendations for the drafting of international instruments. Thus the Committee for the Study of International Loan Contracts, appointed by the Council of the League of Nations on 23 January 1936, was instructed "to examine the means for improving contracts relating to international loans issued by Governments or other public authorities in the future, and, in particular, to prepare model provisions—if necessary, with a system of arbitration—which could, if the parties so desire, be inserted in such contracts." The Committee accordingly formulated recommendations relating to the drafting of loan documents, the monetary clauses, the functions for the service of the loan, and the settlement of legal disputes (cf. Report of the Committee for the Study of International Loan Contracts. Doc. C. 145, M. 93, 1939. II. A., page 5 ff.).

Communications and Transit

One of the essential tasks of the Organization for Communications and Transit of the League of Nations was "to determine and codify the general principles of international law, both public and private, on the freedom of transit and on various means of communications, and to unify or simplify certain administrative and technical subjects" (Essential Facts about the League of Nations, 1939, page 242). Several general and partial conferences, held successively, resulted in international conventions dealing with the following matters:

Transit

The Convention and Statute on Freedom of Transit, the Convention and Statute on Waterways of International Concern, and the Declaration recognizing the Right to a Flag of States having no Seacoast, were adopted by the Barcelona Conference on 20 April 1921 (cf. Hudson, *International Legislation*, Vol. I, Nos. 41-43, pages 625, 638, 662).

Unification of River Law

The Conference held in Geneva adopted on 9 December 1930 three conventions dealing with collisions in inland waters, the registration of inland navigation vessels, and the right of such vessels to a flag (cf. Hudson, *International Legislation*, Vol. V, Nos. 275-277, page 815 ff.). A Convention regarding the Measurement of Vessels Employed in Inland Navigation had been concluded at the Paris Conference on 27 November 1925 (cf. Hudson, *International Legislation*, Vol. III, No. 151, page 1,808).

Maritime Questions

The Conference held in Paris in 1923 adopted a Convention on the International Regime of Maritime Ports (cf. Hudson, *International Legislation*, Vol. II, No. 107, page 1,156); the Lisbon Conference of 1930 adopted two Agreements on Maritime Signals and on Manned Lightships not on their Stations respectively (cf. Hudson, *International Legislation*, Vol. V, Nos. 272, 273, pages 792, 801). The Lisbon Conference also considered an agreement for a uniform system of maritime buoyage. By decision of the Council of the League of 13 May 1936 a draft agreement on this subject was opened for signature (cf. Hudson, *International Legislation*, Vol. VII, No. 440, page 308).

Railways

A Convention and Statute on the International Regime of Railways was adopted by the Geneva Conference on 9 December 1923 (Hudson, *International Legislation*, Vol. II, No. 106, page 1,130).

Road Traffic

The Geneva Conference held in 1931 adopted three instruments dealing respectively with the unification of road signals, the taxation of foreign motor vehicles, and the procedure in regard to undischarged or lost triptychs (cf. Hudson, *International Legislation*, Vol. V, Nos. 287-289, pages 935 ff.).

Emigrants

An Agreement concerning the preparation of a Transit Card for Emigrants was concluded on 14 June 1929 (cf. Hudson, *International Legislation*, Vol. IV, No. 219, page 2,844).

Electricity

The Conference held in Geneva in 1923 adopted two Conventions relating to the Transmission of Electric Power and the Development of Hydraulic Power affecting more than one State respectively (cf. Hudson, *International Legislation*, Vol. II, Nos. 108-109, pages 1,173 ff.).

Intellectual Co-operation

The Intellectual Co-operation Organization of the League of Nations, through its agencies, was responsible for two conventions dealing respectively with the International Circulation of Films of an Educational Character, of 11 October 1933, the use of Broadcasting in the Cause of Peace, of 23 September 1936, and the Declaration regarding the Teaching of History, of 2 October 1937 (cf. Hudson, *International Legislation*, Vol. VI, No. 347, page 456; Vol. VII, Nos. 451 and 496, pages 417, 850).

Social and Humanitarian Questions

The League of Nations promoted the co-operation between Governments in the solution of a number of humanitarian and social questions. In this

field of the League's legislative work the following instruments may be noted:

1. The Convention for the Suppression of the Traffic in Women and Children of 30 September 1921 (cf. Hudson, *International Legislation*, Vol. I, No. 51, page 726).

2. The Convention for the Suppression of Traffic in Women of Full Age of 11 October 1933 (cf. Hudson, *International Legislation*, Vol. VI, No. 348, page 469).

3. The International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications of 12 September 1923, (cf. Hudson, *International Legislation*, Vol. II, No. 97, page 1,051).

4. The Slavery Convention of 25 September 1926 (cf. Hudson, *International Legislation*, Vol. III, No. 169, page 2,010).

5. The Convention and Statute establishing an International Relief Union of 12 July 1927 (cf. Hudson, *International Legislation*, Vol. III, No. 178, page 2,090).

In this connection several instruments dealing with the problem of refugees may be mentioned, namely:

1. The Convention relating to the International Status of Refugees (Russian, Armenian, and Assimilated Refugees) of 28 October 1933 (cf. Hudson, *International Legislation*, Vol. VI, No. 350, page 483).

2. The Provisional Arrangement concerning the Status of Refugees coming from Germany of 4 July 1936 (cf. Hudson, *International Legislation*, Vol. VII, No. 488, page 376).

3. The Convention concerning the Status of Refugees coming from Germany of 10 February 1938, and

4. An Additional Protocol to the two preceding instruments of 14 September 1939.

Narcotics

The legislative work of the League in the campaign against opium and other dangerous drugs comprises several instruments which have been most widely ratified. The Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of 13 July 1931 received sixty-four ratifications, the Procès-Verbal to alter the latest date of issue of the annual statement drawn up by the Supervisory Body of 26 June 1936 received sixty definitive signatures, and the Opium Convention of 19 February 1925 received fifty-five ratifications (cf. Hudson, Vol. V, No. 294, page 1,048; Vol. VII, No. 447, page 374, and Vol. III, No. 137, page 1,589). In addition the following instruments may be noted:

the Agreement concerning the suppression of the Manufacture of, and, the Internal Trade in, and Use of Prepared Opium, with Protocol and Final

Act of 11 February 1925 (cf. Hudson, *International Legislation*, Vol. III, No. 136, page 1,580);

the Protocol to the Opium Convention of 19 February 1925 (cf. Hudson, *International Legislation*, Vol. III, No. 137a, page 1,614);

the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs and Protocol of Signature of 26 June 1926 (cf. Hudson, *International Legislation*, Vol. VII, No. 446, page 359).

Method of Adopting Conventions

Generally the instruments concluded under the auspices of the League were drawn up and adopted by diplomatic conferences. In some cases the instruments were drawn up and adopted by the organs of the League themselves, viz., the Statute of the Permanent Court of International Justice and the General Act for the Pacific Settlement of International Disputes of 1928.

In the case of instruments drawn up and adopted by diplomatic conferences "the Assembly and the Council, the directing organs of the League of Nations, initiate the project, organize the preparatory work, and convene the conference, which, as a rule, assembles at the seat of League of Nations, though sometimes elsewhere. Furthermore, the Secretary-General of the League of Nations provides the secretariat for the preparatory work and for the diplomatic conference" (Signatures, Ratifications and Accessions in respect of Agreements and Conventions concluded under the auspices of the League of Nations, Twenty First List, 1944, O. J., Special Supplement, No. 193, page 16).

Ratifications

Of the instruments of general significance sixty-three had come into force, receiving a total of 1,758 ratifications distributed over sixty-four members of the family of nations. Of the instruments which had come into force:

- 2 received 60 or more ratifications,
- 4 received 50 or more ratifications,
- 10 received 40 or more ratifications,
- 14 received 30 or more ratifications,
- 40 received 20 or more ratifications,
- 67 received 10 or more ratifications.

Participation of Non-Member States

States not members of the League were generally invited to take part in the legislative work of the League. Frequently such States were invited to take part in the preparatory work and the resulting diplomatic conferences. Generally, conventions drawn up under League auspices were open to accession by non-member States. The Convention of 1930 concerning Financial Assistance may be noted as one of the rare exceptions.

Conference on the Treatment of Foreigners

The International Conference on the Treatment of Foreigners, held at Paris from 5 November to 5 December 1929, had its origin in a recommendation by the World Economic Conference, held at Geneva in May, 1927. The Conference recommended that the Council of the League of Nations prepare for a diplomatic conference for drawing up an international convention on the treatment of foreigners.

On 16 June 1927, the Council of the League entrusted the preparation for the Conference to the Economic Committee of the League. The draft convention prepared by this Committee was communicated to various Governments by the Secretary-General of the League in May, 1928, with a request that they inform him whether the draft Convention constituted an adequate basis for a Conference, and whether they were prepared to take part in it.

Replies from twenty-nine Governments were received by 1 March 1929. Of these twenty-three declared the intention of their Governments to take part in the proposed Conference, three were undecided, two intimated that they would not attend, and one Government, that of the Union of Soviet Socialist Republics, informed the Secretariat of the League that it would send an observer to the Conference.

The draft Convention was generally based on the principle of national treatment, *i.e.* complete equality between foreigners and nationals under the laws of the countries concerned. Several Governments questioned the basic principles embodied in the draft Convention and pointed out that they were unable to assess its possible effect in view of the fact that it was impossible to know beforehand what countries would become parties to the proposed Convention. Some were of opinion that inequalities in such treatment might result in lack of reciprocity or in a disparity between the undertakings to be given and the advantages that may accrue.

The International Conference on the Treatment of Foreigners, convoked by the Council of the League of Nations on 10 April 1929, met at Paris from 5 November to 5 December 1929.

Forty-two Members of the League and five non-members were represented at this conference.

Among the questions examined by the Conference were: safeguards for international trade; freedom of travel, sojourn and establishment; the exercise of trade, industry, and occupation; civil and legal guaranties; property rights; exceptional charges; fiscal treatment and the treatment of foreign companies (cf. Report by M. Devèz, President of the Conference on the Treatment of Foreigners, submitted to the Council of the League, 14 January 1930, O. J., February, 1930, page 169).

It was apparent at the Conference "that the countries with the most liberal laws and practice in the treatment of foreigners . . . wished to secure the adoption in the future Convention of principles which, if applied, would

constitute an advancement on the various provisions generally inserted in bilateral treaties on establishment, or would, at any rate, consolidate those which at present govern more or less provisionally, the position of foreigners." On the other hand the majority of Governments "seemed bent on retaining as extensive freedom of action as possible, without accepting any limitations on their full sovereignty, and on endeavouring to secure recognition of the legality of the measures adopted for reasons of revenue, national defense or security, or for the protection of the home labour market" (Report by M. Devèz, *ib.*).

The Conference failed to adopt a Convention but in a Final Protocol of 5 December 1929, it envisaged a second session of the Conference to be held before 31 December 1930, and directed its Bureau to make the necessary preparations.

On 14 January 1930 the Council of the League of Nations adopted the conclusions of a report on the Conference which declared that the Conference had not met with insuperable difficulties but that "the chief thing lacking was time." It agreed in principle to the holding of a second session of the Conference. No second session, however, was held.

The draft Convention considered by the Conference may have influenced later the drafting of bilateral and regional arrangements (cf. Martin Hill, *The Economic and Financial Organization of the League of Nations*, 1946, page 42).

The Conference has been said to have attempted a more extensive codification than any undertaken by the Committee of Jurists. The Conference's efforts aimed at both a codification of international law relating to the treatment of aliens and a unification of national laws on the subject. Its chief motive, however, was probably to promote international trade rather than to promote the codification of international law (cf. Arthur K. Kuhn, *The International Conference on the Treatment of Foreigners*, 24 April (1930), page 573).

B. THE INTERNATIONAL LABOUR CONFERENCE

The International Labour Conference of the International Labour Organization, created as part of the League of Nations Organization in 1919, adopted eighty International Labour Conventions and the same number of Recommendations, in the course of twenty-nine sessions held from 1919-1946.

Preparatory Procedure

It is the duty of the International Labour Office, subject to such directions as the Governing Body may give, to prepare the documents on the various items of the agenda for the meetings of the Conference (Article 10, paragraph 2 of the Constitution). It is, on the other hand, the duty of

the Governing Body "to make rules to ensure thorough technical preparation and adequate consultation of the Members primarily concerned, by means of a preparatory Conference or otherwise, prior to the adoption of a Convention or Recommendation by the Conference" (Article 14, paragraph 2 of the Constitution).

The Governing Body of the International Labour Organization decides what questions shall be placed on the agenda of the Conference. The normal procedure followed is known as the double-discussion procedure. The Governing Body, however, may, in cases of special urgency or where special circumstances exist, decide to refer the question to the Conference with a view to a single discussion (cf. Appendix 4 for text of Article 8, paragraphs 4 and 5 of the Standing Orders of the Governing Body). The Governing Body may also "if there are special circumstances which make this desirable, decide to refer the question to a preparatory technical conference with a view to such a conference making a report to the Governing Body before the question is placed on the agenda. The Governing Body may, in similar circumstances, decide to convene a preparatory technical conference when placing a question on the agenda of the Conference" (Article 8, paragraph 3 of the Standing Orders of the Governing Body).

Preparatory Conference

If the Governing Body decides to convene a preparatory technical conference, the International Labour Office "shall prepare a report adequate to facilitate an exchange of views on all issues referred to it and, in particular, setting out the law and practice in the different countries" (Article 8, paragraph 9 of the Standing Orders of the Governing Body).

Double-Discussion Procedure

This procedure, which in 1926 replaced the so-called "second-reading procedure," was first applied in 1927 and 1928 and, with some changes, has been maintained since then. The double-discussion procedure provides, according to Article 32 of the Standing Orders of the International Labour Conference, for the following stages (cf. Appendix 4 for text of Article 32):

1. Preparation by the International Labour Office of a preliminary report setting out the law and practice in the different countries and any other useful information together with a questionnaire.

2. The report and questionnaire with a request to give reasons for their replies are communicated to the Governments by the Office so as to reach them at least six months before the opening of the Conference.

3. The Office then prepares a report on the basis of the replies from the Governments indicating the principal questions which require consideration by the Conference.

4. The preliminary report and the report are submitted to the Conference.

5. These reports are discussed by the Conference either in full sitting or in committee.

6. The Conference decides whether the subject is suitable for draft Conventions or Recommendations.

7. If the decision is affirmative the Conference adopts such conclusions as it sees fit and decides either:

(a) that the question shall be placed on the agenda of the following session of the Conference; or

(b) that the Governing Body shall place the question on the agenda of a later session.

8. The Office prepares one or more draft Conventions or Recommendations on the basis of the replies of the Governments to the questionnaires mentioned in paragraph 1 above and of the first discussion by the Conference.

9. These draft Conventions or Recommendations are transmitted to the Governments, requesting them to state within four months whether they have any amendments to suggest or comments to make.

10. The Office draws up, in the light of the replies received from the Governments, a final report containing the texts of draft Conventions or Recommendations with any necessary amendments.

11. The Office communicates the report to Governments, so as to reach them at least three months before the opening of the Conference. Article 33 of the Standing Orders of the Conference lays down the procedure for the consideration of the prepared texts by the Conference (cf. Appendix 4 for text of Article 33).

Single-Discussion Procedure

This procedure begins with a preliminary report and questionnaire prepared by the Office and circulated to Governments; the Governments prepare their replies within a period of about three months and submit them to the Office as soon as possible; the Office then prepares a final report in the light of the replies received from Governments. This report, containing one or more draft Conventions or Recommendations, is communicated to the Governments so as to reach them at least four months before the Conference. The Conference then, in accordance with Article 33 of the Standing Orders, considers the report and such draft Conventions or Recommendations as it includes. It will be recalled that this abridged procedure is designed to meet special circumstances.

Voting

In accordance with Article 19, paragraph 2, of the Constitution, "a majority of two-thirds of the votes cast by the delegates present shall be necessary for the adoption of the Convention or Recommendation, as the case may be, by the Conference." Article 21, paragraph 1, of the Constitution, however, provides that "if any Convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the delegates present, it shall nevertheless be within the right of any of the Members of the Organization to agree to such Convention among themselves."

It will be recalled that, according to the Constitution of the International Labour Organization each member Government appoints four delegates, of whom two are government delegates and the other two are delegates representing respectively the employers and the work people of each of the members. Every delegate is entitled to vote individually on all matters which are before the Conference (Article 4 of the Constitution). In consequence, it is possible for a Convention to be adopted regardless of the opposition of a large number of government delegates. While this procedure facilitates the adoption of conventions by the Conference, a convention not supported by government delegates is less likely to be widely ratified.

Ratification

Generally, a minimum of two ratifications is sufficient for a convention to come into force. Under Article 19 of the amended Constitution of 1946, Members are bound to "inform the Director-General of the International Labour Office of the measures taken . . . to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them." In case the Member concerned fails to receive the consent of the competent authority or authorities, it shall report to the Director-General, stating the difficulties which prevent or delay the ratification of the Convention.

By 31 July 1946, fifty-two conventions had come into force, the number of ratifications received being 885, distributed over fifty States. Of the Conventions which had come into force:

- 9 received 30 or more ratifications,
- 15 received 25 or more ratifications,
- 22 received 20 or more ratifications,
- 33 received 10 or more ratifications,
- 41 received 5 or more ratifications,
- 56 received 2 or more ratifications.

Follow-up Procedure

Each Member makes an annual report to the Office on the measures taken by it in order to give effect to the Conventions to which it is a party. These reports are made in such a form and contain such particulars as are prescribed by the Governing Body. The Governing Body has approved report forms for fifty out of fifty-two Conventions in force (cf. International Labour Conference, Twenty-Ninth Session, 1946, Reports on the Application of Conventions, Report V, page 1).

In 1927 the Governing Body adopted the practice of having the reports submitted by the Members examined by a Committee of Experts on the Application of Conventions. This Committee acts in an advisory capacity and submits its observations to the Governing Body. The Governing Body presents to the Conference a summary of the Reports submitted by the Members, to which the report of the Committee of Experts is usually appended.

Both the summary and the report are examined by a committee appointed by the Conference which submits its observations to the Conference.

Revision of Conventions

The International Labour Conventions generally provide that at the expiration of each period of ten years after the coming into force of a Convention, the Governing Body shall present to the Conference a report on the working of the Convention, and shall consider the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

The Standing Orders of the Governing Body, in Article 9, lay down the procedure for revision of a Convention in whole or in part. The decision to place the question of revising a Convention on the agenda of the Conference is taken by the Governing Body on the basis of a report of the Office on the working of that Convention and of replies thereon submitted by the Governments.

Subject Matter of Conventions

The topics dealt with in Conventions adopted by the International Labour Conference at its various sessions cover so wide a field that a summary becomes difficult. The "International Labour Code 1939," published by the International Labour Office in 1941, arranged the subject matter covered by international labour conventions under the following twelve main headings: Employment and Unemployment; General Conditions of Employment; The Employment of Children and Young Persons; The Employment of Women; Industrial Health, Safety and Welfare; Social Insurance; Industrial Relations; the Administration of Social Legislation; The International Seaman's Code; Standards of Colonial Labour Policy; Migration; and Statistics and Other Information.

PART III

THE FIRST CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

A. ORIGIN

The Advisory Committee of Jurists

The Advisory Committee of Jurists, assembled at the Hague to draft the Statute of the PCIJ, adopted a resolution on 24 July 1920 concerning the advancement of international law. The resolution recommended the continuation of the work begun by the first and second Hague Conferences of 1899 and 1907 in order to promote the development of international jurisdictions and to ensure the security and well-being of nations (Text of Resolution in Appendix 5).

Action by the League

The resolution adopted by the Committee of Jurists was taken up by the Council of the League of Nations at its session held at Brussels in October 1920. The Council adopted on 27 October 1920 a report and transmitted the Committee's recommendations to the Assembly. The report also outlined the procedure to be followed in preparing a list of subjects to be submitted to the proposed conference or conferences the object of which would be "to assist in the fixing and codifying of international law."

The third Committee of the First Assembly of the League of Nations considered the recommendation of the Advisory Committee of Jurists and concluded that the Assembly itself was continuing the work of the Hague Conferences and that it was unnecessary to establish an additional organization. The Committee, being of the opinion that on the one hand "it is urgently essential to study the problems of a more precise definition and co-ordination of the rules of international law" and that on the other "it would be too ambitious to contemplate a rapid and systematic codification of international law in the near future," proposed to the Assembly the following draft recommendation:

The Assembly of the League of Nations invites the Council to address to the most authoritative institutions which are devoted to the study of international law a request to consider what would be the best methods of co-operative work to adopt for the more precise definition and more complete co-ordination of the rules of international law which are to be applied in the mutual relations of States (Records of the First Assembly, Plenary Meetings, 1920, page 745).

The Assembly, at its Thirty-First Plenary Meeting, held on 18 December 1920, considered the above draft recommendation and decided, on the motion of Lord Robert Cecil (South Africa), not to adopt it. Lord Robert Cecil thought it represented "a very dangerous project at this stage in the

world's history" and he urged that we had not arrived at sufficient calmness of the public mind to undertake the first steps towards the codification of international law without serious results to the future of international law (*loc. cit.*, page 747).

Committee of Experts

At the Fifth Assembly of the League, the Delegate for Sweden recalled the decision of the First Assembly, and referred on the one hand to the progress achieved by the League in promoting the development of international treaty law and on the other to existing gaps in international law. He outlined a procedure for the development of international law by means of international conventions or other international instruments to be adopted by future Assemblies of the League or international conferences held under the auspices of the League. As a first step he proposed that the Members of the League be invited by the Council to indicate the subjects of international law, public or private, which in their opinion lend themselves for incorporation in international conventions or other instruments.

The Assembly of the League adopted on 22 September 1924 a Resolution on the development of international law (cf. Appendix 6). While endorsing the Swedish proposal in general, the Resolution, as drafted by the First Committee of the Assembly, laid down a different procedure. The most notable change was that instead of calling upon the Governments to indicate appropriate subjects, this initiative was entrusted to a Committee of Experts. It was felt that whereas Governments may hesitate to make definite suggestions they would not experience any difficulty in pronouncing an opinion with reference to concrete proposals submitted to them by a Committee of Experts.

Task of Committee of Experts

The Committee was to be so composed as to represent "the main forms of civilization and the principal legal systems of the world." Without trespassing upon official initiatives which may have been taken by particular states, the Committee of Experts was instructed:

1. to draw up a provisional list of subjects the regulation of which by international agreement, appeared most desirable and realizable;
2. to communicate the list to Governments of states, members and non-members of the League;
3. to examine the replies received from the Governments;
4. to submit a report to the Council of the League on questions which appeared sufficiently ripe for solution by conferences;
5. to submit a report to the Council on the procedure which might be followed in preparing for such conferences.

Acting upon the request of the Assembly, the Council of the League on 12 December 1924 adopted a Resolution appointing seventeen persons as members of the Committee of Experts for the Progressive Codification of International Law. (For text see Appendix 7.) It was understood that it was not the task of the Committee to cover the whole field, and to draw up a single code, of international law. The Committee was to proceed by stages.

First Meeting of Committee of Experts

The Committee of Experts, at its First Session held at Geneva, 1-8 April 1925, adopted a list of subjects for preliminary examination and appointed eleven sub-committees to report to the Committee on the following subjects:

- (a) conflicts of laws regarding nationality;
- (b) the law of the territorial sea;
- (c) diplomatic privileges and immunities;
- (d) legal status of Government ships;
- (e) extradition;
- (f) liability of states for injury caused on their territory to the person or property of foreigners and related problems of inquiring into the facts which may involve liability and of prohibiting recourse to measures of coercion before exhausting means for pacific settlement;
- (g) rules for the procedure of international conferences and the conclusion and drafting of treaties;
- (h) suppression of piracy;
- (i) application in international law of the conception of prescription;
- (j) rules regarding the exploitation of the products of the sea;
- (k) principles governing the criminal competence of States in regard to offences committed outside their territory.

The Committee adjourned the consideration of problems connected with war and neutrality. It also adjourned the examination of problems of private international law but appointed a sub-committee to draw up a list of such problems.

Second Meeting of Committee of Experts

At its second session, held at Geneva from 12 to 29 January 1926, the Committee of Experts drew up questionnaires on the following topics:

1. Nationality.
2. Territorial waters.
3. Diplomatic privileges and immunities.
4. Responsibility of states in respect to injury caused in their territory to persons or property of foreigners.

5. Procedure of international conferences and procedure for the conclusion and drafting of treaties.

6. Piracy.

7. Exploitation of the products of the sea.

The Committee in several of these questionnaires, including those on nationality, territorial waters, responsibility of states, procedure of international conferences, and piracy, declared that it did not pronounce itself either for or against the various resolutions suggested and that its sole task at this stage consisted "in drawing attention to various questions of international law, the regulation of which, by international agreement, would seem desirable and realizable" (Document C.43.M.18.1926.V). However, in the questionnaire on diplomatic immunities, the Committee included several questions which in its view "might advantageously be dealt with in a general convention" (Document C.45.M.22.1926.V).

With reference to the procedures of international conferences the Committee declared that there was "no question of attempting to reach by way of international agreement a body of rules which would be binding obligatorily upon the various States." The purpose was "to put at the disposal of the states concerned rules which could be modified as they chose in each concrete case but whose existence might save them much discussion, doubt and delay" (Document C.47.M.24.1926.V).

In connection with the exploitation of the products of the sea the Committee stated that the report "indicates in broad outline the problems which a conference including experts of various kinds might be called upon to solve, and feels it a duty to emphasize the urgent need of action" (Document C.49.M.26.1926.V).

The questionnaires included a report on the subject and three of these, namely, those on nationality, territorial waters and piracy also included the preliminary draft of a convention. No specific questions on any of the seven subjects were included in the different reports. The drafts attached to some of the questionnaires expressed the views of the Rapporteurs or Sub-Committees and not necessarily the view of the whole Committee of Experts (cf. Document C.197.M.71.1927.V, page 2).

In transmitting the questionnaires to the Governments, the Secretary-General of the League requested them to send him, for transmission to the Committee, "their opinion upon the question whether the regulation by international agreement of the subjects treated, both in their general aspects and as regards the specific points mentioned in the questionnaires, is desirable and realizable in the future."

In addition, the Committee transmitted to the Governments, for their information, reports on extradition and on the criminal competence of states in respect of offences committed outside their territory, and to the

Council of the League a special report on the legal status of Government ships employed in commerce.

In selecting the seven subjects referred to above "the Committee was at special pains to confine its inquiry to problems which it thought could be solved by means of conventions without encountering any obstacles of a political nature" (Report to the Council of the League of Nations on the Questions which appear Ripe for International Regulation. Adopted by the Committee at its Third Session, March-April 1927. C.196.M.70.1927.V, page 7).

Third Meeting of Committee of Experts

The Committee reported to the Council on 2 April 1927, that "generally speaking, the above questions, within the limits indicated by the respective questionnaires, are now, in the words of the terms of reference, 'sufficiently ripe'" (*ib.*).

Thirty-three Governments replied to Questionnaire No. 1 on Nationality; thirty-five to Questionnaire No. 2 on Territorial Waters; thirty-two to Questionnaire No. 3 on Diplomatic Privileges and Immunities; thirty-seven to Questionnaire No. 4 on Responsibility of States; thirty-one to Questionnaire No. 6 on Piracy; and thirty-four to Questionnaire No. 7 on Products of the Sea.

Only a small number of Governments adopted a frankly negative attitude. The favourable replies received by the Committee, however, were by no means uniform.

Nine Governments were generally in favour of codification of questions relating to nationality; while not opposed to codification, eleven Governments raised some objections; two were definitely opposed; two were partially opposed; one indicated preference for bilateral solutions; and another suggested postponement (Analysis of Replies, *ib.*, page 261).

With reference to territorial waters, twenty-one Governments replied affirmatively in principle; three Governments did not think that the conclusion of a convention was either possible or opportune; two Governments were in their replies neither definitely affirmative nor negative (Analysis of Replies, *ib.*, page 262).

The replies to the Questionnaire on Diplomatic Immunities and Privileges were on the whole favourable; twenty-four Governments were explicitly in favour of summoning a conference; two were favourable in principle, and three were opposed (Analysis of Replies, *ib.*, page 266).

On the subject of the Responsibility of States, twenty-four Governments replied affirmatively and without reservations; five Governments replied affirmatively with certain reservations; and four did not think that the conclusion of a convention was either possible or opportune (Analysis of Replies, *ib.*, page 267).

The Questionnaire on the Procedure of International Conferences was received favourably and without reservations by fourteen Governments; five Governments replied in the affirmative with reservations; and seven Governments replied in the negative (Analysis of Replies, *ib.*, page 271).

With respect to the Questionnaire on Piracy, nine Governments replied affirmatively; nine Governments replied affirmatively but with reservations; three Governments though not opposed found the question of no urgency and of limited interest; six Governments refrained from expressing any opinion and two Governments did not think the conclusion of a Convention either possible or desirable (Analysis of Replies, *ib.*, page 273).

Twenty-one Governments gave affirmative or favourable answers to the Questionnaire on Products of the Sea; five Governments gave replies which were unfavourable or opposed to the conclusions and two Governments refrained from expressing an opinion (Analysis of Replies, *ib.*, page 279).

Some Comments Made by Governments

While the general attitude of the different Governments appears with sufficient clarity from the figures given above, it may be of interest to note in particular, the reactions of some of these Governments regarding the three subjects which were eventually submitted to the Hague Codification Conference; nationality, territorial waters and responsibility of states.

Thus the Government of the United States declared that international arrangements on these subjects "would serve a useful purpose and would, therefore, be desirable; and that there would be no insuperable obstacles to the concluding of agreements on these general subjects. The Government of the United States is not prepared at this time, to state whether all the points mentioned in the questionnaires on the subjects referred to would yield to regulation by international agreement nor does it desire to express an opinion regarding the desirability or possibility of regulating all the points by international agreement until it has had opportunity to make a more intensive study of them than it has as yet done. The details would seem to be proper matters for discussion in any negotiations which may ensue" (Document C.196.M.70.1927.V, page 160).

The British Empire made the following observation with reference to nationality: "His Majesty's Government in Great Britain consider that the questions which arise in connection with dual nationality and statelessness are subjects whose regulation by international agreement it might be desirable to attempt, and that they do not consider that it would be possible to regulate questions of nationality as a whole by this means or desirable at the present time to attempt to do so" (*Ib.*, page 144). While considering that it might be desirable to attempt the regulation by international agreement of the responsibility of states, the British Government added this reservation: "They wish, however, to place it on record that the Report of the Sub-Committee to the Committee of Experts, while making many ex-

cellent suggestions, contains conclusions with which His Majesty's Government are not in agreement" (*Ib.*, page 145). The Governments of India and New Zealand expressed similar views.

The French Government, referring to the subject of nationality replied that it "approves the terms of this preliminary draft as a whole, apart from a few reservations which it will have to make with regard to certain articles . . ." (*Ib.*, page 165). The reply of the French Government to the Questionnaire on territorial waters was as follows: "The regulation of the question of territorial waters is conditioned in the different States by such diverse requirements, due to the geographical, economic and political factors involved, that it would be difficult to regulate in a uniform manner. It has often been proposed to draw up general regulations with regard to territorial waters, and it has never yet been found possible to give practical effect to this proposal. It seems likely that in future difficulties will be encountered similar to those which have prevented success in the past" (*Ib.*, page 165). The same Government declared with reference to the responsibility of States: "Questionnaire No. 4 too closely affects the internal or the external policy of States, their social life and the stability of their institutions for it to be possible, without serious danger, to propose to establish conventional or general stipulations acceptable by every State in its relations with the other States" (*Ib.*, page 165).

The Government of Australia, expressing generally a favourable attitude, declared: "To what extent agreement is realizable can only be ascertained by a conference for the purpose of formulating rules which are generally acceptable, but it would appear to the Commonwealth Government that agreement on many points, if not on all, ought to be attainable (*Ib.*, page 137).

The Swiss Government regarded with sympathy the proposal to regulate the problem of nationality by means of international agreement, but stated that, "in view of the fact that there exists practically no uniform international usage in this field, and in view of the reasons which impel most States to maintain their present attitude towards problems of nationality, to attempt to conclude a convention for the settlement of all, or even the most important questions relating to nationality would undoubtedly be premature. Even codification on a scale as limited as that proposed in the report will, undoubtedly, meet with serious difficulties, which it would be wrong to underestimate and which appear to justify a certain scepticism" (*Ib.*, page 241).

The Norwegian Government, replying to the Questionnaire on nationality, observed "that the questions raised in the amended preliminary draft of a convention, with the exception, however, of the contents of Article 6, would be capable of solution in the way indicated.

"Without examining more closely the various questions submitted by the Committee of Experts, I would observe that, in regard to certain points,

it is doubtful whether the Norwegian Government would find it possible to accept the solution proposed by the amended preliminary draft convention" (*Ib.*, page 172). While in agreement with the desirability of clarifying the international law regarding territorial waters the same Government was of opinion "that it is difficult for a State to reply separately and definitely to the main questions until sufficient data have been obtained regarding the practice followed in other countries and the light in which they regard their own territorial waters. In the opinion of the Norwegian Government, the questionnaire is a first preliminary step towards international agreement on these questions . . ." (*Ib.*, page 172).

The Government of the Netherlands concurred in the desirability of an international regulation of the subjects covered in the seven questionnaires. On the question of whether such a regulation was realizable in the near future, it submitted the following general comment: "If the aim is to attain a comprehensive settlement which could be simultaneously accepted by all the Powers concerned, then the Netherlands Government feels that the reply to all seven points would be in the negative. None of these questions seems as yet to have reached a stage at which general, uniform and universal settlement could be secured. If, however, no attempt is made to settle these questions in their absolute entirety, international conferences might succeed, to a certain degree, in harmonizing divergent opinions and, as a consequence, diminishing the difficulties which modern practice occasions" (*Ib.*, page 180).

It is apparent from this brief survey of the actual views of several Governments, chosen at random, that even at this early stage of the preparatory work their attitude reflected varying degrees of reserve which was bound to influence the outcome of the Hague Codification Conference.

Question of Procedure

The Committee of Experts, at its Second Session, adopted three Reports with reference to procedure which might be followed with a view to preparing eventually for conferences for the solution of questions deemed sufficiently ripe. The Reports were transmitted to the Council of the League. The first Report outlined the procedure that might be followed in connection with the following five subjects: nationality, territorial waters, diplomatic immunities and privileges, responsibility of states, and piracy.

The Committee emphasized the need of additional and thorough preparation in order to facilitate and shorten the task of such conferences. The most desirable method seemed to be the preparation of complete drafts which might serve as basis for discussion. The Committee was not, however, in the position to adopt this method in all cases as the time at its disposal was too short. Furthermore, the budget voted for the Committee's work by the Assembly provided for only one session a year.

The Committee drew the attention of the council to the desirability of collecting and classifying, as part of the preparation for conferences, all the historical, legislative, and scientific data on the questions deemed sufficiently ripe.

The Committee considered the question whether a separate conference should be convoked for each of the subjects deemed ripe for international agreement or whether a single conference should be held to discuss all such subjects. It concluded from every point of view that a single conference was preferable. The Committee was of opinion that the delegations to such a comprehensive conference should include not merely jurists, but also economists, statesmen and experts in commerce and shipping.

In its recommendation to the Council, however, the Committee left it to the Council to decide whether a single conference or two or more conferences should be convoked. It recommended that all States, whether or not Members of the League, should be invited.

The Committee, in two separate Reports, recommended a special procedure in regard to the question of the exploitation of the products of the sea, and in regard to the question of the procedure of international conferences and the procedure for the conclusion and drafting of treaties.

Four new questionnaires were prepared at the Committee's Third Session and transmitted to the Governments, namely on communication of judicial and extra-judicial acts in penal matters; on the legal position and functions of consuls; on the revision of the classification of Diplomatic Agents, and on the competence of the courts in regard to foreign states.

The Report of the Council of the League of Nations, 13 June 1927

The Council of the League of Nations at its session held at Geneva, 13-17 June 1927, considered the Report submitted by the Committee of Experts on the work of its Third Session and the Report thereon. The latter pointed out that the terms of reference of the Committee of Experts as formulated by the Assembly Resolution of 22 September 1924 directed the Committee not to attempt an immediate codification of international law but "to advise as to whether there were any questions of international law, not forming the object of existing initiatives, in regard to which the conclusion of general agreements could be considered immediately desirable and realizable."

Referring to the subjects deemed sufficiently ripe for international agreement, the Report emphasized the fact that although the various Governments, in their replies to the Questionnaires, have shown a desire to further the initiative taken by the Assembly in 1924, it was "noticeable that in regard to every subject, *most Governments have not given any detailed expression of their views as to the provisions which might be inserted in an international convention to solve the various questions raised by the Committee*" (italics supplied). The Report also stressed the fact

that the Committee had carefully abstained from creating the impression "that it has given the weight of its authority to any of the detailed suggestions for the solution of particular questions which have been made by its rapporteurs." Realizing that all the subjects were not of equal importance, the Report proposed that of the five subjects for which the Committee envisaged a general conference the subjects of piracy and possibly of diplomatic privileges be excluded.

With reference to the method of convening the conference or conferences, the Report stated that there were two possibilities. One would be for the League Assembly to request the Council to hold the conference under League auspices. The other would be for the Assembly to invite a Government to convene the conference. As regards the necessary preparatory work, in the former case such work would become the responsibility of the League and in the latter of the Government concerned. In connection with the preparatory work, the Report urged that the conference was more likely to succeed if the delegates had before them a draft convention, and that it was prudent "to aim in the first instance at international law, *i.e.*, at a codification of the existing views and practices of Governments, or at least, that we should be ascertaining what such views and practice are and make them the basis of the work of the conference." In dealing with public international law, it was desirable to impose upon all the Governments the responsibility, and to give them the opportunity, of stating fully what they considered to be the present state of the law. This method appeared preferable to that actually employed by the Committee of Experts of requesting replies to questionnaires. Furthermore, it would be extremely difficult either for an individual Government or for the League Secretariat or for an expert committee to draw up questionnaires which would enable the Governments to state their views fully.

The Council, on 13 June 1927, adopted the Report outlined above and decided to transmit it to the Assembly. It may be mentioned in passing that the representative of the Netherlands Government, in the belief that the convening of a conference by a particular government might have certain advantages, stated that his Government would take the initiative if requested to do so by the League Assembly.

The Resolution of the Assembly of the League of Nations, 27 September 1927

The League Assembly considered the Council's Report at its Eighth Session. The First Committee of the Assembly, after careful preparation, adopted a Report the salient points of which were as follows:

There shall be held in 1929, if possible, at the Hague, a Conference called the First Codification Conference to consider three questions of international law: nationality, territorial waters and responsibility of states. The Convocation and preparation of the Conference should

be left entirely to the League of Nations as "any other course would be interpreted by a certain section of public opinion as a real blow to the prestige of the League."

The preparation of the Conference shall be entrusted to a Preparatory Committee composed of five persons appointed by the Council and possessing the necessary knowledge of practice, precedents and scientific data on the problems to be resolved.

The preparation shall proceed in these stages:

1. a general survey of the three subjects;
2. a specific inquiry consisting of

(a) the drawing up of schedules for each of the three questions, indicating in full detail the points on which Governments should be requested to submit information concerning:

- (i) the state of their positive law, internal and international, with, as far as possible, circumstantial details as to the bibliography and jurisprudence;
- (ii) their own practice at home and abroad; and
- (iii) their wishes as regards possible additions to rules in force and the manner of making good present deficiencies in international law;

(b) the drawing up, on the basis of the information received from the Governments, of detailed reports, showing points of agreement or divergence, as the case may be, which might serve as bases of discussion for the Conference.

After completion of the preparatory work, the Council of the League should issue invitations to the Conference enclosing the reports and bases of discussion drawn up by the Preparatory Committee as well as draft rules of procedure. Referring to the experiences of the Second Hague Conference of 1907, the First Committee made the following recommendations:

(a) Regarding voting the Committee stated: "Although it is desirable that the Conference's decisions should be unanimous, and every effort should be made to attain this result, it must be clearly understood that, where unanimity is impossible, the majority of the participating States, if disposed to accept as among themselves a rule to which some other States are not prepared to consent, cannot be prevented from doing so by the mere opposition of the minority."

(b) Regarding the possible result of the Conference the Committee was of opinion that they might be embodied in two kinds of conventions: "A very comprehensive convention of the general rules on the subject, likely to be accepted by all States; and a more restricted convention, which, while keeping within the framework of the other convention, would include

special rules binding only upon such States as might be prepared to accept them."

(c) With the double object in view of, on the one hand facilitating the acceptance of Conventions adopted by the Conference, and, on the other, providing for their adaptation to changes, the Committee proposed an "organized system of revision" along these lines: "Any convention drawn up by the Conference would be concluded for a period of ten years, renewable by tacit agreement, unless in the course of a subsequent period of ten years a certain number of signatory States should demand revision. In that case, it would be for the Council of the League to summon a conference at the earliest possible opportunity to consider what amendments were to be made in the convention the revision of which had been demanded" (Document A.1/5/1927. Official Journal, Special Supplement No. 55, page 56).

(d) In order to avoid misunderstanding, the First Committee recommended that the Governments which might be invited to the Conference should be informed that the codification effort to be undertaken by the First Codification Conference must aim at adapting existing rules to contemporary conditions. For this reason it should not be limited to the mere registration of existing law but it should refrain from making too many innovations.

The First Committee finally recommended that the Advisory Committee of Jurists should complete its work at its next session and that, before proceeding further, the results of the work already accomplished should be awaited.

The Assembly, on 27 September 1929, adopted a Resolution which was based on the above-mentioned Report of the First Committee (cf. Appendix 8 for text of Resolution).

Comparison Between the Report of the Council and the Resolution of the Assembly

It appears from a comparison of the Report adopted by the Council and of the Report of the First Committee adopted by the Assembly, that there are certain points of concordance and divergence. The Assembly, following the Council, limited the programme to three subjects and eliminated piracy and diplomatic privileges. The Assembly decided, however, that a single conference should be held to discuss all these subjects. In this it followed the proposal made by the Advisory Committee of Experts. The question arises whether in so doing the Assembly had not unduly enlarged the programme of the First Codification Conference.

As regards the method of convening the Conference, the Council's Report seemed to be in favour of the initiative being taken by a particular Government. The Assembly, on the other hand, decided that the Conference be

convened by the League of Nations. It followed that the preparatory work was in the hands of the League and not in those of a particular Government. The Assembly Resolution aimed, as regards the preparatory work, at the drawing up of comparative reports which would serve as bases of discussion for the Conference. The Council's Report, however, indicated that a conference was most likely to be successful if the delegates had before them a draft convention. The Assembly Resolution amended the method of questionnaires pursued by the Advisory Committee in favour of a new method which, in accordance with the Council's Report, placed emphasis upon detailed information to be supplied by the Governments.

The Assembly Resolution of 27 September 1927, in point 6 (d) declared that "the spirit of the codification which should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to contemporary conditions of international life." The task to be set before the First Codification Conference was thus defined in terms of an optimum. It was to be expected that the solution of so delicate a task, calling at once for the talent of the statesman and the international lawyer, was bound to encounter serious difficulties in the Conference. What the Assembly had in mind was apparently a combination of codification and legislation. The difficulties involved in this approach were probably increased by the fact that a single conference was called upon to perform codification and legislation with respect to three major problems of international relations.

The Preparatory Committee

The Council of the League on 28 September 1927 authorized the Acting President of the Council to nominate the five members of the Preparatory Committee in the interval between that session and the December session of the Council. The following were appointed to serve on the Preparatory Committee: Professor Basdevant (France); Counsellor Carlos Castro Ruiz (Chile); Professor François (Netherlands); Sir Cecil Hurst (Great Britain); and M. Massimo Pilotti (Italy) (cf. Document 548.M.196.1927.V, page 51).

The Preparatory Committee for the Codification Conference met at Geneva from 6-15 February 1928, and adopted three lists of points on which information was desired. The Governments were requested to supply the necessary information under these heads:

- (a) The state of their positive law, internal and international, with, as far as possible, full details as to bibliography and jurisprudence;
- (b) Information derived from the practice at home and abroad;
- (c) Their views as regards possible additions to the rules in force and the manner of making good existing deficiencies in international law (cf. Document C.44M.21.1928.V).

It will be noted that under heads (a) and (b) information is requested on the *lex lata* while under heading (c) proposals *de lege ferenda* are invited.

The Preparatory Committee met again at Geneva from 28 January-17 February 1929, and examined replies received from twenty-nine Governments. The Committee noted that some of the replies did not deal with all the questions contained in the request for information. The Committee, accordingly, decided to meet again in May, 1929 for the purpose of drafting in final form, the bases of discussion on nationality, territorial waters and responsibility of States. The Committee also suggested that the meeting of the Conference should be postponed until the spring of 1930 (cf. Document C 73.M.38.1929.V, page 5).

By the time of its May session the number of replies received rose to thirty. Again the Committee noted that these replies "in whole or in part, complied with the request for information." The Committee was now able to draft the bases of discussion in final form.

These bases of discussion, in some cases, represented views on which all or most Governments appeared to be agreed, in other instances they represented views which seemed to the Committee to offer hope of agreement being reached at the Conference itself. The Committee did not incorporate suggestions if "their realization seemed difficult" or if they were not stated in detail by the Governments concerned.

In drawing up the bases of discussion the Preparatory Committee sometimes merely to state existing law and sometimes new law which appeared acceptable to some Governments. Some of the provisions included in the bases of discussion were regarded by some Governments as statements of existing law and by others as proposals for new law (*ib.*, page 7).

It appears, therefore, that the bases of discussion as drawn up by the Preparatory Commission were neither in the nature of a mere restatement of existing law nor purely in the nature of proposals for new law. Moreover, they were not merely summaries of opinions expressed by the Governments nor were they merely statements of what, in the view of the Preparatory Commission, the law might be. Finally, in drawing up the bases the Preparatory Commission was not in the position to consider the opinions of all Governments as all Governments requested for their opinions have not complied with this request. In this context it may be proper to recall the words of Sir Cecil Hurst, the delegate for the British Empire, in the Assembly of the League of Nations: "If upon the plan submitted to you now we can secure that essential element of Government co-operation in supplying the information required, there is no reason why this task should not be carried through with success." The fundamental issue was, as Sir Cecil put it "that, if we are to make this first Conference a success, we must have the co-operation of the Governments" (27 September 1927, O.J., Special Supplement, No. 74, page 9).

The Preparatory Committee, at the request of the Council of 7 March 1929, also drafted rules of procedure for the First Codification Conference. The preparatory work for the Codification Conference was regarded as concluded (O.J., July, 1929, page 995).

The Bases of Discussion on Nationality and Territorial Waters and Responsibility of States and the draft rules of procedure were distributed in June, 1929 to Members of the League and twelve non-Member Governments, and 13 March 1930 was provisionally fixed as the date of the Conference.

The Calling of the Conference

In the Resolution of 24 September 1929, the Assembly, "conscious of the wide scope of the preparatory work undertaken for the First Codification Conference," requested the Council "to call the attention of all the Governments invited to the Conference to the desirability of appointing without delay their representatives at the Conference . . . in order that the members of the Conference may be able to make a thorough study of the documentation already assembled" (O.J., Special Supplement, No. 74, page 9).

The Council acted on this request on 25 September 1929. All Members of the League and twelve non-Member Governments, including the Union of Soviet Socialist Republics and the United States of America, were invited to be represented at the Conference whose opening date was now definitely fixed for 13 March 1930. The Council decided, in particular, to request the Governments "to send delegations sufficiently numerous to permit of the three questions on the agenda of the Conference being discussed simultaneously in the committees appointed by the Conference" (O.J., November, 1929, page 1,701).

B. THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

The Conference, meeting at the Hague from 13 March to 12 April 1930, was attended by delegates from forty-seven Governments and by observers appointed by the Union of Soviet Socialist Republics. Some of the Governments were represented by delegations commensurate with the agenda of the Conference. Members of the legal profession in the different countries provided a substantial, perhaps predominating, percentage of the personnel of the Conference.

Questions of Procedure

The first business of the Conference was the adoption of rules of procedure. The draft rules prepared by the Preparatory Committee were generally satisfactory. Draft rules XX, XXI, XXIII, XXIV and XXV, how-

ever, gave rise to discussion and were eventually adopted in an amended form. For the final texts of these rules, see Appendix 9.

The first and perhaps most important question was whether the Conference should endeavour to adopt conventions or should also, as envisaged by the draft rules, leave open the possibility of adopting declarations embodying principles of international law which the signatory states regarded as existing law. While some of the delegates desired to leave the door open, the Conference was "practically unanimous" in the feeling that no declarations should be adopted. Draft Rules XX, paragraph 3, and XXV were therefore deleted (Acts of the Conference, *loc. cit.*, page 29).

Rule XX in its original form expressed the desire of the Preparatory Commission and of the Assembly of the League to ensure success at the Conference by admitting provisions which obtained unanimity as well as those which secured a simple majority. Draft Rule XX was considered by the Bureau and the Central Drafting Committee of the Conference which proposed a new text which was adopted by the Conference with one amendment. The new text as submitted by the Bureau and the Drafting Committee required a majority of two-thirds in both paragraphs 2 and 3 of the revised Rule XX. After an illuminating discussion the Conference adopted an amendment to paragraph 3 which was introduced by M. Politis of Greece and which provided for a simple majority. The reasons which prompted M. Politis in moving that in paragraph 3 the words "by a simple majority" should be substituted for the words "by a two-thirds majority" are best stated in his own words:

This means that the minority in a Committee would, in accordance with the rules we are examining, not only have the right to prevent a particular provision, which it views with disfavour, from being inserted in a main convention, but also it might, in spite of the request made to it by a member of delegations, prevent this provision being embodied in a special protocol which certain Powers would be prepared to sign and, later on to ratify.

This is a very grave matter and the Conference cannot adopt these provisions without mature reflection. They are serious provisions, because they relate to a convention and to an enterprise which demands much time—the work of codification. They are serious provisions because, if the Conference now confers on the minority a right to dictate to the majority, it is jeopardizing the success of the work on which it is embarked (Acts of the Conference, Vol. 1, page 32).

Paragraph 5 of Draft Rule XX, providing for reservations, also gave rise to a debate in the Conference. The need for this provision was stated by Mr. Beckett (Great Britain): "I submit that there is no other possible way of treating this question of reservations than that embodied in paragraph 5 of Rule XX. If the delegations are not to know what reservations are going to be made, or even within what limits they can be made, how can any

delegation possibly sign anything at all? It cannot possibly know what the effect of its signature will be. My delegation, for one, would find the greatest difficulty in deciding anything if it did not even know within what limits reservations could be made" (Acts of the Conference, Vol. 1, page 36).

It may be noticed that the work of the Conference was done primarily in three committees, one each for the three problems on the agenda of the Conference.

The Conference decided that there should be no general discussion in plenary meetings and that the three committees should begin forthwith. These Committees, beginning 10 April 1929, that is within less than four weeks, submitted reports to the Conference as a whole, which voted on their adoption.

C. RESULTS OF THE CONFERENCE

The Conference was relatively most successful in the matter of nationality where it adopted the following instruments:

1. Convention on certain questions relating to the conflict of nationality laws, signed by thirty Governments;
2. Protocol relating to military obligations in certain cases of double nationality, signed by twenty Governments;
3. Protocol relating to a certain case of statelessness, signed by twenty-four Governments; and
4. Special Protocol relating to statelessness, signed by fifteen Governments.

In addition the Conference formulated eight recommendations on various aspects of nationality, including proof of nationality. The achievements of the Conference in this field were all the more remarkable as there was "a constant clash between two legal systems" (Acts of the Conference, *loc. cit.*, page 40).

The Conference was least successful in its work on the responsibility of States. The Committee informed the Conference that it "was unable to complete its study of the question of the responsibility of States for damage caused on their territory to the person or property of foreigners, and accordingly was unable to make any report to the Conference" (cf. Final Act of the Conference, Part C). This failure was all the more surprising as this subject appeared before the Conference to be ready for codification. The British Government expressed this view after the Conference and observed that "the Conference failed to reach agreement even on the most fundamental points. It is useless to disguise the fact that a great part of the proceedings of the Conference in relation to this subject consisted of diplomatic negotiations, ultimately unsuccessful, with the object of finding

a common factor on which, as the result of mutual concessions, agreement might be possible" (Document A.12.1931.V, page 8).

The Conference was somewhat more successful in its work on territorial waters. The Conference adopted a Resolution including as an annex thirteen Articles on the legal status of the territorial sea "which have been drawn up and provisionally approved with a view to their possible incorporation in a general convention on the territorial sea" (Final Act of the Conference, Part B). These articles do not cover the whole field. The reason for this and the absence of a convention, as stated by the Rapporteur of the Committee, was that it was impossible to reach agreement "on the main point, namely, the breadth of the territorial sea" (Acts of the Conference, *loc. cit.*, page 50).

In addition to the above mentioned Resolution the Conference adopted a Recommendation concerning inland waters and a Recommendation concerning the protection of fisheries (cf. Final Act of the Conference, Part C II and III). In spite of its failure to produce a convention on the territorial sea the Conference recommended to the Council of the League of Nations to continue the preparatory work in this matter and to convene, as soon as it deems opportune, a new conference.

It may be noted here that the Bases of Discussion had recorded lack of unanimity on the breadth of the territorial sea but pointed out that in the view of the majority, the breadth was three nautical miles. It was stated that the claim of some states to more than three miles of territorial waters was categorically disputed by other states (cf. Bases of Discussion, II. Territorial Waters, Document C.74.M.39.1929.V, page 33).

The Recommendations of the Hague Conference with Regard to Preparatory Work for Future Codification Conferences

The Conference finally adopted some recommendations with a view to the progressive codification of international law. (For text cf. Appendix 10.) Without attempting to express a view on the subject of future conferences for the codification of international law—a matter which was regarded to fall within the province of the League—the Conference felt it desirable to suggest some improvements in the technique adopted by the League in preparing for codification conferences.

An important innovation consisted of requiring the Committee to draw up a report stating the reasons why it appeared possible and desirable to conclude international agreements on certain subjects selected by the Committee for codification. The actual selection of subjects for further study, however, would not be made as in the past by the Committee, a technical body composed of individual experts, but by the Council of the League, a political body composed of Governments. Thus almost from the very start the responsibility for selecting subjects would devolve upon Governments.

The next step would be for an appropriate body to draw up draft conventions. It will be recalled that neither the Committee of Experts nor the Preparatory Committee had prepared draft conventions.

These draft conventions would be communicated to the Governments for their comments and these comments would also be communicated to all the other Governments with the request for further observations. The Governments would be asked to state their opinion as to the desirability of placing such draft conventions on the programme of a conference.

The last step in the preparatory procedure would be a decision of the Council of the League to place on the agenda of the conference such subjects as were "formally approved by a very large majority of the Powers which would take part therein." It was noted at the Hague Conference that the object of this was to point out the inadvisability of selecting subjects which did not offer a sufficiently strong prospect of agreement. Furthermore, by requiring formal approval on the part of the Governments, the recommendation stressed the desirability of engaging the responsibility of the Governments even prior to a Conference to a greater degree than had been the case heretofore.

Reasons for Failure of the Conference

As to the Conference itself, notably in the plenary meetings, some of the delegates singled out certain factors as having prevented the Conference from reaching satisfactory results in all the subjects on its agenda. The following points may be noted:

Basic of Discussion

The Delegate for Belgium declared that while the Conference disposed of valuable materials "we have no true basis of discussion." He also noted that "in particular we possess no concise documentation" (Acts of the Conference, I, page 23).

Scope of the Conference

The President of the Conference, in his closing speech, said that the delegates had dealt with three extremely delicate and complex subjects and concluded that "perhaps that was too much to attempt at once" (Acts of the Conference, II, page 57).

Time at the Disposal of the Conference

The President of the Conference also noted: "First of all, the time allowed us was short" (Acts of the Conference, I, page 57).

Voting

The Delegates for Greece, recording the fact that he was not in favour of the two-thirds majority required for draft conventions and protocols by paragraph 2 of Rule XX of the Rules of Procedure, and stating that he would nevertheless agree to it as an experiment, declared: "If, however,

the concession thus made in paragraph 2 of Rule XX of the Rules of Procedure is shown to yield regrettable results for the work of the Conference, I should not fail to point out before the Assembly of the League of Nations, or from any other platform, the injury to the great and fine work we are beginning today" (Acts of the Conference, I, page 33). On 3 April 1930, he said that he knew "that a minority had been formed, and that this minority is resolved to prevent a part of the Conference's work from being carried through" (Acts of the Conference, I, page 34).

Selection of Subjects

The Rapporteur of the Committee on territorial waters, in reporting to the Conference the deep disappointment that the Committee could not achieve success, declared: "The subjects to be codified must, however, be selected with the greatest care. Conferences convened to codify questions which are not sufficiently ripe for treatment can do nothing towards removing or reducing the divergencies of view existing between States. They may even at times increase these divergencies" (Acts of the Conference, I, page 51).

Codification v. Legislation

The Conference encountered some difficulty in drawing a distinction between codifying existing and drawing up new rules of international law. Thus the Delegate for Belgium observed: "In reality, our examination of the questions led us to believe—and the discussions in the Committees convinced us of the truth of this—that, while it is perfectly right in theory to distinguish between pure codification and the adoption of new rules, nevertheless, in practice we could not maintain this distinction in any of our Committees" (Acts of the Conference, II, page 33). A similar view was expressed by another Delegate: "The Conference has shown very clearly that it is impossible simply to codify the principles of existing international law. We are encountering the same difficulties in the codification of public law as are daily being experienced in the codification of private law. The old view, which merely consisted in preparing conventions to settle the conflict of laws, must be discarded. Whether we wish it or not, we are compelled to lay down rules in regard to the substance of the questions dealt with, or to adopt systems based on compromises, for the purpose of settling the conflict of laws. Such systems, however, are bound to touch upon questions of substance" (Acts of the Conference, I, page 52).

Diplomatic Preparation

It is apparent from a study of the proceedings of the Conference that its effectiveness for the solution of the problems inscribed on its agenda suffered from the lack of diplomatic preparation. In fact, the procedure laid down for the preparation of the Conference by the Assembly of the League in its Resolution of 27 September 1927 failed to provide for negotiations

leading to the clarification of the attitude of the Governments on the problems selected for the First Codification Conference. This was partly the result of the decision of the League Assembly to entrust the initiative to convoke the Conference to the League rather than to a particular Government. Another reason was that, as a consequence of that decision, the responsibility for preparing for the conference was conferred upon the Preparatory Committee rather than upon a Government. It was in the nature of this procedure and of the Preparatory Committee that the solution of the problem of codifying certain chapters of international law was approached from a technical point of view and that, as a consequence, political aspects were left to the Conference itself. The diplomatic Conference could not solve the technical issues without first ironing out political divergencies. Where this was possible—as in the matter of nationality—the Conference was successful; where the time was too short—as in the matter of territorial waters and the responsibility of states—the Conference failed.

D. ACTION OF THE LEAGUE OF NATIONS SUBSEQUENT TO THE HAGUE CODIFICATION CONFERENCE

The Resolution of the Council of the League of Nations, 15 May 1930

The Council of the League of Nations, on 15 May 1930, adopted a Resolution placing on the agenda of the next session of the Assembly the recommendations formulated by the Hague Conference in order to facilitate the progressive codification of international law. The Council deferred action on the Assembly Resolution of 24 September 1929, calling upon the Council to invite the Committee of Experts to hold further sessions after the Hague Conference (cf. O.J., June, 1930, pages 546, 547).

Resolution of the Assembly of the League of Nations, 3 October 1930

The Assembly of the League of Nations after prolonged discussion on the Hague Codification Conference, adopted a Resolution on 3 October 1930, in which it reaffirmed "the great interest taken by the League of Nations in the development of international law, *inter alia*, by codification, and considers it to be one of the most important tasks of the League to further such development by all the means in its power." In order to provide for the careful study of the recommendations made by the Hague Conference, the Assembly decided to adjourn the question to its next session and requested the Council of the League of Nations to invite members and non-members to communicate to it their observations on these suggestions (O.J. Special Supplement, No. 84, page 212).

While many Governments, in the Assembly debate, took a pessimistic view of the Hague Conference, the Rapporteur of the First Committee probably expressed the prevailing sentiment when he declared:

The First Conference for the Codification of International Law was neither a success nor a failure. It did all it could. It worked hard.

It made a start, and that is at least something done to promote the great movement for international concord (O.J. Special Supplement, No. 84, page 212).

The trend towards a more sober evaluation of the Hague Codification Conference manifested itself in the First Committee of the Assembly which was unanimous on the point "that a broader and less pessimistic view of the work accomplished by the first Conference is necessary, and that the results it attained should not, and are not of a nature to discourage the efforts to continue the task which has been begun" (O.J. Special Supplement, No. 84, page 565).

Various Draft Resolutions

Draft Resolutions emanating from different Governments and groups of Governments were submitted to the First Committee. But the Committee owing to lack of time and press of other business, was not in the position to examine them adequately. These draft resolutions expressed the thoughts of different Governments on the question of how a greater measure of success could be secured for future efforts at codification. The proposal submitted by the Belgian Delegate stressed the importance of thorough preparation and the need for examining the value of the rules which it was contemplated to adopt for the future.

The draft resolution submitted by the British, French, German, Greek and Italian Delegations concluded that, as demonstrated by the Hague Conference, it was not for the League to attempt to formulate existing rules of customary international law. These delegations took the view that it would be proper for the League, or the Conferences convened by it, to endeavour to formulate rules, embodied in international conventions, regardless of whether derived from customary international law or entirely new in character.

Council's Request for Comments on the Hague Conference

The Council of the League, on 19 January 1931, acting on the request of the Assembly, decided to request the Secretary-General of the League to invite the Governments associated with the Hague Codification Conference, to submit observations on the question of the progressive codification of international law. The Secretary-General was also requested to direct the attention of the Governments to the above-mentioned draft resolutions and proposals submitted by certain delegations (O.J., February, 1931, page 148).

Replies of Governments

Some twenty Governments responded to the request addressed to them (cf. O.J. Special Supplement, No. 94, 1931, pages 101-114).

The British Government, having distinguished between "legislative codification" and "consolidatory codification," pointed out that the prelimi-

nary work for the Hague Codification Conference proceeded on the assumption that the task of the Conference was one of consolidation, *i.e.* of "ascertainment and establishment in precise and accurate legal phraseology of rules of international law which have already come into existence," and not of codification, *i.e.* "free acceptance, by means of law-making conventions, of certain rules by which the parties to such conventions agree to abide in their mutual relations." The Conference, itself, however, "proceeded on the basis that its work was that of codification; and the attitude of many delegates made it clear that, in their view, their task was not so much to assist in the establishment in precise language of already existing principles of international law, as to state and defend certain rules by which their country was prepared to be bound."

Adverting to the process of codification, *i.e.* the development of international law by means of law-making conventions, actively pursued under the auspices of the League, the British Government declared:

Consolidation, on the other hand, should be reserved for subjects as to which it can be shown, that so large a measure of agreement as to the present state of the law exists that the work of consolidation can usefully be undertaken. It is for the League to decide whether, and if so by what means, the search for such subjects should be pursued; but His Majesty's Government in the United Kingdom are themselves disposed, in the light of the experience which has now been gained, to doubt the likelihood of important branches of international law being found to which the application of this method would at present be useful.

Declaring themselves in agreement with the recommendations of the Hague Conference, the British Government believed that "a great work for the development of international law can be accomplished through the instrumentality of the League" (*cf.* Doc. A.12.1931.V, pages 8, 9).

The Government of the United States in its reply believed "that the procedure suggested in the recommendations made by the Hague Conference would be likely to attain satisfactory results. It is suggested, however, that, after observations have been received from the various Governments on the draft Conventions referred to in paragraph 3 of those recommendations, a revised draft or drafts might be prepared and circularised with the comments of the Governments on the first draft; and that these new drafts, together with the comments by the Governments, should be communicated to the various Governments sufficiently well in advance of the Conference as to enable the Governments to study the drafts and comments and to formulate their views thereon.

It is noted from the draft resolutions submitted by certain delegations, incorporated in the report of the First Committee (Document A.82, 1930.V), that distinctions are drawn between customary international law and new rules designed to govern relations between States, and that the

view has been expressed that the term "codification" as applied to the work for the development of international law undertaken by the League of Nations should be understood as relating to the latter. It is believed that conventions adopted should be declaratory of existing customary law on the subjects dealt with, supplemented by such enlargements as are demanded by modern conditions" (cf. Doc. A.12(a).1931.V, page 2).

The French Government declared:

It is necessary to bear in mind that to attempt to negotiate and conclude conventions with the object of setting out the rules of customary law in the form of written law would involve a danger of creating unnecessary difficulties and, *inter alia*, of throwing doubt upon the existence of particular rules which an international judge, as for example the Permanent Court of International Justice, would have been in a position to recognize. It appears, therefore, that codification by way of conventions ought not to be directed towards the laying down of rules which would be declared to be already part of existing international law.

The method of conventions signed and ratified by the Governments, or open to their accession, is on the other hand, appropriate for the establishment of rules which are to be accepted by the Governments as henceforward applicable in their mutual relations without prejudging what may be the rules which the common law of nations applies as regards the matters dealt with in the conventions. In drawing up conventions of this character, account will naturally be taken of the common law of nations, with a view to reaffirming it or with a view to advancing beyond it; but the two aspects of international law would remain distinct. The question whether the law which will thus be laid down in conventions may have operated to modify the customary law will remain to be examined in each case by legal science or to be settled by judicial decisions.

The above distinction appears to be of great importance as regards continuation of the work of codification.

A good method for selecting subjects, and for preliminary study of the subjects selected, is necessary. On this point the Hague Conference made suggestions of the highest value. The suggestion that the draft conventions should be drawn up in the light of all the data of science might be reinforced by contemplating the possibility of consulting the principal institutions devoted to the study of international law. To do so might make the preparatory work slower, but this disadvantage does not seem very serious. On the other hand, it will in general be wise not to submit to the same conference too many or too desperate [sic!] questions. Concentration of attention seems likely to increase the chances of success.

It seems desirable that the drafts and the conventions should contain only really essential provisions, to the exclusion of rules on points of detail or of a secondary character. The conclusion of the conventions would thereby be facilitated and their permanence better assured. In this connection, account must be taken of the development of international tribunals whose proper function it will be to apply in particular cases the principles on which agreement has been obtained.

Finally, all the preparatory work, the importance of which has been pointed out by the Hague Conference, should, from the very outset, be supported by a very copious documentation as to the data of science and practice (cf. document A.12(a).1931.V, pages 2, 3).

The Government of the Irish Free State outlined a new preparatory procedure for codification but felt that it was possible to exaggerate the practical importance of maintaining the distinction between the two meanings of codification in the future work of the League in connection with the development of International Law (cf. document A.12(a).1931.V, page 4).

The Government of Switzerland, being in agreement with the threefold consultation of Governments recommended in the Resolution adopted at the Hague, asked in its reply whether the codification conventions should be declaratory or enactory, whether they should supplant or supplement customary law. The Federal Council of Switzerland declared that "such new law cannot have the effect of merely supplanting the old. The old law, which is derived from international practice or the decisions of international tribunals, or from both combined, remains in force in its entirety. Otherwise, we should be forced to the conclusion that States not bound by the new conventions are free from all obligations. International law would be shaken to its very foundations, and codification accepted in this sense would cause irreparable harm.

It is not the task of codification conferences to register existing international law, but to lay down rules which it would appear desirable to introduce into international relations in regard to the subjects dealt with. Their work should, therefore, mark an advance on the present state of international law. In certain cases, indeed, it would be extremely difficult to say what the existing law really is, as it is not clearly known or is a matter of controversy. It would be most unfortunate if the attempt to discover an adequate solution of an important problem were abandoned on the ground that no such solution is to be found in the existing positive law. One of the fundamental tasks of codification conferences should be to choose between disputed rules and, within the limits of their agenda, to fill up the gaps in a law whose deficiencies and obscurities are obvious.

"The experience gained at The Hague has, moreover, shown clearly that, if a conference were empowered—supposing this to be possible—to state the existing rules of international law, the results might be disastrous. It has been proved that the conception of existing international law current in the various States or groups of States is very different. In some of them it may be extremely liberal, in others much less so. It is therefore beyond question that, on a number of subjects, unanimous agreement would be unattainable without mutual concessions. But, if existing law is to be enunciated in conventions at the cost of concessions which, in fact, would mark a retrograde movement, the law which would emerge from such bargaining would no longer represent what the friends of legal progress could rightly

regard as the existing law; it would be a compromise law, a law impaired and weakened. To accept this law as the expression of the only law in force would amount for many to a disavowal of progress. The only reasonable course is to accept such compromise law as a second best, as a kind of supplementary law in no way affecting those rules of customary law which are not incompatible with the new rules. That conventional law and customary law should thus exist side by side would undoubtedly complicate international jurisprudence, but such a state of affairs is inevitable. Customary law is stable; that is one of its virtues. But, if its stability degenerated into immutability, the virtue would become a defect. The law would become petrified, and we should be apt to forget the principle of evolution which is the guiding rule of life. This disadvantage, however, can be remedied by means of conventional law, which, by definition and by nature, is open to revision. The possibility of excessive rigidity in the one will be corrected by the suppleness of the other, and the latter's tendency to variability will be held in check by the comparative stability of the former. A kind of balance will thus be struck between the two kinds of law. The Federal Council is therefore, of opinion that the Assembly should abide by the sound principle which forms the basis of one of the draft resolutions submitted at its last session—namely, that the law laid down in codification conferences must not impair the force of customary law, “which should result progressively from the practice of States and the development of international jurisprudence” (cf. Document A.12(b).1931.V, pages 3, 4).

Procedure for Future Codification Conferences Adopted by the Assembly on 25 September 1931

The First Committee of the Twelfth Assembly, having considered the observations submitted by the Governments, formulated a new procedure for the progressive codification of international law. The Assembly of the League, in a Resolution adopted on 25 September 1931, accepted this procedure, the essential features of which are as follows. (For the text of the Resolution see Appendix VII.)

The Preamble of the Resolution, responding to the desire of several Governments as expressed in their observations, safeguards the continued development of customary international law by the traditional means of the practice of states and the jurisprudence of international tribunals. Furthermore, the Preamble distinguishes between what might be called the normal procedure, which is laid down in the Resolution and the special procedure that the Assembly may wish to adopt to meet special needs.

The Resolution reserves to the Governments, whether members or not, the initiative in proposing subjects for codification by international conventions. Such proposals must be accompanied by an explanatory memorandum and must be submitted in good time so as to enable the Governments to study them prior to the meeting of the Assembly.

It is for the Assembly of the League of Nations to determine whether the proposed subjects appear *prima facie*, suitable for codification.

Following the positive outcome of this preliminary investigation, the Assembly will ask the Council to set up a committee of experts to prepare a draft convention and an explanatory statement to be submitted to the Council for transmission to the Assembly. The Assembly will then determine whether the subject should be retained provisionally for codification. In case of an affirmative decision the Committee's report will be transmitted to states members and non-members of the League.

The comments made by the Governments will be examined by the Committee of Experts. At this stage there are two possibilities. The Committee may revise its first draft. In that case the revised draft will be submitted to the Governments for their comments. The Assembly will then examine the revised draft and the comments thereon and decide on any further action that may appear desirable, or it may decide to submit the draft to a codification conference. In case the Committee decides not to revise its first draft, the latter will be transmitted to the Assembly together with the comments of the Governments, for such action as the Assembly may wish to take.

It is thus apparent that according to this procedure, the Governments will be consulted at least three times and the Assembly will be called upon at least three times to take a decision. "If there were a considerable majority in favour of the codification of some particular subject, there would be every reason to hope that the conference would lead to positive results" (Judge Huber in the First Committee of the Assembly, 19 September 1931, O.J. Special Supplement, No. 94, page 42).

It was estimated by the Rapporteur that whereas the procedure recommended by the Hague Codification Conference would have required about four years, the procedure adopted by the Assembly in 1931, may require about ten years (O.J. Special Supplement, No. 94, page 45). He felt, however, "that we cannot be too cautious," and that frequent consultation with the Governments was desirable "in order to prevent hasty decisions being taken in the matter and to avoid any difficulties which might arise out of the examination of such a question by a conference" (O.J. Special Supplement, No. 93, page 136).

The recommendations, included in the Assembly Resolution, with regard to the co-operation between the League and national and international institutions and with regard to the work of codification undertaken by the Conferences of American States were taken over from the general recommendations of the Hague Codification Conference and are self-explanatory.

Conclusions

It appears that in 1931 the Assembly of the League of Nations established a degree of harmony between the procedure to be followed in the

future in preparing for conferences for the progressive codification of international law and the procedure to be followed in the case of general conventions to be negotiated under the auspices of the League. The two procedures may be said to be characterized by the emphasis which they place upon the co-operation of Governments in order to ensure the successful outcome of conferences for the progressive development of international law in different fields.

APPENDIX 1

RESOLUTION ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS,
3 OCTOBER 1930

Official Journal, Special Supplement, No. 84, pages 215-216.

The Assembly :

Having examined with the greatest interest the report of the Committee appointed to consider the question of the ratification and signature of conventions concluded under the auspices of the League of Nations in accordance with an Assembly resolution of 24 September 1929;

Being convinced that the solution of the problem of ratification depends to a great extent upon satisfactory preparation for the conferences which are convened to draw up conventions;

Considering it to be of the greatest importance that all steps should be taken to assure that conventions concluded under the auspices of the League of Nations should be accepted by the largest possible number of countries and that ratifications of such conventions should be deposited with the least possible delay;

Expresses its appreciation of the work of the Committee and its approval of their report; and

Recommends that effect should be given to the proposals contained in the report of the Committee in the manner set out in the immediately following resolutions.

I

That each year the Secretary-General should request any Member of the League or non-Member State which has signed any general convention concluded under the auspices of the League of Nations but has not ratified it before the expiry of one year from the date at which the protocol of signature is closed, to inform him what are its intentions with regard to the ratification of the convention. Such requests of the Secretary-General to Governments should be sent at such a date in each year as to allow time for the replies of Governments to be received before the date of the Assembly, and information as to the requests so made and replies received should be communicated to the Assembly for its consideration.

II

That, at such times and at such intervals as seem suitable in the circumstances, the Secretary-General should, in the case of each general convention concluded under the auspices of the League of Nations, request the Government of any Member of the League of Nations which has neither signed nor acceded to a convention within a period of five years from the date on which the convention became open for signature, to state its views with regard to the convention—in particular whether such Government considers there is any possibility of its accession to the convention or whether it has objections to the substance of the convention which prevent it from accepting the convention. Information of all such requests made by the Secretary-General and of all replies received should be communicated to the Assembly.

III

That the Council of the League should, with regard to each existing general convention negotiated under the auspices of the League of Nations, consider, after consultation with any appropriate organ or committee of the League, and in the light of such information as may be available as to the result of the enquiries recommended in resolutions Nos. I and II, and any other enquiries that the Council may think fit, whether it would be desirable and expedient that a second conference should be summoned for the purpose of determining whether amendments should be introduced into the convention or other means adopted, to facilitate the acceptance of the convention by a greater number of countries.

IV

That, in the case of all general conventions to be negotiated under the auspices of the League of Nations, the following preparatory procedure should, in principle, be followed, exception made of the cases where previous conventions or arrangements have established a special procedure or where, owing to the nature of the questions to be treated or to special circumstances, the Assembly or the Council consider other methods to be more appropriate:

1. Where an organ of the League of Nations recommends the conclusion of a general convention on any matter, it shall prepare a memorandum explaining the objects which it is desired to achieve by the conclusion of the convention and the benefits which result therefrom. Such memorandum shall be submitted to the Council of the League of Nations.
2. If the Council approves the proposal in principle, a first draft convention shall be prepared and communicated, together with the explanatory memorandum, to Governments, with the request that, if they feel that the draft should be taken into consideration, they shall inform the Secretary-General of their views, both with regard to the main objects or the sug-

gested means of attaining them, and also with regard to the draft convention. In some cases, it may be desirable to annex a specific questionnaire.

3. The draft convention and the observations of Governments (together with the answers to the questionnaire, if any) shall be communicated to the Assembly, and the Assembly shall then decide whether to propose to the Council to convoke the contemplated conference.

4. If the Assembly recommends that a conference should be convoked, the Council shall arrange for the preparation of a draft convention, in the light of the replies received from Governments and the new draft convention (together with the replies of other Governments) shall be transmitted to each Government, with a request for their opinion on the provisions of the draft and any observations on the above-mentioned replies of the other Governments.

5. In the light of the results of this second consultation of the Governments, the Council shall decide whether the conference should be convoked and fix the date.

6. The Council, in fixing the date for the convocation of a conference, shall endeavour, as far as possible, to avoid two League of Nations conferences being held simultaneously, and to ensure the lapse of a reasonable interval between two conferences.

7. The procedure set out in the preceding paragraphs will be followed as far as possible in the case of draft conventions, the desirability of which is recognized by a decision of the Assembly or as the result of a proposal by a Government.

The above rules shall be communicated to the technical organizations of the League of Nations and to the Governments, for the purpose of enabling the Assembly at its next session to consider whether changes should be made therein as a result of any suggestions which may be made.

V

That, in conformity with the recommendations contained in Part III, paragraphs 2 (d), (e) and (f), of the report of the Committee appointed in accordance with the resolution of the Assembly of 24 September 1929 (see Document A.10.1920.V), at future conferences held under the auspices of the League of Nations at which general conventions are signed, protocols of signature shall, as far as possible, be drawn up on the general lines of the alternative drafts set out in Annexes I and II of the present resolution.

ANNEX I

Protocol of Signature

In signing the Convention of this day's date relating to.....
the undersigned plenipotentiaries, being duly authorized to this effect and

in the name of their respective Governments, declare that they have agreed as follows:

1. That the Government of every Member of the League of Nations or non-Member State on whose behalf the said Convention has been signed undertakes, not later than.....(date) either to submit the said Convention for parliamentary approval, or to inform the Secretary-General of the League of Nations of its attitude with regard to the Convention.

2. If on.....(date) the said convention is not in force with regard to.....Members of the League of Nations and non-Member States, the Secretary-General of the League shall bring the situation to the attention of the Council of the League of Nations, which may either convene a new conference of all the Members of the League and non-Member States on whose behalf the Convention has been signed or accessions thereto deposited, to consider the situation, or take such other measures as it considers necessary. The Government of every signatory or acceding State undertakes to be represented at any conference so convened. The Governments of Members of the League and non-Member States which have not signed the Convention or acceded thereto may also be invited to be represented at any conference so convened by the Council of the League.

Note: The procedure provided for in this Annex is generally suitable for most general conventions. In cases in which it is applied, the final article of the convention should be drafted in the usual form and should not fix any named or final date for the entry into force of the convention, but should permit its entry into force on receipt of a relatively small number of ratifications or accessions.

ANNEX II

Final Article of the Convention

Article X

The present Convention shall enter into force on.....(date), provided that, on this date, ratifications or accessions have been deposited with or notified to the Secretary-General of the League of Nations on behalf of.....¹ Members of the League of Nations or non-Member States.

Protocol of Signature

In signing the Convention of today's date relating to.....the undersigned plenipotentiaries, being duly authorized to this effect in the name of their respective Governments, declare that they have agreed as follows:

¹ The figure indicated here should be a relatively large one.

If on.....² the said Convention has not come into force in accordance with the provisions of Article X, the Secretary-General of the League of Nations shall bring the situation to the attention of the Council of the League of Nations, which may either convene a new conference of all the Members of the League and non-Member States on whose behalf the Convention has been signed or accessions thereto deposited to consider the situation, or take such other measures as it considers necessary. The Government of every signatory or acceding State undertakes to be represented at any conference so convened.

Note: The procedure provided for in Annex II is suitable for certain types of convention whose practical utility depends on their immediate entry into force for a considerable number of States.

VI

That the Council will investigate to what extent in the case of general conventions dealing with particular matters, it is possible—in view of the constitutional law and practices of different States—to adopt the procedure of signing instruments in the form of governmental agreements which are not subject to ratification, and that, to the extent that it is possible to do so, this procedure should be followed in regard to minor and technical matters.

VII

That, in future, general conventions negotiated under the auspices of the League of Nations and made subject to ratification shall not be left open for signature after the close of the conference for a longer period than six months, unless special reasons render a longer period advisable.

APPENDIX 2

RESOLUTION ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS,
25 SEPTEMBER 1931

Official Journal, Special Supplement, No. 92, 1931, page 11

The Assembly adopts the following amended text for Section IV of Resolution No. I, adopted by the eleventh Assembly on 3 October 1930:

That, in the case of all general conventions to be negotiated under the auspices of the League of Nations, the following preparatory procedure should, in principle, be followed, except in the cases where previous conventions or arrangements have established a special procedure or where, owing to the nature of the questions to be treated or to special circum-

² Same date as that indicated in Article X.

stances, the Assembly or the Council consider other methods to be more appropriate:

1. Where an organ of the League of Nations recommends the conclusion of a general convention on any matter, it shall prepare a memorandum explaining the objects which it is desired to achieve by the conclusion of the convention and the benefits which result therefrom. Such memorandum shall be submitted to the Council of the League of Nations.

2. If the Council approves the proposal in principle, a first draft convention shall be prepared and communicated, together with the explanatory memorandum, to the Governments, with the request that, if they feel that the draft should be taken into consideration, they shall inform the Secretary-General of their views, both with regard to the main objects or the suggested means of attaining them, and also with regard to the draft convention. In some cases, it may be desirable to annex a specific questionnaire.

3. The draft convention and the observations of Governments (together with the answers to the questionnaire, if any) shall be communicated to the Assembly and the Assembly shall then decide whether the subject appears *prima facie* suitable for the conclusion of a convention.

4. If the Assembly considers the subject *prima facie* suitable for the conclusion of a convention, the Council shall arrange for the preparation of a draft convention in the light of the replies received from Governments, and the new draft convention (together with the replies of other Governments) shall be transmitted to each Government with a request for their opinion on the provisions of the draft and any observations on the above-mentioned replies of the other Governments.

5. In the light of the results of this second consultation of the Governments, the Assembly shall decide whether a convention should be concluded and, if so, whether the draft should be submitted to a conference, the date of which it will request the Council to fix.

6. The Council, in fixing the date for the convocation of a conference, shall endeavour, as far as possible, to avoid two League of Nations conferences being held simultaneously, and to ensure the lapse of a reasonable interval between two conferences.

7. The procedure set out in the preceding paragraphs will be followed, as far as possible, in the case of draft conventions the desirability of which is recognized by a decision of the Assembly either on its own initiative or as the result of a proposal by a Government. In these cases, the Council will instruct either the Secretariat or some other organ of the League or specially selected experts to prepare the above-mentioned report, which shall subsequently be submitted to the Council.

APPENDIX 3

STANDING ORDERS OF THE GOVERNING BODY OF THE
INTERNATIONAL LABOUR ORGANIZATION

International Labour Organization Constitution and Rules, 1946, page 74.

Article 8

Procedure for Placing an Item on the Agenda of the Conference

1. When a proposal to place an item on the agenda of the Conference is discussed for the first time by the Governing Body, the Governing Body cannot, without the unanimous consent of the members present, take a decision until the following session. Const. 14

2. When it is proposed to place on the agenda of the International Labour Conference an item which implies a knowledge of the laws in force in the various countries, the Office shall place before the Governing Body a concise statement of the existing laws and practice in the various countries relative to that item. This statement shall be submitted to the Governing Body before it takes its decision.

3. When considering the desirability of placing a question on the agenda of the International Labour Conference, the Governing Body may, if there are special circumstances which make this desirable, decide to refer the question to a preparatory technical conference with a view to such a conference making a report to the Governing Body before the question is placed on the agenda. The Governing Body may, in similar circumstances, decide to convene a preparatory technical conference when placing a question on the agenda of the Conference.

4. Unless the Governing Body has otherwise decided, a question placed on the agenda of the Conference shall be regarded as having been referred to the Conference with a view to a double discussion.

5. In cases of special urgency or where other special circumstances exist, the Governing Body, by a majority of three fifths of the votes cast, decide to refer a question to the Conference with a view to single discussion.

6. When the Governing Body decides that a question shall be referred to a preparatory technical conference it shall determine the date, composition and terms of reference of the said preparatory conference.

7. The Governing Body shall be represented at such technical conferences which, as a general rule, shall be of a tripartite character.

8. Each delegate to such conferences may be accompanied by one or more delegates.

9. For each preparatory conference convened by the Governing Body, the Office shall prepare a report adequate to facilitate an exchange of views on all the issues referred to it and, in particular, setting out the law and practice in the different countries.

APPENDIX 4

STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE AS ADOPTED
AT THE TWENTY-SEVENTH SESSION ON 22 OCTOBER 1945

International Labour Organization Constitution and Rules, 1946,
pages 50-52.

Article 31

Preparatory Stages of Single-Discussion Procedure

1. When a question is governed by the single-discussion procedure the Office shall circulate to the Governments a summary report upon the question containing a statement of the law and practice in the different countries and accompanied by a questionnaire drawn up with a view to the preparation of draft Conventions or Recommendations. This questionnaire shall request Governments to give reasons for their replies. At least three months shall be given to the Governments to prepare their replies and such replies should reach the Office as soon as possible and as a general rule six months before the opening of the Conference.

2. On the basis of the replies from the Governments the Office shall draw up a final report which may contain one or more draft Conventions or Recommendations. This report shall be communicated by the Office to the Governments as soon as possible and every effort shall be made to secure that the report shall reach them in no case less than four months before the opening of the Conference.

3. If a question on the agenda has been considered at a preparatory technical conference the Office, according to the decision taken by the Governing Body in this connection, may either:

(a) circulate to the Governments a summary report and a questionnaire as provided for in paragraph 1 above; or

(b) itself draw up on the basis of the work of the preparatory technical conference the final report provided for in paragraph 2 above.

Article 32

Preparatory Stages of Double-Discussion Procedure

1. When a question is governed by the double-discussion procedure, the International Labour Office shall prepare as soon as possible a preliminary report setting out the law and practice in the different countries and any other useful information, together with a questionnaire. The report and the questionnaire requesting the Governments to give reasons for their replies shall be communicated by the Office to the Governments at the earliest possible date so as to reach them at least six months before the opening of the Conference.

2. The Office shall submit to the Conference the preliminary report referred to in the preceding paragraph, together with a further report drawn up on the basis of the replies from the Governments indicating the principal questions which require consideration by the Conference. These reports shall be submitted to a discussion by the Conference either in full sitting or in committee, and if the Conference decides that the matter is suitable to form the subject of draft Conventions or Recommendations it shall adopt such conclusions as it sees fit and may either:

(a) decide that the question shall be included in the agenda of the following session in accordance with Article 16, paragraph 3, of the Constitution; or

(b) ask the Governing Body to place the question on the agenda of a later session.

3. On the basis of the replies from the Governments to the questionnaire referred to in paragraph 1 and on the basis of the first discussion by the Conference the Office may prepare one or more draft Conventions or Recommendations and transmit them to the Governments asking them to state within four months whether they have any amendments to suggest or comments to make.

4. On the basis of the replies from the Governments the Office shall draw up a final report containing the texts of draft Conventions or Recommendations with any necessary amendments. This report shall be communicated by the Office to the Governments so as to reach them in no case less than three months before the opening of the Conference.

Article 33

Procedure for the Consideration of Texts

1. The Conference shall decide whether it will take as the basis of discussion the draft Conventions or Recommendations prepared by the International Labour Office, and shall decide whether such draft Conventions or Recommendations shall be considered in full Conference or referred to a committee for report. These decisions may be preceded by a debate in full Conference on the general principles of the suggested draft Convention or Recommendation.

2. If the draft Convention or Recommendation is considered in full Conference each clause shall be placed before the Conference for adoption. During the debate and until all the clauses have been disposed of, no motion other than a motion to amend a clause of such draft Convention or Recommendation or a motion as to procedure shall be considered by the Conference.

3. If the draft Convention or Recommendation be referred to a committee, the Conference shall, after receiving the report of the committee,

proceed to discuss the draft Convention or Recommendation in accordance with the rules laid down in paragraph 2. The discussions shall not take place before the day following that on which copies of the report have been circulated to the delegates.

4. During the discussion of the articles of a draft Convention or Recommendation, the Conference may refer one or more articles to a committee.

5. If a draft Convention contained in the report of a committee is rejected by the Conference, any delegate may ask the Conference to decide forthwith whether the draft Convention shall be referred back to the committee to consider the transformation of the draft Convention into a Recommendation. If the Conference decides to refer the matter back, the report of the committee shall be submitted to the approval of the Conference before the end of the session.

6. The provisions of a draft Convention or Recommendation as adopted by the Conference shall be referred to the Drafting Committee for the preparation of a final text. This text shall be circulated to the delegates.

7. No amendment shall be allowed to this text, but, notwithstanding this provision, the President, after consultation with the three Vice-Presidents, may submit to the Conference amendments which have been handed to the Secretariat the day after the circulation of the text as revised by the Drafting Committee.

8. On receipt of the text prepared by the Drafting Committee and Const. after discussion of the amendments, if any, submitted in accordance with the preceding paragraph, the Conference shall proceed to 19 take a final vote on the adoption of the draft Convention or Recommendation in accordance with Article 19 of the Constitution of the Organization.

APPENDIX 5

RESOLUTION OF THE ADVISORY COMMITTEE OF JURISTS, 24 JULY 1920

(Procès-Verbaux of the Proceedings of the Committee, 1920, page 747)

The Advisory Committee of Jurists, assembled at the Hague, to prepare the constituent Statute of a Permanent Court of International Justice;

Convinced that the extension of the sway of Justice and the development of international jurisdictions are urgently required to ensure the security of States and well-being of the Nations;

Recommend that:

I. A new interstate Conference, to carry on the work of the two first Conferences at the Hague, should be called as soon as possible for the purpose of:

1. Re-establishing the existing rules of the Law of Nations, more especially and in the first place, those affected by the events of the recent War;

2. Formulating and approving the modifications and additions rendered necessary or advisable by the War, and by the changes in the conditions of international life following upon this great struggle;

3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy;

4. Giving special consideration to those points, which are not at the present time adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

II. That the Institute of International Law, the American Institute of International Law, the Union juridique internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work.

III. That the new Conference should be called the Conference for the advancement of International Law.

IV. That this Conference should be followed by periodical similar conferences; at intervals sufficiently short to enable the work undertaken to be continued, insofar as it may be incomplete, with every prospect of success.

APPENDIX 6

RESOLUTION ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS,
22 SEPTEMBER 1924

Official Journal, Special Supplement, No. 21, 1924, page 10.

The Assembly,

Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to international conciliation, communications and transit, the simplification of Customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolutions concerning legal assistance for the poor;

Desirous of increasing the contribution of the League of Nations to the progressive codification of International Law:

Requests the Council,

To convene a Committee of Experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilization and the principal legal systems of the world. This Committee, after eventually consulting the most authoritative organizations which have devoted themselves to the study of International Law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

1. To prepare a provisional list of the subjects of International Law, the regulation of which by international agreement would seem to be most desirable and realizable at the present moment;

2. After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

3. To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

APPENDIX 7

RESOLUTION ADOPTED BY THE COUNCIL OF THE LEAGUE OF NATIONS ON 12 DECEMBER 1924

League of Nations Official Journal, February, 1925, page 274.

"The Council invites the following persons to form part of the Committee for the Progressive Codification of International Law:

1. M. Hammarskjöld, Governor of Upsala (Sweden) (Chairman);
2. Professor Diera, Professor of International Law at the University of Turin (Italy) (Vice-Chairman);
3. Professor Briery, Professor of International Law at the University of Oxford (Great Britain);
4. M. Fromageot, Legal Adviser to the Ministry for Foreign Affairs of the French Republic (France);
5. Dr. J. Gustavo Guerrero, Minister of Salvador in Paris (Salvador);
6. Dr. Bernard C. J. Loder, former Member of the Supreme Court of the Netherlands, President of the Permanent Court of International Justice (Netherlands);
7. Dr. Vilhena Barboza de Magalhaes, Professor of Law at the University of Lisbon, Barrister former Minister for Foreign Affairs, for Justice and Education (Portugal);

8. Dr. Adelbert Mastny, Minister for Czechoslovakia in London, President of the Czechoslovak Branch of the International Law Association (Czechoslovakia);

9. M. M. Matsuda, Doctor of Law, Minister Plenipotentiary (Japan);

10. M. Simon Rundstein, Barrister, former legal Adviser to the Ministry for Foreign Affairs (Poland);

11. Professor Walter Schücking, Professor at the University of Berlin (Germany);

12. Dr. José León Suárez, Dean of the Faculty of Political Sciences of the University of Buenos Aires (Argentina);

13. Professor Charles de Visscher, Professor of Law at the University of Ghent, Legal Adviser to the Minister for Foreign Affairs (Belgium);

14. Dr. Chung Hui Wang, Deputy Judge of the Permanent Court of International Justice (China);

15. Mr. George W. Wickersham, former Attorney-General of the United States, member of the Committee of International Law of the American Bar Association, and President of the American Law Institute (United States of America);

16. A Spanish Legal Adviser;

17. A Legal Expert in Moslem Law."

APPENDIX 8

RESOLUTION ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS,
27 SEPTEMBER 1927

Official Journal, Special Supplement, No. 53, page 5.

The Assembly,

Having considered the documents transmitted to it by the Council in conformity with its resolution of 13 June 1927, and the report of the First Committee (Documents A.18.1927.V and A.105.1927.V) on the measures to be taken as a result of the work of the Committee of Experts for the Progressive Codification of International Law;

Considering that it is material for the progress of justice and the maintenance of peace to define, improve and develop International Law;

Convinced that it is therefore the duty of the League to make every effort to contribute to the progressive codification of International Law;

Observing that, on the basis of the work of the Committee of Experts, to which it pays a sincere tribute, systematic preparations can be made for a first Codification Conference, the holding of which in 1929 can already be contemplated;

Decides:

1. To submit the following questions for examination by a first Conference:

- (a) Nationality;
- (b) Territorial Waters; and
- (c) Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners;

2. To request the Council to instruct the Secretariat to cause its services to study, on the lines indicated in the First Committee's report, the question of the Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties;

3. To instruct the Economic Committee of the League to study, in collaboration with the Permanent International Council for the Exploration of the Sea at Copenhagen and any other organization specially interested in this matter, the question whether and in what terms, for what species and in what areas, international protection of marine fauna could be established. The Committee will report to the Council the results of its enquiry indicating whether a Conference of Experts should be convened for such purpose at an early date;

4. To ask the Council to make arrangements with the Netherlands Government with a view to choosing The Hague as the meeting place of the first Codification Conference, and to summon the Conference as soon as the preparations for it are sufficiently advanced;

5. To entrust the Council with the task of appointing, at the earliest possible date, a Preparatory Committee, composed of five persons possessing a wide knowledge of international practice, legal precedents, and scientific data relating to the questions coming within the scope of the first Codification Conference, this Committee being instructed to prepare a report comprising sufficiently detailed bases of discussion on each question, in accordance with the indications contained in the report of the First Committee;

6. To recommend the Council to attach to the invitations draft regulations for the Conference, indicating a number of general rules which should govern the discussions, more particularly as regards:

- (a) The possibility, if occasion should arise, of the States represented at the Conference adopting amongst themselves rules accepted by a majority vote;

- (b) The possibility of drawing up, in respect of such subjects as may lend themselves thereto, a comprehensive convention and, within the framework of that convention, other more restricted conventions;

- (c) The organization of a system for the subsequent revision of the agreements entered into; and

(d) The spirit of the codification, which should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to contemporary conditions of international life;

7. To ask the Committee of Experts at its next session to complete the work it has already begun.

APPENDIX 9

EXTRACTS FROM THE RULES OF PROCEDURE OF THE CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW

Acts of the Conference for the Codification of International Law, Volume I.
Plenary Meetings, Page 64, Doc. C.351.M.145.1930.V.

Rules Adopted by the Conference

XX

Each Committee may draw up one or more draft conventions or protocols and may formulate recommendations or *vœux*.

A Committee may embody in the draft conventions or protocols any provisions which have been finally voted by a majority containing at least two-thirds of the delegations present at the meeting at which the vote takes place.

In the case of provisions which have secured only a simple majority, a Committee, at the request of at least five delegations, may decide by a simple majority whether such provisions are to be made the object of a special protocol open for signature or accession.

The provisions referred to in the two preceding paragraphs, if they are not embodied in a draft convention, or protocol, shall be inserted in the Final Act of the Conference.

Each convention or protocol shall contain a provision expressly showing whether reservations are permitted, and, if so, what are the articles in regard to which reservations may be made.

Recommendations and *vœux* may be adopted by a simple majority.

XXI

Each Committee shall forward to the Conference the results of its work, accompanied by a report in which special mention shall be made of those provisions which have been unanimously adopted. The report shall further indicate the points on the Committee's agenda which it has not discussed, and, in general, every question which the Committee considers it desirable to bring to the attention of the Governments.

XXII

The Conference shall pronounce upon proposals submitted to it by the Committees.

XXIII

The draft conventions and protocols, recommendations and *vœux* presented by the Committees may be adopted by the Conference by the vote of the simple majority of the delegations present at the meeting at which the vote takes place.

XXIV

The Final Act of the Conference shall contain:

- (a) A statement of the conventions and protocols open for signature or accession;
- (b) The provisions referred to in the fourth paragraph of Article XX, above which have not been embodied in such conventions or protocols;
- (c) Recommendations and *vœux* which are adopted.

APPENDIX 10

GENERAL RECOMMENDATIONS WITH A VIEW TO THE PROGRESSIVE
CODIFICATION OF INTERNATIONAL LAW

Adopted at the Conference for the Codification of International Law,

The Hague, March-April, 1930, Final Act, League of Nations
Doc. C.228.M.115.1930.V, Page 18.

I

The Conference,

With a view to facilitating the progressive codification of international law,

Recommends

That, in the future, States should be guided as far as possible by the provisions of the Acts of the First Conference for the Codification of International Law in any special conventions which they may conclude among themselves.

II

The Conference,

Highly appreciating the scientific work which has been done for codification in general and in regard to the subjects on its agenda in particular,

Cordially thanks the authors of such work and considers it desirable,

That subsequent conferences for the codification of international law should also have fresh scientific work at their disposal and that with this

object, international and national Institutions should undertake at a sufficiently early date the study of the fundamental questions of international law, particularly the principles and rules and their application, with special reference to the points which are placed on the agenda of such conference.

III

The Conference,

Considering it to be desirable that there should be as wide as possible a co-ordination of all the efforts made for the codification of international law,

Recommends

That the work undertaken with this object under the auspices of the League of Nations and that undertaken by the Conferences of American States may be carried on in the most complete harmony with one another.

The Conference.

Calls the attention of the League of Nations to the necessity of preparing the work of the next conference for the codification of international law a sufficient time in advance to enable the discussion to be carried on with the necessary rapidity and

For this purpose the Conference would consider it desirable that the preparatory work should be organized on the following basis:

1. The Committee entrusted with the task of selecting a certain number of subjects suitable for codification by convention might draw up a report indicating briefly and clearly the reasons why it appears possible and desirable to conclude international agreements on the subjects selected. This report should be sent to the Governments for their opinion. The Council of the League of Nations might then draw up the list of the subjects to be studied, having regard to the opinions expressed by the Governments.

2. An appropriate body might be given the task of drawing up, in the light of all the data furnished by legal science and actual practice, a draft convention upon each question selected for study.

3. The draft conventions should be communicated to the Governments with a request for their observations upon the essential points. The Council would endeavour to obtain replies from as large a number of Governments as possible.

4. The replies so received should be communicated to all the Governments with a request both for their opinion as to the desirability of placing such draft conventions on the agenda of a conference and also for any fresh observations which might be suggested to them by the replies of the other Governments upon the drafts.

5. The Council might then place on the programme of the Conference such subjects as were formally approved by a very large majority of the Powers which would take part therein.

APPENDIX 11

RESOLUTION ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS,
25 SEPTEMBER 1931

Official Journal, Special Supplement, No. 92, 1931, Page 9.

The Assembly recalls that the resolution of 22 September 1924 emphasized the progressive character of the codification of international law which should be undertaken, and, in view of the recommendations of the First Conference for the Codification of International Law held at The Hague in 1930, it decides to continue the work of codification with the object of drawing up conventions which will place the relations of States on a legal and secure basis without jeopardizing the customary international law which should result progressively from the practice of States and the development of international jurisprudence. To this end, the Assembly decides to establish the following procedure for the future, except in so far as, in particular cases, special resolutions provide to the contrary:

1. Any State or group of States, whether Members of the League or not, may propose to the Assembly a subject or subjects with respect to which codification by international conventions should be undertaken. Such proposals, together with a memorandum containing the necessary explanatory matter, should be sent, before 1 March, to the Secretary-General, in order that he may communicate them to the Governments and insert them in the agenda of the assembly.

2. Any such proposals will be considered by the Assembly, which will decide whether the subjects proposed appear *prima facie* suitable for codification.

3. If the investigation of a proposed subject is approved by the Assembly and if no existing organ of the League is competent to deal with it, the Assembly will request the Council to set up a committee of experts, which will be asked, with the assistance of the Secretary-General of the League of Nations, to make the necessary enquiries and to prepare a draft convention on the subject, to be reported to the Council with an explanatory statement.

4. The Council will transmit such report to the Assembly, which will then decide whether the subject is provisionally to be retained as a subject for codification. If this is decided affirmatively, the Assembly will ask the Secretary-General to transmit the said report to the Governments of the Members of the League and non-member States for their comments.

5. The committee of experts, if it considers it desirable to do so, will revise the draft in the light of the comments made by the Governments.

If the committee of experts revises the draft, the revised draft will be submitted to the Governments for their comments and, together with the comments received, will be transmitted to the Assembly, which will then decide finally whether any further action should be taken in the matter and, if so, if the draft should be submitted to a codification conference.

If the committee does not see any reason to revise the draft, it will be transmitted, together with the comments of the Governments, to the Assembly, which will then decide finally whether any further action should be taken and, if so, if the draft should be submitted to a codification conference.

The Assembly recommends:

1. That, in relation with the further work in connection with the codification of international law, the international and national scientific institutes should collaborate in the work undertaken by the League of Nations;

2. That the work of codification undertaken by the League of Nations should be carried on in concert with that of the conferences of the American States.

2. METHODS FOR ENCOURAGING THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS EVENTUAL CODIFICATION *

May 6, 1947

1. METHODS FOR ENCOURAGING THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

A. Methods for Encouraging International Legislation

1. Extension of Area of Matters Covered by International Legislation

One of the most fruitful methods of encouraging the development of international law is to extend the area of "law-governed matters" through the conclusion of international conventions regulating fields of activity on which no agreed rules exist.¹

In considering methods whereby the scope of international legislation may be extended, the Committee might consider the possible preparation of model treaties, not only in relation to form, but also in relation to sub-

* This Memorandum contains certain observations which the Secretariat presents to the Committee on Development and Codification of International Law, in order to facilitate discussion. Doc. A/AC.10/7. The text here printed has been corrected in accordance with Docs. A/AC.10/7/Corr. 1, 7 May 1947 and A/AC.10/7/Corr. 2, 22 May 1947.

¹ See observations submitted by the Government of Great Britain to the recommendations made by The Hague Conference of 1930. *League of Nations O.J.*, 1931, p. 1592.

stance, in connection with such matters as extradition, and consular privileges and immunities, where a considerable number of bilateral conventional agreements exist. Another method which might be considered by the Committee would be the study of those abortive multipartite conventions which, by reason of extraneous factors, never came into force despite a substantial number of signatures and ratifications.

In the selection of fields of activity not covered by international agreements, and regarding which regulation by a multipartite convention may be thought desirable, the Committee may find it useful to consider first of all those fields already widely covered by bilateral conventions and concerning which evidence of a wide need for regulation is abundant.

A continuing process of new legislation is being carried on through the work of the Economic and Social Council and the various specialized agencies brought into relationship with the United Nations. In considering methods of extending the area of matters covered by international legislation the Committee may find it useful to consider here methods of securing the co-operation of the several organs of the United Nations in respect of a positive programme of international legislation.

2. *Compilation of International Legislative Materials*

Systematic compilations of international legislative materials already exist in such forms as the *League of Nations Treaty Series*, Hudson's *International Legislation*, and the *International Labor Code* of 1939. The Committee, however, might find it useful to consider such technical improvements as the preparation of a subject index or classification of the contents of multipartite instruments; a multilingual glossary to be used in the preparation of translations of multipartite instruments; and a list of short titles of multipartite instruments.

3. *Improvement in Techniques of Multipartite Instruments.*

The effectiveness of multipartite instruments might be considerably strengthened through the adoption of methods such as the following:

(a) *Uniform Treaty Clauses*

Multipartite instruments might be considerably improved if, in the body of the instrument itself, a certain uniformity of form and content were to be achieved by clauses safeguarding the obligatory effect of the convention against reservations of a far-reaching character;² clauses requiring the parties to give information regarding the steps which have been adopted by their governments in order to give effect to the convention;³ clauses

² See, for example, Article 39 of the General Act of 1928, Hudson, *International Legislation*, IV, p. 2529.

³ E.g. Protocol to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, 1930; Article 58 of the Convention Concerning Safety of Life at Sea. For more recent examples, see Article VIII of the UNESCO Constitution.

relating to jurisdiction,⁴ denunciation,⁵ and revision;⁶ and clauses relating to accession, and language.⁷

In order to ensure that these and other improvements in the techniques of international legislation may be effectively studied and worked out, the Committee might consider the usefulness of recommending the establishment of an international drafting bureau which would help secure not only those improvements suggested above, but also increased uniformity of terminology, formal clauses, and translations, as well as an orderly system of presentation and uniform rules of style.⁸

(b) *Encouragement of Ratifications and Accessions*

In this connection the Committee might consider continuing the practice of the League of Nations of periodically publishing information on the progress of ratifications of, and accessions to, conventions completed under the auspices of the League of Nations.⁹

The Committee might also consider procedures which the Secretary-General of the United Nations might take in order to encourage ratifications and accessions on the part of the states concerned.

(c) *Encouragement of the Use of Organs of the United Nations in the Conclusion of Multipartite Instruments*

The utilization of any one of the organs of the United Nations, and of the specialized agencies, in connection with the conclusion of multipartite instruments has many advantages.

⁴ Some recent examples are to be found in Article 17 of the FAO Constitution; Article 14 (2) of the UNESCO Constitution; Article 18 (c) of the International Fund Agreement; Article 9 (c) of the International Bank Agreement; Articles 84 and 85 of the Civil Aviation Convention.

⁵ *E.g.* Article 69 of the Declaration of London concerning the Laws of Maritime War; Article 95 of the ICAO Constitution.

⁶ Some recent examples of flexible revision machinery may be found in Article 8 of the UNRRA Agreement; Article 20 of the FAO Constitution; Article 13 of the UNESCO Constitution; Article 17 (a), (c), of the International Fund Agreement; Article 4 of the Constitution of ILO, Instrument of Amendment, 1945.

to the formal procedure to be taken with regard to signature, ratification,

⁷ See in this connection League of Nations, Report of the *Committee of Experts Relating to Uniform Treaty Causes*. League of Nations Document, C.196.M.70.1927.V, p. 105; also League of Nations Document, A.10.1930.V.

⁸ See in this connection Wilfred Jenks, "The Need for an International Legislative Drafting Bureau," *A.J.I.L.*, Vol. 39 (1945), p. 163; also, by the same author, "Some Constitutional Problems of International Legislation," *British Yearbook of International Law*, 1945, pp. 11-72.

⁹ See Resolution adopted by the Eleventh Assembly of the League of Nations on the Ratification of International Conventions Concluded under the Auspices of the League of Nations, *Records of the Eleventh Assembly, 1930*, p. 215. This includes two annexes, one of which is a model protocol of provisions relating to signature, the other being a suggested model for final acts.

In the first place, the difficulty of initiative is to a large extent overcome; for any member state can propose a convention in the meetings of the organ concerned,¹⁰ or such proposals might even emanate from the Secretary-General himself. Another obstacle which such a procedure can overcome to a large extent is the difficulty of securing preliminary agreement on general principles. An organ of the United Nations might, for instance, entrust the preliminary work of drawing up a draft convention to a small group of international experts who would work with the technical assistance of the permanent secretariat. Furthermore, the holding of international conferences is greatly facilitated by the fact that such conferences can be summoned by the United Nations instead of by an individual government,¹¹ and the costs and technical preparations can all be met by the international organization instead of being the burden of one government alone.

B. Methods for Encouraging the Development of Customary International Law

While customary international law develops as a result of State practice and its growth is not dependent upon conscious international efforts, the United Nations can stimulate its development through taking steps to render more accessible the evidence of the practice of states in the form of digests of international law.¹²

It would seem that the work of ascertaining and compiling such digests should not be directed primarily toward obtaining the viewpoint of governments regarding certain points of international law. A more useful approach might be the consideration of methods whereby the materials containing such evidence can be made more readily available. The General Assembly might, for instance, promote this effort on the part of governments through recommending that they initiate the preparation of such digests of their state practice. Such a recommendation, might be implemented through the creation of a small committee which would consult with the governments concerned on the manner in which the preparation of the digests could most effectively be undertaken. This body, with the consent of the respective governments, might, for instance, nominate in each country a certain number of experts who would undertake the preliminary work of research with regard to the practice of that state.

¹⁰ In this connection Article 62 (3) of the Charter empowers the Economic and Social Council to "prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence."

¹¹ The Economic and Social Council is similarly empowered to call international conferences by Article 63 (4) of the Charter.

¹² In the United States of America, for instance, such compilations have been prepared by Wharton, Moore, and Hackworth.

C. Methods for Encouraging the Development of International Law Through the Judicial Process.

In considering methods for encouraging the development of international law through the judicial process, it is suggested that the collection and publication of decisions of national courts dealing with international law problems, possibly in connection with the preparation of digests of state practice suggested above, will provide a useful indication of the *opinio juris* of states.

As far as collections of international law cases are concerned, a useful method would be to encourage the continuation of the collection of cases undertaken in the *Annual Digest and Reports of International Law Cases, 1919-1942*, as well as the continuation, in respect of the International Court of Justice, of the Publications of the Permanent Court of International Justice.

II. METHODS FOR ENCOURAGING THE EVENTUAL CODIFICATION OF
INTERNATIONAL LAW

A. International Conventions as a Method

The method of convening an international conference for the purpose of drawing up a convention on the subject or subjects to be codified has hitherto been the method most widely used. The great volume of international legislation and the notable successes of the Inter-American Conferences can be pointed to as evidence of the successful application of the convention method in regulating many diverse fields of international activity.

The convention method, however, has many drawbacks when it is considered as a method for securing international agreement on general rules and principles of international law. The diverse interests of governments makes it difficult for international agreement to be secured concerning the rules of conduct which are to be binding upon states in the indefinite future, and covering situations which cannot be foreseen. Also, the failure of governments to reach agreement, for political reasons, in a conference convened to codify rules of international law, would seem to cast doubt upon certain rules of international law whose validity has been admitted for a very long time and which has hitherto generally been assumed to be part of customary international law. The disappointing results of the first Codification Conference at the Hague in 1930 may, to a considerable extent, be attributed to the difficulties inherent in attempting to codify international law by the convention method.

B. Restatements of International Law as a Method

The preparation of scientific restatements of international law may be regarded as a useful step in promoting international agreement with re-

gard to the formulation of certain rules of international law which may lead to their eventual codification in an international convention. As such restatements are essentially scientific in nature, and as the weight which would attach to any such restatements would depend entirely on its scientific merit, inter-governmental agreement in regard to particular rules is not a prerequisite to the successful preparation of such restatements. If such restatements, possessing no governmental authority, were to be drawn up by a committee of jurists functioning under a mandate from the United Nations, and were to be published from time to time under the *imprimatur* of the United Nations, they might serve as a useful guide to statesmen and judges. Though lacking the imperative authority of legislative enactments or treaty stipulations, such restatements would commend themselves by their own intrinsic value, and exercise a persuasive influence of an effective and constructive nature. Their authority will be increased if they are adopted by resolutions of the General Assembly at any time when the General Assembly, on the proposal of a Member State or Member States, considers it desirable to do so.

While it is not intended to suggest that the preparation of scientific restatements of international law should serve as an alternative to international conventions as a method of codification, the preparation of such restatements might be considered as a useful preliminary step which would prepare the ground for the eventual codification of international law by international agreement.

3. OUTLINE OF THE CODIFICATION OF INTERNATIONAL LAW IN THE INTER-AMERICAN SYSTEM WITH SPECIAL REFERENCE TO THE METHODS OF CODIFICATION *

PART I

HISTORY OF CODIFICATION OF INTERNATIONAL LAW IN THE INTER-AMERICAN SYSTEM

- A. Introduction—Previous to the First World War.
- B. The Fifth International Conference of American States.
- C. The Second Meeting of the International Commission of Jurists.
- D. The Sixth International Conference of American States.
- E. The Seventh International Conference of American States.
- F. The Inter-American Conference for the Maintenance of Peace.
- G. The Eighth International Conference of American States.
- H. The Meetings of the Ministers of Foreign Affairs of the American Republics.

* Doc. A/AC.10/8, 6 May 1947. Text corrected in accordance with Doc. A/AC.10/8/ Corr. 1, 12 May 1947.

PART II

ANALYSIS OF THE METHODS OF CODIFICATION IN THE
INTER-AMERICAN SYSTEM

- A. The National Committees.
- B. The Permanent Committees of Rio de Janeiro, Montevideo, and Havana.
- C. The Committee of Experts.
- D. The International Conference of Jurists.

THE CODIFICATION OF INTERNATIONAL LAW IN THE
INTER-AMERICAN SYSTEM

PART I

HISTORY OF CODIFICATION OF INTERNATIONAL LAW IN THE
INTER-AMERICAN SYSTEMA. *Introduction—Previous to the First World War*

The initial effort to codify international law in America manifested itself very shortly after the independence movement. As early as 1826, at the congress of Panama, it was suggested in one of the articles of the Pact of Union, "Pacto de Union, Liga y Confederación Perpetual," that the ratifying nations should lay down rules and principles to be followed by the contracting parties in time of peace and war.¹ Fifty-one years later, in 1877, the government of Peru called a conference for the codification of private international law and for the purpose of establishing uniformity in civil legislation. A treaty on extradition was drawn up and a treaty on rules to co-ordinate conflict of laws was also achieved.² Upon the initiative of the governments of Argentina and Uruguay, another conference for the codification of private international law was held at Montevideo in 1888. The seven states represented (Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay) signed five conventions covering nearly all subjects pertaining to private international law (civil law, commercial law, literary and artistic copyrights, patents, trade marks).³ This Treaty was ratified by Argentina, Bolivia, Peru, Paraguay and Uruguay.⁴

¹ The International Conferences of American States, *A Collection of Conventions*, New York, 1931 (Annex to Introduction), pages xxiv-xxix.

² For text of Treaty see: F. Mehl, *Die Kodifikation des internationalen Zivil und Handelsrechts* (Leipzig, 1891), pp. 91-105.

³ República Argentina, *Tratados, Convenciones, Protocolos* (Publicación oficial), Buenos Aires, 1901, pp. 150-152. See also Ernesto Restelli, *Actas y Tratados del Congreso Sud-Americano de Derecho Internacional* (Buenos Aires, 1938).

⁴ Restelli, *Ibid.*, pp. 931-962.

However, the first attempt of the American governments to set up a joint agency for the codification of international law was made at the Second International Conference of American States held at Mexico City, October, 1901, to January, 1902. The delegates, representing sixteen American nations, signed a Convention for the "Formation of Codes on Public and Private International Law" which provided that the Secretary of State of the United States of America and the Ministers of the American Republics accredited in Washington should appoint a committee of five American and two European jurists, of acknowledged reputation, to be entrusted with the drafting of a "Code of Public International Law" and another of "Private International Law" which would govern the relations between the American nations.⁵ This Convention, receiving five ratifications only—Bolivia, Ecuador, El Salvador, Guatemala, and Nicaragua—failed to come into effect.⁶

It was not until the Third International Conference of American States met at Rio de Janeiro in 1906 that the first agency for codification was successfully organized.

The agenda of the Conference included a project providing for the creation of a committee of jurists who would prepare for the consideration of the next conference a draft of a Code of Public International Law and Private International Law.⁷ A large number of delegates favoured the total codification of international law, recommending that special attention be given to the subjects and principles on which there is agreement in existing treaties and conventions as well as those which are incorporated in national laws of American States.⁸ The Brazilian Delegate, however, strongly objected to including "supposed law" which did not seem to him to go beyond "a collection of customary and courteous rules, 'arbitrarily' adopted by sovereign states in their relations, but entirely without the possibility of attaining the coercive condition which is, nevertheless, essential and inherent to the existence of law."⁹

The committee of codification, organized by the Conference, pointed out that if codes were to have positive value, they would have to follow the filiation of general principles of law, and also to determine the real need of the American nations in their relations with other states.¹⁰

In order to cope with the problem of codification, a convention was signed

⁵ *Minutes and Documents*, Second International Conference of American States, Mexico, 1901-1902, p. 716. (Hereafter all documents pertaining to the International Conferences of American States will be cited I.C.A.S.)

⁶ *The International Conferences of American States, First Supplement*, 1933-1940 (Published by the Carnegie Endowment), Washington, D. C., 1940, p. 501.

⁷ *Third I.C.A.S., Minutes, Resolutions, Documents*, Rio de Janeiro, 1907, page 6.

⁸ *Ibid.*, pp. 283-291.

⁹ *Ibid.*, p. 530.

¹⁰ *Ibid.*, p. 297.

establishing an International Commission of Jurists to be composed of one representative from each of the signatory states.¹¹

Although the Convention provided that the first meeting of the Commission should "be held in the city of Rio de Janeiro during the year 1907," due to the delay of the governments in ratifying it, the International Conference was not convened until 26 June 1912.

The delegations of seventeen American republics,¹² under the able chairmanship of Dr. E. Pessoa, proceeded to study two codes of law, one of private international law,¹³ and one of public international law, which had been prepared by the Brazilian Government to facilitate the task of the Conference.¹⁴

No sooner had the Conference opened than two conflicting trends of thought confronted the delegates. On the one hand there were those who believed the Conference should base its work on the two Brazilian codes. They believed that total and immediate codification of international law was possible and could be achieved by careful study and elaboration of the Brazilian codes. On the other hand, the majority considered it of utmost importance to come to an agreement on the best methods to be employed thereafter, and advocated a partial and progressive codification of international law.¹⁵ It was decided, thereupon, to limit the work of the Conference to preliminary organization and adoption of working procedures.

The Commission of Jurists was divided into six working committees, four of which were assigned to work on public international law and two on private international law. They were to sit, until the next Conference of Jurists, in six different capitals.¹⁶ The first committee, stationed at Washington and made up of delegates of the United States, Mexico, Guatemala, Salvador, Costa Rica, and Panama, would study and prepare codes on maritime war and neutrality. The second committee at Rio de Janeiro, composed of Brazil, Colombia, Peru, and Cuba, would do similar work on the law of war and on claims arising from civil war. In Santiago de Chile a third committee¹⁷ (Argentina, Chile, Bolivia, Ecuador) would study the general problem of international law in peace time (*l'état de paix*). The fourth committee (Chile, Argentina, Colombia, Uruguay), sitting at Buenos

¹¹ *Ibid.*, p. 627.

¹² Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Salvador, Uruguay, Venezuela.

¹³ For text of code see Epistácio Pessoa, *Projecto de Código de Direito Internacional*, Rio de Janeiro, 1911, pp. 1-2 ff.

¹⁴ See Fifth I.C.A.S., *Actas de las sesiones de las comisiones de la conferencia* (Santiago de Chile, p. 207).

¹⁵ *Ibid.*, p. 207.

¹⁶ Fifth I.C.A.S., *op. cit.*, p. 208.

¹⁷ This committee held its first meeting during the Conference of 1912 and unanimously agreed upon the gradual and progressive codification of international law, and briefly pointed out those topics which may be ripe for codification. *Ibid.*, p. 210.

Aires, would compile rules for the pacific settlement of disputes and the organization of international tribunals. The committees on private international law, at Montevideo (composed of Paraguay, Uruguay, Brazil), and at Lima (Peru, Venezuela, Bolivia, and Cuba) would work on the treatment of aliens, and on penal law, respectively.¹⁸

It was within the duty of the committees to gather minute and detailed information regarding the internal legislation, judicial decisions, conventions, and rules of customary international law applied by the American governments. The projects prepared by the six committees, would be submitted to the following meeting of the International Commission of Jurists and all projects approved by two-thirds of the delegates would be introduced to the next Inter-American Conference.¹⁹

The first meeting of the Commission of Jurists was adjourned and its next meeting set for 1914. Owing to the First World War, this meeting failed to take place.

B. *The Fifth International Conference of American States*

The Fifth International Conference of American States met at Santiago de Chile in 1923. The juridical committee, presided over by Dr. Afranio de Mello Franco of Brazil, immediately agreed to the advisability of a gradual and progressive codification of international law as recommended by the Congress of International Jurists of 1912, and took as a basis of discussion the projects presented by Dr. Alejandro Alvarez, entitled "Codification of American International Law,"²⁰ which dealt with the following subjects: fundamental basis of international law, fundamental rights of American public international law, maritime neutrality, rights and duties of neighbouring States on disputed territories, diplomatic immunities, and status of consular agents.²¹ The projects presented by Alvarez include the work done by the Third Committee. Inasmuch as the meeting of the International Commission of Jurists had not been held since the war, and the labour of its committees had also been suspended, it was agreed by the committee and subsequently approved by the Conference to reinstate the Commission.²² The Conference's resolution dealing with the codification of international law added that resolutions adopted by the Commission of Jurists should be submitted to the Sixth International Conference of American States, "in order that, if approved," they should be "submitted to the American Governments and incorporated into Conventions."²³

¹⁸ *Ibid.*, p. 208.

¹⁹ Fifth, *Ibid.*, p. 203.

²⁰ Fifth I.C.A.S., *op. cit.*, p. 223. *Actas de las sesiones de la conferencia* (1923), p. 223.

²¹ *Ibid.*, p. 210. For text see: Fifth I.C.A.S., Vol. II, Alvarez, *La codificación del derecho internacional en América*, p. 65 ff.

²² Fifth I.C.A.S., *Actas de las sesiones*, pp. 221-222.

²³ Fifth I.C.A.S., *Tratado, Convenciones, y Resoluciones* (Pan-American Union, 1923), p. 29.

Among the agreements, within the realm of International Law, negotiated and signed at Santiago de Chile, is the Treaty to Avoid or Prevent Conflicts (gondra Treaty) which has been ratified by every American State, except Argentina.²⁴

An important step in the efforts to find methods for the successful codification of international law was taken by the Governing Board of the Pan-American Union on 2 January 1924.

A resolution was adopted requesting the American Institute of International Law to hold a special session and to prepare a series of projects of international law which might be sent to the forthcoming meeting of the International Commission of Jurists.²⁵ The American Institute appointed J. B. Scott, Louis Anderson, and Alejandro Alvarez to prepare a preliminary draft. When the Institute met at Lima in 1925, they submitted thirty projects comprising the following subjects: (1) preamble; (2) general declarations; (3) Pan-American Union; (4) fundamental bases of international law; (5) declaration of the rights and duties of States; (6) fundamental rights of the American Republics; (7) international rights and duties of natural and artificial persons; (8) nationality and naturalization; (9) immigration; (10) rights and duties of foreigners and diplomatic protection; (11) responsibility of governments; (12) maritime communication in time of peace; (13) maritime neutrality; (14) freedom of transit; (15) aerial navigation; (16) treaties; (17) recognition of new states and new governments; (18) recognition of belligerency; (19) diplomatic agents; (20) consuls; (21) extradition; (22) rights and duties of nations in territories in dispute on the question of boundaries; (23) exchange of publications; (24) interchange of professors and students; (25) pacific settlement; (26) measures of repression; (27) States; (28) jurisdiction; (29) acquisition and loss of territory; (30) national domain.

The Members of the American Institute who attended the Third Scientific Pan-American Congress at Lima discussed the above projects. Project 18 was rejected, because it was pointed out that civil war should not be legalized by Convention. Project 29 was also dropped. Two additional projects were adopted however, the first condemning acquisition of territory by conquest (project No. 30) and the second on navigation of rivers (project No. 19). The Members of the American Institute appointed a working committee.²⁶

²⁴ Eighth I.C.A.S., *Special Handbook for the Use of Delegates* (Pan-American Union, 1938), p. 13.

²⁵ Report on steps taken by the Pan-American Union in fulfilment of Conventions and Resolutions adopted by the Fifth International Conference of American States (Washington, 1925), p. 5.

²⁶ For proceedings of these meetings see American Institute of International Law, *Informal Conversations at Lima*, 20-31 December 1934. Published by the Carnegie Endowment of International Peace, Washington, D. C., 1924.

The Committee appointed by the Congress of Lima met at Havana. It rejected the projects dealing with Maritime Communications and Nationality and Naturalization, which were deemed to be subjects of private International Law and it added a project dealing with the Pan-American Court of Justice and another project dealing with a declaration on Pan-American Union.²⁷

Upon the completion of the task, thirty projects were sent to the Pan-American Union, which, in turn, sent them to the various American Governments. The Secretary of State, Charles Evans Hughes, who was currently chairman of the Governing Board of the Pan-American Union, expressed his satisfaction, saying:

At last we have the texts and projects, the result of elaborate study, for consideration. . . . I believe that this day, with the submission of concrete proposals which take the question of the development of international law out of mere aspiration, mark a definite step in the progress of civilization.²⁸

In addition to the thirty codes on international law, a committee of the American Institute under A. Sánchez de Bustamante, comprised of José Matos, Rodrigo Octavio, and Eduardo Sarmiento, prepared a code of private international law, which was also transmitted for examination to the governments.²⁹

C. *The Second Meeting of the International Commission of Jurists*

The second meeting of the International American Commission of Jurists took place at Rio de Janeiro (April-May, 1927). Every American State, excepting the Central American republics of Guatemala, Honduras, El Salvador, and Nicaragua, was represented by one or two delegates. In view of the necessary division of the conference into two large sub-commissions (A and B) dealing with private and public international law, respectively, it is regrettable that many nations limited their representation to one member. It made it necessary for single-member delegations to attend each of these two sub-commissions, thus forcing the sub-commissions to meet at different hours.³⁰

The Inter-American Commission, in session for five weeks, was a successful example of a body of official delegates, meeting for the explicit purpose of codifying public and private international law, in that it succeeded in

²⁷ Pan-American Union, *Codification of American International Law*, Washington, D. C., 1926, page 7 ff.

²⁸ Quoted in Scott, "Gradual and Progressive Development of International Law," 21 *A.J.I.L.*, p. 427.

²⁹ Pan-American Union, *Codification of American International Law, a Project of Code of Private International Law* (Washington, 1923), p. 7 ff.

³⁰ Brazil, *Comissão internacional de juristas americanos*, Vol. 1 (Edición Castellana), Rio de Janeiro, 1927, pp. 31-32.

drafting, in so little time, twelve codes of public international law and a code on private international law. As Mr. James Brown Scott, who was president of the American delegation, pointed out, it "exceeds in value that of all other gatherings ever held for the purpose."³¹ The fruitful results of the Conference were made possible largely owing to the extensive preparations made in advance by individuals and competent bodies. The jurists at the meeting were presented with the following projects: A project for the codification of public international law, submitted by Dr. Epitacio Pessoa in 1912; the projects known as "Codification of American International Law," which had been presented by Dr. Alejandro Alvarez at Santiago in 1923; and the monumental projects published by the American Institute of International Law.³² In regard to conflict of laws, the Commission had for detailed examination the Conventions subscribed to at Montevideo in 1889; a draft code on conflicts presented by Mr. Lafayette Pereira at the meeting of jurists held in 1912; and a project of a code on conflicts drawn up at the request of the American Institute of International Law by Dr. A. Sánchez de Bustamante.³³

Upon an amendment submitted by Dr. Victor Maurtua, Peruvian delegate, two important sub-commissions (C and D) were created. Sub-Commission C was to suggest plans for the creation of permanent organs necessary to the further progress of future codification of international law. Sub-Commission D was assigned the field of comparative legislation.³⁴ Owing to the existence of two great systems of law in America, civil law and common law, the task of Sub-Commission D was greatly handicapped in elaborating a single code of civil law. Hence, it could only recommend the creation of a commission for the study of comparative legislation and publish the results of its labour.³⁵ Sub-Commission C was more fortunate in its task for it recommended various methods by which more efficient preliminary work could be achieved. It recommended that the International Commission of Jurists be placed on a permanent basis, and that it should meet every two years. It also recommended that two committees, at Rio and Montevideo, on public and private international law, respectively, should be charged with presenting to the various governments lists of matters "susceptible of being submitted to a contractual regulation," would submit to the various governments the viewpoints of other governments, and should entrust the American Institute to study scientifically matters referred to it by the American governments.³⁶

³¹ Scott, *op. cit.*, p. 435.

³² Brazil, *International Commission of American Jurists* (Rio de Janeiro, 1927), Vol. IV, p. 8 (English edition).

³³ Brazil, *op. cit.*, Vol. I, p. 9.

³⁴ *Ibid.*, Vol. I, p. 23.

³⁵ *Ibid.*, Vol. IV, p. 159.

³⁶ *Ibid.*, Vol. IV, pp. 153-154.

Sub-Commission A, as well as Sub-Commission B, was composed of one member for each nation. In a preliminary meeting of the plenary session, Dr. A. Sánchez de Bustamante proposed that the two projects dealing with aerial navigation and the Pan-American Union should be dropped. He pointed out that a special aeronautic conference was shortly convening in Washington and the Pan-American Union was going to do the work concerning its own organization.³⁷ It was also submitted that all questions of a political or doctrinal nature should be set aside in order to consider those projects which are exclusively juridical.³⁸ Owing to their political nature the following projects were discarded: preamble; general declaration; declaration of Pan-American unity and co-operation; declaration of rights and duties of nations, fundamental rights of American Republics, national domain, rights and duties of nations in territories in dispute on question of boundaries, jurisdiction, responsibility of governments; diplomatic protection, freedom of transit, navigation of international rivers, Pan-American court of justice, measures of repression and conquest.³⁹ The remaining twelve projects were presented to Sub-Commission A for further discussion.

Sub-Commission B of Private International Law achieved great success. Dr. Antonio Sánchez de Bustamante, Chairman of the Sub-Commission, presented his monumental code of international law of 435 articles. At the end of the meeting his code was enlarged by four articles and modified here and there, but in substance and form was substantially the same as Sánchez de Bustamante's original draft.⁴⁰

If we are to compare the texts adopted by the International Commission of Jurists of 1927 with the projects prepared by the American Institute, an essential difference is observed. The thirty codes compiled by the Institute presented a tentative plan for total codification of international law. The progress made tended toward creating a purely "American international law" for American states. The jurists, however, reverted to the theory of gradual codification and it is observed that the drafting of the twelve codes leave open the possible adherence of States outside the system.

D. *The Sixth International Conference of American States*

Aided by the preliminary work of the Commission of Jurists, the delegates of the Sixth International Conference of American States, held in Havana, 1923, concluded seven conventions of public international law and one convention of private international law.

³⁷ *Ibid.*, Vol. I, pp. 23-29.

³⁸ *Ibid.*, Vol. II, p. 28.

³⁹ *Ibid.*, Vol. II, p. 29.

⁴⁰ J. M. Yepes, *La Codificación del derecho internacional americano y la conferencia de Río de Janeiro* (Bogotá, 1927), pp. 143-149.

The twelve projects submitted by the Commission of Jurists were studied by the Committee on Public International Law of the Havana Conference. In view of the variety of subjects, seven rapporteurs were appointed. Dr. Victor M. Maurtua was appointed to study the projects on Fundamental Bases of International Law and States—Existence, Equality, Recognition.⁴¹ Within two weeks, Dr. Maurtua, in his oral presentation, gave an exposition of the purposes of codification, methods, and limitations. He deemed it essential that the formulation and development of the law of nations should be founded on unchanging principles in respect of international rights, recognized by all American governments.⁴² There followed a discussion on the general principles of sovereignty and independence.⁴³ The Sub-Committee appointed to consider the matter in all its phases realized the great political issues involved and made the following statement:⁴⁴

Recognizing that in dealing with the codification of international law, the making of a declaration which is wanting in the accord which gives weight to international law would fail of its purpose, the sub-committee recommends that the subject be given further study and that its consideration be postponed until the next conference of American States.

The articles of the draft on the status of aliens submitted by the Committee on Public International Law reproduced in substance the project drafted by the Commission of Jurists. The draft on asylum, treaties, diplomatic agents, consuls, and obligations of states in the event of civil war, was also substantially the same as that proposed by the Commission of Jurists.⁴⁵ In its original form, the project on maritime neutrality contained provisions intended to change existing practices of law in the interest of neutral states. In view of the objections raised by the delegates to these variations from the generally accepted rules of international law, the final convention was drafted with provisions based exclusively on current practice.⁴⁶ No agreement could be reached in adopting a final convention on the pacific settlement of disputes. The Conference, therefore, adopted the following resolution on this subject:⁴⁷

1. That the American Republics adopt obligatory arbitration as the means which they will employ for the pacific solution of their international difficulties of a juridical nature.

⁴¹ Sixth I.C.A.S., *Diario*, Havana, 1928, p. 81.

⁴² *Ibid.*, pp. 252, 253.

⁴³ *Ibid.*, p. 273.

⁴⁴ Sixth I.C.A.S., *Report of the Delegates of the United States*, Washington, D. C., 1928, p. 12.

⁴⁵ *Ibid.*, pp. 16-28.

⁴⁶ *Ibid.*, p. 18.

⁴⁷ Sixth I.C.A.S., *Final Act*, p. 175.

2. That the American Republics will meet in Washington within the period of one year in a conference of conciliation and arbitration to give conventional form to the realization of this principle.

Having examined all the codes submitted by the Commission of Jurists, the Havana Conference approved and signed the following conventions on international law:⁴⁸

1. Status of aliens.
2. Treaties.
3. Diplomatic agents.
4. Consular agents.
5. Maritime neutrality.
6. Asylum.
7. Rights and duties of states in case of civil war.

Subsequently, these conventions have been ratified by a large number of American states. The convention on Status of Aliens, and the convention on Rights and Duties of States in case of a civil war have been ratified by thirteen American states. The conventions that relate to Asylum and Diplomatic Agents have been ratified by twelve states; the convention on Consular Agents by ten states; the convention of Maritime Neutrality by seven states, and the convention on Treaties by six states.⁴⁹ The code on private international law, officially called the "Bustamante Code" has been ratified by fifteen American nations.⁵⁰ In addition to the conventions mentioned above, the Havana Conference passed a resolution providing:⁵¹

1. That the future formulation of international law shall be effected by means of technical preparation, duly organized, with co-operation of the committees of investigation and international co-ordination and of the scientific institutes hereinafter mentioned.

2. That the International Commission of Jurists of Rio de Janeiro shall meet on the dates which may be appointed by the respective governments for the purpose of undertaking the codification of public and private international law, the Pan-American Union being entrusted with furthering the agreement necessary to bring about its meeting.

3. That three permanent committees shall be organized, one at Rio de Janeiro, for the work relating to public international law; another at Montevideo for the work dealing with private international law, and another in Havana for the study of comparative legislation and uniformity of legislations.

⁴⁸ For text of the conventions, see Sixth I.C.A.S., *Final Act*.

⁴⁹ *The International Conferences of American States, First Supplement, 1933-1940*, pp. 501, 502.

⁵⁰ *Ibid.*, p. 502.

⁵¹ Sixth I.C.A.S., *Final Act*, p. 176.

These permanent committees were to present to the governments statements on the subjects which they deemed ready for codification, including those subjects which may be required "for prudent juridical development."⁵² Together with the resolution referred to above, the permanent committees were to send questionnaires "for the purpose of having the governments indicate which matters they deemed susceptible to study to the end that they may be used as a basis in the formulation of conventional rules or fundamental declarations."⁵³ Upon receiving the governmental viewpoints, the committees had to classify the answers in the following manner: "(1) Subjects which are in proper condition for codification because they have been unanimously consented to by the governments; (2) matters susceptible of being proposed as submitted subject to codification because, although not unanimously endorsed by, they represent a predominant opinion on the part of most governments; and (3) matters respecting which there is no predominant agreement in favour of immediate regulation."⁵⁴

It was also within the duties of the permanent committees to present to the governments a compilation of the answers of the other governments. Lastly, the opinions solicited and obtained from the American Governments, as well as opinions requested from national bodies concerned with international law, would be co-ordinated and sent to the Pan-American Union. The drafts of the final project would be presented to the International Commission of Jurists or to the International Conference of American States.⁵⁵

In accordance with the resolution for progressive codification of international law issued at Havana in 1928, the permanent Committee of Public International Law was appointed by the Brazilian Government in September, 1931.⁵⁶ The Pan-American Union, however, believing that some time would elapse before the organization of the three committees provided for by the Sixth Conference would come into existence, requested the American Institute of International Law "to continue its work in the field of codification of international law and to send any of the projects formulated by the Institute to the governing body of the Pan-American Union."⁵⁷

E. *The Seventh International Conference of American States*

Several projects were formulated by the American Institute. It drafted code-projects on the rights and duties of states, interpretation of treaties,

⁵² Sixth I.C.A.S., *Final Act*, p. 177.

⁵³ *Ibid.*, p. 177.

⁵⁴ *Ibid.*, p. 177.

⁵⁵ *Ibid.*, p. 177.

⁵⁶ Seventh I.C.A.S., *Special Handbook for the Use of Delegates*, Washington, D. C., 1933, p. 55.

⁵⁷ Seventh I.C.A.S., *Preliminary Sessions*, Montevideo, 1933, p. 3.

international responsibility, extradition, political asylum, neutrality, and the territorial sea. All these projects were placed on the agenda of the Seventh Inter-American Conference.⁵⁸ The Seventh International Conference of American States, meeting in Montevideo in 1933, had, in addition to the projects mentioned above, a project drafted by the Permanent Committee on Public International Law of Rio de Janeiro dealing with the general plans which may facilitate regional agreements between adjacent states on the industrial and agricultural use of the waters of international rivers.⁵⁹ This report was presented in essay form for brevity, and there is no evidence that the elaborate machinery of consultations set forth by the resolution of the Havana Conference was ever used.

The sub-committee on International Law presented to the Conference a convention on the Rights and Duties of States. "The principal sources," admitted Mr. Rivas, "have been the projects presented by the Commission of Jurists in 1927, but since the codification of international law is, by its very nature, gradual and progressive only the rules generally accepted in our hemisphere have been inserted in the aforementioned Convention."⁶⁰ A Convention on the Rights and Duties of States was signed at Montevideo and has been subsequently ratified by sixteen American States.⁶¹ At Montevideo four additional Conventions on International Law were signed relating to Nationality of Women, Extradition, and Political Asylum. The Convention on Nationality has been ratified by Chile, Ecuador, Honduras and Panama; the Conventions on Nationality of Women and Political Asylum by ten States, and the Convention on Extradition by eleven States.⁶²

The Montevideo Conference adopted Resolution LXX dealing with the future codification of international law.⁶³ This resolution provided for the continuation of the Commission of Jurists and provisions were made for the creation of national committees, made up of qualified officials from the respective Foreign Offices or jurists specially qualified in international law. These committees were to act through their respective foreign offices. At the same time a commission of experts, seven in number, was created to serve as a sub-committee of the Committee of Jurists. These members were to sit "ex officio" during the meetings of the Commission of Jurists. They were to act as a centralized and systematic agency for the codification of international law. According to the resolution, they were entrusted

⁵⁸ Seventh I.C.A.S., *Special Handbook*, p. 55.

⁵⁹ Seventh I.C.A.S., *Report of the Permanent Committee on Public International Law*, Pan-American Union, 1933, p. 1.

⁶⁰ Seventh I.C.A.S., *Second Committee, Minutes and Antecedents*, Montevideo, 1933, p. 165.

⁶¹ Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Haiti, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, U. S. A., Venezuela, *The International Conferences of American States, First Supplement*, 1929-1933, p. 502.

⁶² Seventh I.C.A.S., *Ibid.*, p. 502.

⁶³ Seventh I.C.A.S., *Final Act*, p. 103.

with the duty of formulating questionnaires on subjects susceptible of codification, and these questionnaires were to be submitted to the national committees. The commission of experts was to co-ordinate the replies and formulate drafts on the observations made by the national committees. The need of a general secretariat for the administration of the work of codification was recognized, hence the juridical section of the Pan-American Union was set up for that purpose.⁶⁴

In order to give effect to the recommendations of Resolution LXX relative to methods of codification, the Pan-American Union resolved:

1. To urge the governments' members to the Union to organize as soon as possible the National Committees on Codification.
2. To request the Governments, through their representatives on the Governing Board, to send to the Pan-American Union the lists of persons from which shall be elected the members of the Commission of Experts.
3. That the office of the Secretary of the Board assume the duties of general secretariat to be created in the Pan-American Union.⁶⁵

The Committee of Experts was organized in accordance with the procedure established by Resolution LXX.

The Montevideo Conference adopted a resolution for the ratification of, and adherence to, a number of conventions, pacts and agreements for avoiding and preventing conflicts, namely, the Treaty for Avoiding and Preventing Conflicts, concluded in Santiago, Chile, 1923, and known as the "Gondra Treaty"; the Kellogg-Briand Treaty, signed in Paris in 1928; the Conciliation Convention, signed in Washington in 1929; and the Inter-American Arbitration Treaty of the same year, as well as the Anti-War Treaty, signed in Rio de Janeiro, and also known as the "Saavedra Lamas Treaty."⁶⁶ The Anti-War treaty is intended, as stated in its principles, to co-ordinate and make effective these various instruments. This pact has been ratified by twenty American States and seven European States have deposited ratifications of their adherence.⁶⁷

F. *The Inter-American Conference for the Maintenance of Peace*

The deliberations of the Committee on Juridical Problems of the Inter-American Conference for the Maintenance of Peace which met at Buenos Aires in 1936 were not extensive because the primary interest of the Conference was in questions closely related to peace. Also, the Committee of Experts, already appointed by the Pan-American Union, was to meet in

⁶⁴ Seventh I.C.A.S., *Final Act*, p. 108. For Text of Resolution LXX, see Appendix I.

⁶⁵ *Organization of the Committee of Experts Entrusted with the Work of Codification by Resolution LXX of the Seventh I.C.A.S.* (Washington, D. C.), 1935, p. 5.

⁶⁶ Seventh I.C.A.S., *Final Act*, p. 6.

⁶⁷ *The International Conference of American States. First Supplement, 1933-40*, p. 503.

the near future, hence it was considered preferable to recommend that the study of the question of pecuniary claims, and the subject of the immunity of government vessels, be undertaken by the Committee of Experts.⁶⁸

Resolution VI on the Codification of International Law adopted by the Conference provided for a procedure somewhat at variance with that prescribed by the Seventh International Conference of American States. It was resolved:

1. To re-establish the Permanent Committees created by the Sixth International Conference of American States in order that they may undertake the preliminary studies for the codification of international law.

2. That these studies shall be made in the following manner, in view of the recommendations of the Sixth and the Seventh International Conference of American States:

- (a) The National Committees on Codification of International Law shall, in their respective countries, undertake studies of the doctrine on the various subjects to be codified, and shall transmit the results thereof to the Permanent Committees on Codification.

- (b) The Permanent Committee shall prepare draft conventions and resolutions based on discussions and preparatory work for the Commission of Jurists.

- (c) The studies of the Permanent Committees shall be transmitted in ample time to the members of the Committee of Experts, at Washington, who will meet to revise and co-ordinate them.

- (d) Upon completion of the work of general revision of the studies of the Permanent Committees, the Committee of Experts, at Washington, shall transmit all such preparatory studies with a detailed report to the Pan-American Union, for the transmission to the governments of the American Republics and ultimate submissions for discussion and consideration by the International Commission of American Jurists.

- (e) The Committee of Experts may act by a majority of the members present at a meeting, provided, however, that the two great juridical systems of the hemisphere are represented thereat.⁶⁹

The Committee of Experts on the Codification of International Law held its first session at Washington in 1937. The following projects were entrusted, to the members indicated below, "for examination and study, and with an understanding that the opinion of the other members of the Com-

⁶⁸ Dr. Victor M. Maurtua, Peru; Dr. Alberto Cruchaga, Chile; Dr. Carlos Saavedra Lamas, Argentina; Dr. Luis Anderson, Costa Rica; Dr. Eduardo Suarez, Mexico; Dr. A. de Mello-Franco, Brazil; Mr. J. Ruben Clark, United States. See Eighth I.C.A.S., *Special Handbook for the Use of Delegates* (Washington, 1938), p. 33.

⁶⁹ *Ibid.*, p. 8.

mittee with respect to each subject, shall be ascertained and considered."⁷⁰ Dr. Mello Franco was assigned the topic on Definition of the Aggressor, Sanctions, and the Prevention of War; Dr. Maurtua, Investigation, Conciliation and Arbitration; Dr. Cruchaga, Nationality; Dr. Anderson, Code of Peace; Dr. Suarez, Immunity of Government Vessels; and Dr. Borchard was assigned Pecuniary Claims.⁷¹ At the same meeting the experts made the following suggestions:

To place on record that the Committee considers susceptible of codification the rules relative to the codification of international law on the continent, through the conclusion of a convention, subject to ratification, which will reintegrate, after revision, all the organic provisions in the matter contained at present in the various resolutions on the subject adopted by the International Conferences of American States.

The Committee resolved likewise to submit the question of such a convention to the consideration of all the national commissions of codification, and to call their attention to the desirability that the convention, in addition to clarifying, improving, and establishing in a satisfactory manner the relevant rules of codification, be extended to include the following points:

1. That the governments agree to appoint within a set period, and to maintain in activity, through the filling of any vacancies that may occur, the permanent committees or national commissions of codification which it is incumbent upon each government to designate; and furthermore, that in the event the appointment is not made, the functions of such committees or commissions shall be undertaken by the Ministry of Foreign Affairs of the respective country;

2. That the governments agree to inform the Pan-American Union at least once a year regarding the work accomplished in the corresponding period by the respective permanent committees or national commissions, for the purpose of enabling the Union to take such reports into consideration when preparing those which it is charged, by Resolution VI of the Inter-American Conference for the Maintenance of Peace, with preparing and transmitting at least once a year to the governments with regard to the developments in the field of codification; and

3. That the new convention will expressly stipulate that it will enter into effect after it has been ratified by all the American governments, and that until the new instrument becomes effective, the provisions of the relevant resolutions shall govern the labour of codification.⁷²

As previously mentioned, in its last session, the Committee of Experts agreed to entrust to its advisory members for examination and study, and

⁷⁰ First meeting of Committee of Experts, *Final Act*, in Eighth I.C.A.S., *Special Handbook for the Use of Delegates*, 1938, p. 37.

⁷¹ *Ibid.*, p. 38.

⁷² *Ibid.*, pp. 37-38.

with the understanding "that the opinion of the other members should be ascertained and considered, the topics above-mentioned, in order that reports might be submitted to the Eighth Pan-American Conference."⁷⁵

At the second meeting of the Committee of Experts, Lima, 1938, attended by Dr. A. de Mello Franco, chairman, and Drs. Alberto Cruchaga, Luis Anderson, and Edwin M. Borchard, the reports were studied and approved and subsequently submitted to the Eighth International Conference of Inter-American States.⁷⁴

G. *The Eighth International Conference of American States*

When the Eighth Conference met at Lima in 1938, it had for its consideration the following projects:

1. Definition of the aggressor and sanctions.⁷⁵
2. Investigation, conciliation, and arbitration.⁷⁶
3. Nationality.⁷⁷
4. Code of peace.⁷⁸
5. Immunity of government vessels.⁷⁹
6. Pecuniary claims.⁸⁰

It was deemed that the national committees should send to the Committee of Experts antecedents and all material relevant to the subject of nationality.⁸¹ Due to the universal character of the problems involved in immunities of government vessels, the Experts suggested, and the Conference recommended, that those countries which had not yet done so should adhere to the Brussels Convention of 1925.⁸² The Lima Delegates considered further study necessary on the last topic submitted by the Commission of Experts pecuniary claims as well as the project submitted by the Delegations of Argentina, Peru, and Mexico. They were to be sent back for further examination, to the three permanent committees, the national committees, and the Committee of Experts.

The Committee of Experts was not the only juridical organ of the Inter-American system which submitted projects to the Lima Conference. The

⁷⁵ Eighth I.C.A.S., *Special Handbook for the Use of Delegates*, Washington, D. C., 1938, p. 38.

⁷⁴ Pan-American Union, *General Report on the Status of the Work Provided for in the Resolutions on the Codification of International Law Approved by the Eighth International Conference of American States*, Washington, D. C., 1944, p. 11.

⁷⁵ Eighth I.C.A.S., *Diario de sesiones*, Lima, Peru, p. 101.

⁷⁶ *Ibid.*, p. 109.

⁷⁷ *Ibid.*, p. 341.

⁷⁸ *Ibid.*, p. 114.

⁷⁹ *Ibid.*, p. 343.

⁸⁰ *Ibid.*, p. 293.

⁸¹ *Ibid.*, Resolution XXXII, p. 985.

⁸² *Ibid.*, Resolution XXXIII, p. 986.

permanent committee of Rio de Janeiro also prepared a project on the uniformity and improvement of methods for the preparation of multi-lateral treaties.⁸³ Its major contribution was in preparing a project on codification of international law which was submitted to the Lima Conference by the Committee of Experts.⁸⁴ This report pointed out that the previously existing system of carrying out the work of codification was "unnecessarily complicated and hindered rather than facilitated codification."⁸⁵ In the same report, it was also pointed out that "none of the national commissions have given their opinion on questions referred to them by the Committee of Experts. The national committees," it added, "must be maintained, because these committees are specially called to stimulate, in their respective countries, the task of codification."⁸⁶ Therefore, on the basis of the project submitted by the Experts, as well as additional projects presented by Argentina, Chile, and Mexico, a comprehensive resolution was adopted by the Lima Conference. This resolution attempted to co-ordinate, by classifying the successive stages of the work and by establishing the precise duties to be performed by each of the agencies, the codification of international law in America. Resolution XVII recommends that the studies of the national committees were to be submitted in the form of preliminary drafts to the Permanent Committee, now reorganized by the addition of six non-national members. The Permanent Committee in turn has to submit its drafts to the Committee of Experts now enlarged from seven to nine members. The drafts prepared by the Committee of Experts on the basis of the material submitted to it were to be forwarded to the Pan-American Union, and from the Union to the American Governments. The last stage of the work was to be carried out by the International Conference of American Jurists, successor to the former International Commission of Jurists. Instead of having the delegates to a regular international conference pass upon the drafts prepared by a technical body, as had happened in Havana in 1928, the Lima Conference provided that the Conference of Jurists should be composed of the delegates with plenipotentiary powers and that the function of the Conference should be "the revision, co-ordination, approval, modification or rejection of the draft prepared by the Committee of Experts."⁸⁷ Nothing would remain to be done then, except to submit the instrument signed by the Conference of Jurists to the Pan-American Union, and from the Union to the American Governments for ratification.⁸⁸

⁸³ *Ibid.*, pp. 347-350.

⁸⁴ *Ibid.*, p. 285.

⁸⁵ *Ibid.*, p. 286.

⁸⁶ *Ibid.*, p. 286.

⁸⁷ Paragraph 12, Resolution XVII of the Eighth I.C.A.S.

⁸⁸ Paragraph 14, Resolution XVII.

Before the elaborate machinery thus set up at the Lima Conference could be set in motion, however, the outbreak of the Second World War created separate and more urgent problems in the field of neutrality. Consequently, in order to deal with these problems, the foreign ministers, meeting at Panama in 1939, created an ad hoc committee, the Inter-American Committee, to deal with these problems. It was composed of seven experts in the field of international law who were designated by the governing board of the Pan-American Union.⁸⁹ The following year, at a meeting of foreign ministers at Havana, the neutrality committee was entrusted with "the drafting of a project of Inter-American convention which will cover completely all the principles and rules generally recognized in international law, and especially those contained in the resolution of Panama."⁹⁰

H. The Meetings of the Ministers of Foreign Affairs of the American Republics

Following the attack upon the United States at Pearl Harbor it became apparent that the International Neutrality Committee, which had been created at Panama, should be reorganized to meet new conditions. The foreign ministers thereupon held a meeting at Rio de Janeiro in 1942, and adopted the resolution providing that the Neutrality Committee should continue to function in its existing form under the name of the American Juridical Committee. The seat of the new committee was to be in Rio de Janeiro, and its function was "to develop and co-ordinate the work of codifying international law, without prejudice to the duties entrusted to other existing organizations."⁹¹ Having thus far studied the historical development of the agencies created by the American Governments for the codification of international law, it may now be profitable to make an analysis of each of them individually in order to determine, if possible, why particular agencies have failed to function efficiently and what further co-ordination may be necessary to produce the desired results.

PART II

ANALYSIS OF THE METHODS OF CODIFICATION IN THE INTER-AMERICAN SYSTEM

The following analysis is based on the report of the Inter-American Juridical Committee which accompanied their recommendations on the codification of international law.

⁸⁹ Reunion de consulta entre los ministros de Relaciones Exteriores, *Diario*, Panama, 1939, p. 53.

⁹⁰ Second meeting of the Ministers of Foreign Affairs of the American Republics, Final Act, Havana, 1940, p. 5.

⁹¹ Republica Argentina, *Tercera reunión de consulta de ministros de relaciones extrangeras de las Repúblicas americanas* (Buenos Aires, 1942), p. 127.

A. *The National Committees*

These committees are appointed by each separate government. Their function is to undertake doctrinal studies in public and private international law and comparative legislation, and to transmit preliminary drafts, with explanatory summaries, to the three permanent committees at Rio de Janeiro, Montevideo, and Havana respectively. The Lima resolution (VII) made provision that they should serve as consultative agencies for their respective governments. "It would appear," stated the report, "that the extensiveness of the work of the national committees will depend to a greater or lesser degree upon the financial support which they may be able to obtain. Few jurists have the leisure to devote themselves to the doctrinal studies asked of them."⁸²

For this reason, the contribution of the national committees to the work of codification has not been significant. None of the committees have thus far reported projects bearing upon the work of codification contemplated by the Lima Conference.

B. *The Permanent Committees of Rio de Janeiro, Montevideo, and Havana*

These committees were created by the Havana Conference to do preliminary technical work for the International Commission of Jurists on codification of private and public international law and of comparative legislation. Members of the three committees were to be selected respectively by each of the three governments from among their national societies of international law. Their functions were to inquire into the subjects ripe for codification and on the basis of the answers received from the American governments "to prepare draft projects which might be ultimately submitted to the International Commission of Jurists."⁸³ The failure of the three committees to function within the succeeding five years led the Montevideo Conference of 1935 to establish new agencies, the Committee of Experts and the national committees, but the permanent committees were re-established by the Conference for the maintenance of peace, in 1936. In making a new attempt to co-ordinate the agencies entrusted with the work of codification, the Lima Conference of 1938 continued the three permanent committees, but made provision that in addition to the members appointed by the governments of the countries in which the committees had been set, six members should be designated by the other American states. The report of the Inter-American Juridical Committee states that the addition of six non-national members proved to be unfortunate. "Theoretically it was desirable to make the committees more Inter-American in character. But," they add, "the means taken

⁸² Inter-American Juridical Committee, *Recommendations and Reports*, Official Documents, 1942-1944 (Rio de Janeiro, 1945), page 113.

⁸³ *Ibid.*

were not adequate. Unless the non-national members were to be selected from the members of the diplomatic corps of their respective countries, it could hardly be expected that jurists from distant countries would be able to attend sessions of the committees with sufficient regularity."⁸⁴

Apart from the difficulty created by the provision of non-permanent members, it is doubtful whether the permanent committees could meet the heavy burden of work entrusted to them. Lists of the national members of the committees include the names of jurists distinguished in their respective fields of law but they are, in most cases, occupied with other official duties. The report shows that, while the committees met from time to time, the permanent committee of Rio de Janeiro was the only one which was able to take preliminary steps towards the actual work of codification. The inability of the permanent committees to organize themselves effectively has made it difficult for them to produce any official action on a large scale.⁸⁵

C. The Committee of Experts

This committee was created by the Montevideo Conference of 1933 with the object of organizing the preparatory steps of the work of codification. Members are selected by the following system: each Government draws up a list not exceeding five persons, and from the combined list each government designates seven persons, of whom only two may be its own nationals. This committee was to perform functions similar to those which had been assigned to the permanent committees, namely, the selection of subjects suitable for codification, the submission of questionnaires to the national committees, and the preparation of draft projects for the International Commission of Jurists.

The Juridical Committee finds that the Inter-American membership of the Committee of Experts is a feature of the highest importance, "which should be preserved as an essential part of the preliminary work of codification. But the experience of the Committee of Experts makes it clear that if a committee of that character is to do effective work it must be organized upon a more permanent basis. The personnel of such a permanent committee should not be only jurists of the highest qualifications, but jurists who are in a position to give a large part of their time to the work of codification."⁸⁶

No reflection upon the distinguished jurists who composed the committees between 1936 and 1942 is made because the committee did not make a great deal of progress in the field of codification. The obstacle lay in the fact that the work required a far greater concentration of effort than was possible under the circumstances.

⁸⁴ *Ibid.*, p. 114.

⁸⁵ *Ibid.*, p. 114.

⁸⁶ *Ibid.*, p. 117.

D. *The International Conference of Jurists*

The International Conference of Jurists is the legal successor of the International Commission of Jurists created by the Rio de Janeiro Conference of 1906, but its functions differ from those of the earlier body. When first created, the International Commission of Jurists was intended to do the preliminary work which was later entrusted to the permanent committees. When, however, the Lima Conference adopted resolution XVII, it was provided that a commission of jurists, thereafter to be called the International Conference of Jurists, should function as the last stage of the procedure and have as its function the ultimate revision, co-ordination, approval or rejection of the drafts prepared by the Committee of Experts. In view of the fact that the International Conference of American Jurists has not yet received projects from the committees engaged in the preparatory work of codification, it is not possible to estimate the work of the Conference in the role it has been called upon to perform.⁹⁷

As far as the Inter-American efforts relating to codification are concerned, the Inter-American Juridical Committee has concluded that the Inter-American system of codifying international law is unnecessarily complicated and difficult of co-ordination. It has recommended, therefore, that a small committee of technical experts, representative of the whole Inter-American community, and permanent in character, be created as a central agency for the co-ordination of activities relating to codification. One of the chief functions of this proposed committee would be to act as an organ of communication with the various bodies, both public and private, engaged in the work of codification, as well as with outstanding American jurists. It is significant that the Inter-American Juridical Committee has recommended that any codification committee thus set up should maintain close contact with the Secretariat of any new international organization to be established after the war. In accordance with the spirit of Article XIII (1) of the Charter of the Inter-American Juridical Committee, it has been recognized that the task of codifying international law is inextricably bound up with the progressive development of that law. In the words of the Committee itself, "The task of codifying international law is in large part a work *de lege ferenda*, the formulation of new rules to meet the changing conditions in the mutual relations of States."⁹⁸

The said recommendations of the Juridical Committee are under the study of the American governments. The problem raised therein is also being considered by the governing board of the Pan American Union according to Resolution XXV of the Inter-American Conference on Problems of Peace and War, held in Mexico in 1945. Resolution XXV deals with the re-organization of the Inter-American system and also with the co-

⁹⁷ *Ibid.*, page 118.

⁹⁸ *Ibid.*, pp. 119-122.

ordination of the agencies of codification. "As soon as the approval of the various governments has been obtained," states the resolution, "the Pan American Union entrusts to the Inter-American Juridical Committee the functions of a central agency for the codification of public international law."⁹⁹

Thus it is left to the Ninth International Conference of American States to give permanent form to the juridical machinery of the Inter-American system.

4. NOTE ON THE PRIVATE CODIFICATION OF PUBLIC INTERNATIONAL LAW*

A. Individuals

The codification of the whole of international law was first proposed by Jeremy Bentham in the last quarter of the eighteenth century.¹ Since his time numerous attempts have been made by private individuals, by scientific organizations, and by governments to reduce international law more or less completely to the form of written rules, and to substitute for the vagueness of the customary law the precision and definiteness of the statute.

Bentham not only first proposed the reduction of the totality of international law to a code, but he coined the term "codification" itself.² His *Principles of International Law*, in which is set forth the propositions which must serve as a basis for the construction of an international code, was written in the period 1786-1789, but it was not published until after his death.³ It is not a code, properly speaking, but is general in nature, and aims not at a restatement of the existing international law but rather at providing a scheme for an everlasting peace between nations. In explanation of the purpose of his work Bentham said that although "unhappily there has not yet been any body of law which regulates the conduct of a nation, in respect to all other nations on every occasion . . . yet let us do as much as is possible to establish one."⁴ Asking what would be the object of a citizen of the world if he were to prepare a universal international code, he answers that it "would be the common and equal utility of all nations; this would be his inclination and his duty."⁵ The "line of com-

⁹⁹ Inter-American Conference on Problems of War and Peace, *Final Act*, Resolution XXV.

* Doc. A/AC.10/25, 16 May 1947.

¹ Nys, "The Codification of International Law," 5 *American Journal of International Law*, 876.

² *Ibid.*, 872.

³ Nys says, *Ibid.*, 877, that the *Principles* was not published until 1843, but it appears in Bowring's edition of Bentham's *Works* published in 1839.

⁴ *Works*, II, 538.

⁵ *Ibid.*, 537.

mon utility once drawn, this would be the direction towards which the conduct of all nations would tend—in which their common efforts would find least resistance—in which they would operate with the greatest force—and in which the equilibrium once established, would be maintained with the least difficulty.”⁶ The disinterested international legislator would “set himself to prevent positive international offenses—to encourage the practice of positively useful actions.”⁷ Wars were to be prevented by means of:

1. Homologation of unwritten laws which are considered as established by custom.

2. New conventions—new international laws to be made upon all points which remain unascertained; that is to say, upon the greater number of points in which the interests of the two States are capable of collision.

3. Perfecting the style of the laws of all kings; whether internal or international.⁸

In 1802 Bentham's *Traité de législation civile et penale* was published at Paris by Etienne Dumont, the twenty-third chapter of which contained a *Plan du Code International*, a general discussion of a code which should be “a compilation of the duties and rights of the sovereign toward every other sovereign.”⁹ In the British Museum there is a Bentham manuscript dated 1827, in which is proposed the adoption of a brief code by the nations of the world acting on a plane of equality, for the purpose of “the preservation, not only of peace (in the sense in which by peace is meant absence of war), but of mutual good-will and consequent good mutual offices between all the several members of this confederation.” The benefits which he expected to flow from the adoption of a code of international law based upon his proposals he summarized as follows:

Good which it is capable of effecting: minimizing the occasion of resentment for supposed injury, to wit, by definition of right and obligation established antecedently to the time when, by means of individual occurrences, the idea of rights accruing thence of rights violated stirs up angry passions and anti-social affections.¹⁰

Bentham made little attempt to base his plans for an international code upon the existing law of nations, but sought to create a code which should be merely a detailed application of his principle of utility. He sought, in other words, to set up a new natural law in place of the old philosophical law of nature which he had rejected. Although he was indebted to his predecessors in his emphasis on the enacted or legislative element in law,

⁶ *Ibid.*, 537.

⁷ *Ibid.*, 538.

⁸ *Ibid.*, 540.

⁹ For a reprint see *Proc. Am. Soc. I. L.*, 1910, 224-226.

¹⁰ Quoted, Nys, “The Codification of International Law,” *Am. J. I. L.*, 5, 880. See *Proc. Am. Soc. I. L.*, 1910, 223.

Bentham may be called the founder of the English school of analytical jurisprudence. Law was for him "an instrument of politics and a useful instrument in accomplishing results"¹¹ and was to be found, not in deductions from *a priori* notions of the rational nature of man, but in the principle of "utility general," and when found it was to be made cognizable by promulgation in written form. "That which is called unwritten law," said Bentham, "which consists of rules of jurisprudence, is a law which governs without existing. The learned may exercise their ingenuity in guessing at it; but the unlearned citizen can never know it."¹²

The first general statement by a natural law philosopher of the principles which should underlie a code of international law was made by the Abbé Grégoire, who introduced, on 7 June 1793, his *Declaration of the Rights of Nations* in the French Convention.¹³ The *Declaration* was a brief enumeration in twenty-one articles of general rights and principles and could be no more than a mere framework for a code. Like Bentham, Grégoire stated what he believed international law should be, and aimed at setting forth "the principles of eternal justice which ought to guide nations in their respective transactions."¹⁴ Pointing out the fact that much time had been wasted in prolonged debates upon diplomatic relations because the terms used were indefinite and the ideas vague,¹⁵ he asserted that the voluntary or secondary law of nations was an incoherent and bizarre assemblage of usages which ought to be submitted to a new examination and clarification.¹⁶ The *Declaration* was rejected because the members of the "Committee of Public Safety thought these principles proclaimed in the face of Europe would irritate the despots with whom it was proposed to enter into negotiations."¹⁷

During the disturbances which followed the revolution in France no serious efforts looking toward the codification of international law were made. In 1815 Lorenzo Celline, a Florentine lawyer, sent to the leading powers represented at the Congress of Vienna copies of a draft code, *La Codice de gius deile gente in terra et in mare*, but it apparently received no consideration.¹⁸ James Mill in 1825 suggested an international code and a tribunal. "It is perfectly evident," he said, "that nations will be much more likely to conform to the principles of intercourse which are best for all, if they can have an accurate set of rules to go by, than if they have not. In the first place, there is less room for possible pretexts; and last of all, the appro-

¹¹ Nys, "The Codification of International Law," *Am. J.*, 5, 880.

¹² *Essay on the Promulgation of Laws*, Works, I, 157.

¹³ *L'Ancien Moniteur*, XXIV: 294-296.

¹⁴ *Ibid.*, 295.

¹⁵ *Ibid.*, 296.

¹⁶ *Ibid.*, 295.

¹⁷ Quoted from Grégoire's *Memoirs*, Nys, *Am. J. I. L.*, 5, 893.

¹⁸ Nys, "The Codification of International Law," *Am. J. I. L.*, 5, 881.

bation and disapprobation of the world is sure to act with tenfold concentration, where a precise rule is broken, familiar to all the civilized world and venerated by it."¹⁹ A Spanish jurist, Don Esteban Ferrater, published in 1846 his *Código de derecho internccional*,²⁰ and in 1851 appeared Auguste Paroldo's *Saggio di codificazione del diritto internazionale*.²¹ Codification of international law by jurists representing all nations was suggested by Katchenowsky, a Russian, in two papers read in 1858 and 1862 before the Juridical Society of London.²² The first real attempt to show the possibility of a code of international law was made in 1861 when Alphonso de Domin-Petruchevetz, the Austrian jurist, published his *Précis d'une code du droit international*.²³ In it he attempted to state not only the customary law but also the common principles which were to be found in the great body of contemporary treaties.²⁴

The efforts for the codification of international law which were made by the various peace societies formed in the United States during the first part of the last century are highly worthy of notice. In the memorials addressed by these societies to the legislature of Massachusetts and to Congress, and in the writings of William Ladd and Elihu Burritt, there is shown a clear realization of the difficulties of codification and a moderate and thoughtful statement of its anticipated benefits. In a petition of the New York Peace Society addressed to Congress in 1833 it is said that the "present law of nations could be thrown into the form of a code, without a single alteration; and that code, duly recognized by the nations, would be binding. Here would be a definite and certain rule; and even this would be a desideratum. But your memorialists would have, *if practicable*, some improvement made in its principles. They would at least have an *attempt* made to improve them. They would have suitable delegates from the various nations *convene*, and discuss and investigate principles, and *see* if they could not agree on some improvements; and if they could not do this, then let them explicitly state the principles on which they might agree, and this would form a definite code."²⁵ Elihu Burritt, in an address before the International Peace Congress held at Brussels in 1848, said that in asking for a "fixed code of international law, we do not necessarily ask for any serious innovation upon the established usages and acknowledged principles of nations. We do not directly ask that what is now called unconstitutionally the law of nations should be modified by a single material alteration. We do not propose to set aside the system of maxims, opinions,

¹⁹ *Ibid.*, 882.

²⁰ *Ibid.*, 883.

²¹ *Ibid.*, 885.

²² *Ibid.*, 886.

²³ Oppenheim, *International Law*, I. 38.

²⁴ Garner, *Recent Developments in International Law*, 711.

²⁵ Ladd, *An Essay on a Congress of Nations*, Appendix, 152.

and precedents which Grotius and his successors or commentators have produced for the regulation of international society, or to weaken the homage which the world has accorded to that system. But if it is to continue to be the only recognized base of international negotiation, treaties, intercourse, and society; if it is to be accepted, in the coming ages of civilization, a universal common law among nations, then we do insist that it should not only retain the spontaneous and traditionary homage accorded to it by the different governments of the civilized world, but that it shall also acquire the authority which the suffrage of nations can only give it through the solemn forms of legislation."²⁶ In his *Essay on a Congress of Nations* William Ladd recommended the compilation of a code with the unanimous consent of all the nations represented at an international conference.²⁷ The House of Representatives of Massachusetts in 1838 passed a resolution, which was approved by the Senate and the Governor, stating its belief that "the institution of a Congress of Nations for the purpose of framing a code of international law, and establishing a high court of arbitration for the settlement of controversies between nations is a scheme worthy of the careful attention and consideration of all enlightened governments."²⁸ In making an unfavourable report upon the memorial of the New York Peace Society to Congress Mr. Legare, Chairman of the Committee of Foreign Affairs, asserted that "international law is a body of jurisprudence which is, and of necessity must be, exclusively the growth of opinion."²⁹

A work which was to have a great influence upon the subsequent history of codification was accomplished by Francis Lieber in 1863 when he published, at the request of President Lincoln, his *Instructions for the Government of the Armies of the United States in the Field*, which were issued by the War Department as General Orders 100.³⁰ Bluntschli, the celebrated Swiss-German jurist, translated the instructions into German, and upon the request of Lieber undertook to prepare a code of international law which was published in 1868 as *Das Moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*³¹ His purpose was "to formulate clearly the actual ideas of the civilized world."³²

David Dudley Field, the American jurist and advocate of the codification of municipal law, published in 1872 his *Draft Outlines of an International Code*, consisting of nine hundred and eighty-two articles with explanatory notes.³³ Although Field aimed for the most part at stating clearly the

²⁶ "A Congress of Nations," *Old South Leaflets*, 442.

²⁷ 9-10, 97.

²⁸ Ladd, *Essay on a Congress of Nations*, Appendix 128.

²⁹ *Ibid.*, 140.

³⁰ Scott, "The Gradual and Progressive Codification of International Law," *Am. J. I. L.*, 21, 420-421.

³¹ Translated into French as *Le Droit International Codifié*, 2d edition, 1874.

³² *Le Droit International Codifié*, Intro., 6.

³³ A second edition was published in 1876 as *Outlines of an International Code*.

existing practice of nations, he did not hesitate to introduce amendments where the law was lacking or in need of improvement.³⁴ In the preface to the first edition he says: "The scheme embraced not only a codification of existing rules, but the suggestion of such modifications and improvements as the more matured civilization of the present age would seem to require. The purpose was to bring together whatever was good in the present body of public law, to leave out what seemed obsolete, unprofitable or hurtful, and then to add such new provisions as seemed most desirable."

In 1890 Pasquale Fiore, the Italian jurist, published his *Il Diritto Internazionale Codificato e la sua Sanzione giuridica*, the most elaborate of the projects thus far proposed.³⁵ In it he aimed "to set forth international law, taking into account the existing law and such rules as may be capable of becoming law." He intended "systematically to formulate the body of rules which consist in part of those accepted by states in general treaties, in their legislation or in diplomatic documents, and in part of those rules found either in the popular convictions which have manifested themselves in our time, or in the common thought of scholars and the most learned jurists. As a natural consequence the rules systematically assembled in the present volume represent in part present international law, and in part the international law of the future."³⁶

Duplessix published in 1906 a code of public international law and a scheme for international organization—*La Loi des Nations. Projet d'Institution d'une Autorité nationale, législative, administrative, judiciaire. Projet de Code de Droit international public*. The project for a code was confined to the existing law of nations.³⁷

In 1910 Jerome Internecchia, a Canadian lawyer, published a *New Code of International Law*, an elaborate project of 5657 articles printed in English, French and Italian. The character of work is indicated by the author's statement in the introduction that "two-thirds of this code contain what is found in books on international law published during the last two or three generations. The rest, while it is not to be found in such books, is yet not altogether new to modern minds; in fact it is something felt by almost every heart beating in this twentieth century, something which, if expressed in one phrase, might be said to be a longing for universal peace."³⁸ Again, he says: "I do not pretend to have entirely created the most important body of laws that has ever been compiled, laws that could rule the whole world without conflict; I have merely collected the produc-

³⁴ Garner incorrectly states that Field's *Outlines* was "limited to a statement of the rules of international law that were actually accepted and regarded as being in force." *Recent Developments in International Law*, 713.

³⁵ Translated by E. M. Borchard as *International Law Codified*, 1918.

³⁶ *International Law Codified*, Intro., 78.

³⁷ Garner, *Recent Developments in International Law*, 715.

³⁸ *New Code of International Law*, Intro., VII.

tions of many minds of many centuries; I have analyzed and scrutinized their ideas and have endeavoured to separate from that infinity of intellectual production, all that was base or tainted with envy and jealousy and selfishness, and I have left what I have believed to be approximately perfect."³⁸

In 1911 appeared the *Projecto deCodigo de Diritto Internacional Publico*, by Epitacio Pessoa, the Brazilian jurist, and Klein's *Codified Manual of International Public and Private Law*.

B. Non-Governmental Organizations

Among the non-governmental organizations devoted to the codification of international law, suffice it to outline briefly the work of the Institute of International Law, the International Law Association, the American Society of International Law, and the Harvard Research in International Law.

(a) *The Institute of International Law*

On 10 September 1873, the Institute of International Law was founded at Ghent. The purposes of the body are set forth in the first article of its statute:⁴⁰

1. To assist the progress of international law, in endeavouring to become the organ of the juridical conscience of the civilized world;
2. To formulate the general principles of the science, as well as the rules which are derived from them, and to propagate the knowledge of them;
3. To give its co-operation to every serious attempt at gradual and progressive codification of international law;
4. To endeavour to obtain the official adoption of the principles which shall have been recognized as being in harmony with the needs of modern society.

The Institute has prepared draft projects upon many important subjects of international law. In 1880 a *Draft Code of Laws of War on Land* was prepared by the Institute and it may be noted that this code facilitated and influenced the work of the Hague Conferences of 1899 and 1907. A brief survey of the Institute's activities in the past few years shows that it has adopted a number of drafts on public and private international law, notably: *Declaration of the International Rights of Man*; *Extension of Compulsory Arbitration*;⁴¹ and *Juridical Nature of the Advisory Opinions of the Permanent Court of International Justice—their Value and Significance in International Law*.⁴²

³⁸ *Ibid.*

⁴⁰ *Annuaire de l'institut de droit international*, I.

⁴¹ *Ibid.*, 1929, p. 298.

⁴² *Ibid.*, 1937, pp. 263-278.

(b) *The International Law Association*

The International Association for the Reform and Codification of the Law of Nations, which has been known since 1895 as the International Law Association, was also founded in 1873. The International Law Association has devoted a great part of its annual meetings to discussing codification and the pacific settlement of international disputes. The main object of the Association has been to provide a code of international law as a preliminary step in the substitution of international arbitration for war.

The Association has prepared draft projects on important subjects of international law. The *Rules on Bills of Exchange*, drafted in 1908 by the Association, have served as a basis of discussion for the Hague Conference of 1910. In 1921, at the Hague, the *Regulations for the Treatment of Prisoners of War* was drafted and has since been adopted in substance by the British Government. At Vienna in 1923 important drafts were adopted by the Association on the *Statutes of a Proposed International Penal Court* and on rules relating to the *Protection of Minorities*.⁴²

In September, 1934, the conference of the International Law Association at Budapest adopted the so-called Budapest Articles of Interpretation of the Pact of Paris. This Interpretation recognized that the Pact "is a multiparite law-making treaty whereby each of the high contracting parties makes binding agreements with each other and all the other high contracting parties."⁴⁴ It recognized *inter alia* that a signatory state cannot by denunciation or non-observance of the Pact release itself from its obligations thereunder. Article 4 of the Budapest Interpretation stated that a signatory state by threatening a resort to armed force or aiding a violating state itself violates the Pact.

(c) *The American Society of International Law*

At its Third Annual Meeting, 24 April 1909, the American Society of International Law appointed a committee for the codification of the principles of justice which should govern the intercourse of nations in time of peace.⁴⁵ Valuable reports were submitted by the committee to the Society, including the outline of a Code of International Law, suggested by Professor Paul S. Reinsch.⁴⁶ The First World War, however, interrupted the progress of the efforts at codification on the part of the Society.

In 1925 the American Society created a Committee for the Progressive Codification of International Law in response to an invitation from the Secretary-General of the League of Nations requesting the coöperation of

⁴² International Law Association, *Report of the Thirty-Eighth Conference, 1934*, p. XII.

⁴⁴ *Ibid.*, 1934, p. 4.

⁴⁵ American Society of International Law, *Proceedings, 1909*, p. 263.

⁴⁶ *Ibid.*, 1911, pp. 257-338.

the Society with the Committee of Experts appointed by the League to study the question of progressive codification of international law. The Committee has consistently endeavoured to follow the progress made in official and unofficial efforts directed toward the codification of international law and has coöperated effectively with the Harvard Research in International Law.

(d) *Harvard Research in International Law*

In April, 1926, the Committee of Experts of the League of Nations drew up a list of eighteen topics as suitable for consideration. These points were considered by a new committee set up by the Assembly of the League of Nations, the Preparatory Committee, which submitted "schedules of points drawn up by the Preparatory Committee for submission to the Governments." After the announcement was made by the League of Nations that a codification conference would soon be held, it was felt by a group of lawyers and scholars in the United States that a scientific study of the topics proposed might be properly instituted in the United States. Due to the initiative of the faculty of the Harvard Law School, the Research in International Law was organized under the directorship of Professor Manley O. Hudson, and a grant of funds was secured for the purpose of conducting such an investigation. The Research had for its purpose the preparation of draft conventions on the subjects which had been placed on the agenda of the First Conference for the Codification of International Law called to meet at The Hague in 1930. The first phase of the work of the Research in International Law was devoted to, and drafts were published on, the following subjects:

1. *Nationality*, with Richard Flournoy as Reporter;
2. *Responsibility of States for Injuries to Foreigners*, with Edwin M. Borchard as Reporter; and
3. *Territorial Waters*, with George Grafton Wilson as Reporter.

In 1930 the Research published a *Collection of Nationality Laws of Various Countries* edited by Richard W. Flournoy and Manley O. Hudson. In 1930 the Harvard Research published drafts on the following four subjects:

1. *Diplomatic Privileges and Immunities*, with Jesse S. Reeves as Reporter;
2. *Legal Position and Functions of Consuls*, with Quincy Wright as Reporter;
3. *Competence of Courts in regard to Foreign States*, with Philip C. Jessup as Reporter; and
4. *Piracy*, with Joseph W. Bingham as Reporter.

In 1932 a volume was published containing a *Collection of Piracy Laws of Various Countries*, edited by Stanley Morrison, and the following year the Research published a *Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*, edited by A. E. Feller and Manley O. Hudson. In 1932 the scope of the Harvard Research was extended to include the following subjects:

1. *Extradition*, with Charles K. Burdick as Reporter;
2. *Jurisdiction with respect to Crime*, with Edwin D. Dickinson as Reporter; and
3. *Law of Treaties*, with James W. Garner as Reporter.

Finally in 1939 the Harvard Research published three drafts covering the following subjects:⁴⁷

1. *Judicial Assistance*, with James Grafton Rogers and A. H. Feller as Reporters;
2. *Neutrality*, with Philip C. Jessup as Reporter; and
3. *Rights and Duties of States in Case of Aggression*, with Philip C. Jessup as Reporter.

In addition, a *Collection of Neutrality Laws, Regulations and Treaties of Various Countries*, edited by Francis Deák and Philip C. Jessup, was published.

The individual studies on the topics selected are in the form of draft conventions, the articles of which are followed by extensive comments consisting of quotations from the opinions of writers, decisions of courts, national legislations, and practice. Practically all of these drafts also include extensive appendices giving extracts from, and an analysis of, municipal laws, treaties, and other official documents.

⁴⁷ The draft convention and the *Recognition of States* was in the course of preparation, but circumstances prevented its completion.

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TO THE

American Journal of International Law

VOLUME 41

1947

OFFICIAL DOCUMENTS

PUBLISHED BY

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

PUBLICATION OFFICE:
LANCASTER PRESS, INC.
LANCASTER, PA.

EXECUTIVE AND EDITORIAL OFFICE:
700 JACKSON PLACE, N.W.
WASHINGTON 6, D. C.

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AMERICAN JOURNAL OF INTERNATIONAL LAW

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